NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 0180

LYNN NUSS

VERSUS

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, AND CHRISTINE ZBORIL

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 2003-15884, Division "G"
Honorable Larry J. Green, Judge Presiding

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BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Judgment rendered March 26, 2008

PARRO, J.

Lynn and Michael Nuss appeal a judgment awarding them damages for injuries Mrs. Nuss received in an automobile accident when her car was hit by one driven by Christine Zboril while in the course and scope of Ms. Zboril's employment with the Louisiana Department of Public Safety and Corrections (DPSC). Mr. and Mrs. Nuss appeal the degree of fault allocated to Mrs. Nuss, as well as the quantum of the damages awarded to both of them. We amend the judgment and affirm as amended.

FACTUAL AND PROCEDURAL BACKGROUND

On April 29, 2003, Lynn Nuss was in an automobile accident at the intersection of U.S. 190B and the I-10 East Service Road in St. Tammany Parish. As Mrs. Nuss proceeded eastbound through the intersection, her vehicle was hit by a car being driven in a southerly direction on the service road by Christine Zboril. At the time of the accident, Ms. Zboril was in the course and scope of her employment with DPSC.[1] Mrs. Nuss sustained injuries and eventually had arthroscopic surgery on her left shoulder for a torn rotator cuff and had decompression and fusion surgery on two lumbar discs.

Mrs. Nuss and her husband[2] sued Ms. Zboril and DPSC, seeking damages for her injuries and for his loss of consortium. They alleged that Ms. Zboril did not wait long enough at a stop sign and did not yield the right-of-way to Mrs. Nuss. A jury found Ms. Zboril was 95% at fault and Mrs. Nuss was 5% at fault in causing the accident. The jury awarded Mrs. Nuss $41,287.88 for past medical bills and $45,000 in general damages; it also awarded $5,000 to Mr. Nuss for loss of consortium. A judgment incorporating these awards was signed on August 3, 2006. After applying the percentages of fault, the court awarded Mrs. Nuss $81,973.49 and awarded Mr. Nuss $4,750, plus legal interest on both awards and all taxable costs.

In this appeal, Mr. and Mrs. Nuss challenge the allocation of 5% fault to Mrs. Nuss. They also appeal the quantum of damages, urging that $25,000 for physical pain and suffering, $10,000 for mental anguish, and $10,000 for loss of enjoyment of life were all below the lowest amounts that could reasonably be awarded for Mrs. Nuss's

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[1] DPSC stipulated to this fact before the trial of this matter.

[2] Michael Nuss was added as a plaintiff in the first supplemental and amending petition.

injuries. They also claim it was error not to compensate her for all of her past medical bills, which totaled $69,117.90, and for future medical expenses that her treating neurosurgeon said she would need. Finally, they aver that the jury abused its discretion in awarding only $5000 to Mr. Nuss for his loss of consortium claim.

APPLICABLE LAW

Fault/Negligence

Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability for damages under the general negligence principles of LSA-C.C. art. 2315. Under a duty-risk analysis, the plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard of care (the breach of duty element); (3) the defendant's substandard conduct was a cause in fact of the plaintiff's injuries (the cause in fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of protection element); and (5) actual damages (the damage element). Pinsonneault v. Merch. & Farmers Bank & Trust Co., 01-2217 (La. 4/3/02), 816 So.2d 270, 275-76.

Duty is a question of law. The inquiry is whether a plaintiff has any law--statutory, jurisprudential, or arising from general principles of fault--to support his or her claim. Bowman v. City of Baton Rouge/Parish of East Baton Rouge, 02-1376 (La. App. 1st Cir. 5/9/03), 849 So.2d 622, 627, writ denied, 03-1579 (La. 10/3/03), 855 So.2d 315. Breach of duty, cause in fact, and actual damages are all factual issues. Snearl v. Mercer, 99-1738 (La. App. 1st Cir. 2/16/01), 780 So.2d 563, 574, writs denied, 01-1319 and 01-1320 (La. 6/22/01), 794 So.2d 800 and 801. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. Mathieu v. Imperial Toy Corp., 94-0952 (La. 11/30/94), 646 So.2d 318, 326; Richard v. Swiber, 98-1515 (La. App. 1st Cir. 9/24/99), 760 So.2d 355, 359.

Allocation of Fault

Where there are concurrent causes of an accident, the proper inquiry is whether the conduct in question was a substantial factor in bringing about the accident.

Whether a party's conduct was a substantial factor in bringing about the harm, and thus, a cause in fact of the injuries, is a factual question to be determined by the fact finder. Rideau v. State Farm Mut. Auto. Ins. Co., 06-0894 (La. App. 1st Cir. 8/29/07), 970 So.2d 564, 574, writ denied, 07-2228 (La. 1/11/08), 972 So. 2d 1168. Because a trier of fact's determination of the allocation of fault is a factual finding, it cannot be overturned in the absence of manifest error. Smith v. Burton, 04-2675 (La. App. 1st Cir. 12/22/05), 928 So.2d 74, 80. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss. LSA-C.C. art. 2323(A).

Standard of Review/Manifest Error

The appellate court's review of factual findings is governed by the manifest error/clearly wrong standard. The two-part test for the appellate review of a factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the trial court; and 2) whether the record further establishes that the finding is not manifestly erroneous. Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trial court's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a trial court's factual finding only if, after reviewing the record in its entirety, it determines the trial court's finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993).

Damages

One injured through the fault of another is entitled to full indemnification for the resulting damages. Wainwright v. Fontenot, 00-0492 (La. 10/17/00), 774 So.2d 70, 74. The trier of fact is given much discretion in the assessment of damages. LSA-C.C. art. 2324.1. In reviewing an award of general damages, the court of appeal must determine whether the trier of fact has abused its much discretion in making the award. Dennis v. The Finish Line, Inc., 99-1413 (La. App. 1st Cir. 12/22/00), 781 So.2d 12, 19-

20, writ denied, 01-0214 (La. 3/16/01), 787 So.2d 319. 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 v. Maritime Overseas Corp., 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. Coco v. Winston Indus., Inc., 341 So.2d 332, 335 (La. 1976); Dennis, 781 So.2d at 30.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money. Aycock v. Jenkins Tile Co., 96-2348 and 2349 (La. App. 1st Cir. 11/7/97), 703 So.2d 117, 123, writ denied, 97-3056 (La. 2/13/98), 709 So.2d 753, reconsideration denied, 97-3056 (La. 3/20/98), 715 So.2d 1198. The primary objective of general damages is to restore the injured party, in as near a fashion as possible, to the state he or she was in at the time immediately preceding the injury. Thibodeaux v. USAA Cas. Ins. Co., 93-2238 (La. App. 1st Cir. 11/10/94), 647 So.2d 351, 356. Factors to consider in assessing quantum for pain and suffering are the severity and duration thereof. Anthony v. Hospital Service Dist. No. 1, 477 So.2d 1180, 1186 (La. App. 1st Cir. 1985), writ denied, 480 So.2d 743 (La. 1986).

Special damages, such as past medical expenses incurred as a result of an accident, have a ready market value and are susceptible of being established with reasonable mathematical certainty. Burrell v. Williams, 05-1625 (La. App. 1st Cir. 6/9/06), 938 So.2d 694, 699. To recover past medical expenses, a plaintiff must show, through medical testimony, both the existence of the injury and a causal connection between the injuries and the incident or accident of which plaintiff complains. Id. When a plaintiff claims to have incurred medical expenses and those claims are supported by medical bills, these expenses should be awarded unless there is contradictory evidence or reasonable suspicion that the bills are unrelated to the

accident. Brandao v. Wal-Mart Stores, Inc., 35,368 (La. App. 2nd Cir. 12/19/01), 803 So.2d 1039, 1047, writ denied, 02-0493 (La. 4/26/02), 814 So.2d 558.

An award for future medical expenses is in great measure highly speculative and is not susceptible of calculation with mathematical certainty. Gaspard v. Breaux, 413 So.2d 288, 292 (La. App. 3rd Cir. 1982). However, like any other element of damage, future medical expenses must be established with some degree of certainty. Rhodes v. State through Dep't of Transp. and Dev., 94-1758 (La. App. 1st Cir. 12/20/96), 684 So.2d 1134, 1148, writ not considered, 97-0242 (La. 2/7/97), 688 So.2d 487. An award for future medical expenses will not be supported in the absence of medical testimony that they are indicated and setting out their probable cost. Brumfield v. Guilmino, 93-0366 (La. App. 1st Cir. 3/11/94), 633 So.2d 903, 908, writ denied, 94-0806 (La. 5/6/94), 637 So.2d 1056.

In general, a claim for loss of consortium involves the elements of loss of love and affection, companionship, material services, financial support, aid and assistance, fidelity, and impairment of sexual relations. O'Connor v. Litchfield, 03-0397 (La. App. 1st Cir. 12/31/03), 864 So.2d 234, 246. A loss of consortium award is a fact-specific determination to be decided on a case-by-case basis and is disturbed only if there is a clear abuse of discretion. Snearl, 780 So.2d at 592.

ANALYSIS

Negligence/Allocation of Fault

We address first the claim that the jury manifestly erred in allocating fault to Mrs. Nuss, because she did not breach any duty and did not cause the accident. The evidence shows Mrs. Nuss was driving on the favored street when she approached the intersection with the service road. She had the right-of-way; there were no traffic signs requiring her to slow or stop. Mrs. Nuss testified that she was driving about 45 miles per hour. Photographs in the record show the posted speed limit was 45 miles per hour. In her written statement to the investigating officer, Mrs. Nuss stated that she saw Ms. Zboril stopped on her left at the stop sign on the I-10 Service Road. She then glanced to her right, but was looking straight ahead as she drove through the intersection. At that point, she glimpsed a car out of the corner of her left eye coming

through the intersection toward her. The Zboril vehicle hit the left front (driver's side) of Mrs. Nuss's car while she turned her steering wheel hard to the right in an effort to avoid the collision. As she did so, Ms. Zboril's car hit Mrs. Nuss's car again, this time on the driver's side door, and slid along the side of Mrs. Nuss's car all the way to the left tail light.

Ms. Zboril said that as she approached U.S. 190B, she stopped at the stop sign; photographs in the record show the sign was located about one and one-half car lengths back from the intersection. Ms. Zboril said she did not see Mrs. Nuss approaching from her right and started through the intersection into the path of the oncoming Nuss vehicle. In a statement written at the accident scene for the investigating officer, Ms. Zboril wrote:

> I was traveling southbound on the I-10 East Service Rd. when I stopped at the intersection with US 190B. I proceeded to go through the intersection and struck the vehicle traveling eastbound on US 190B. I was blinded by sunglare when I was stopped at that intersection which could have caused me to be unable to see the other vehicle.

She reiterated this description of the accident in her deposition, which was read for the jury at trial, stating:

> I was stopped on the service road that was going to cross [US 190B]... . [T]he sun was coming over the hill, and I just didn't see her.

Based on these facts, which are fully supported by the accident report, testimony, and physical evidence, we conclude that the jury manifestly erred in finding any fault on the part of Mrs. Nuss. LSA-R.S. 32:123(B) defines the duty of the motorist approaching an intersection regulated by a stop sign:

> Except when directed to proceed by a police officer or traffic-control signal, every driver and operator of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the cross walk on the near side at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. **After having stopped, the driver shall yield the right of way to all vehicles which have entered the intersection from another highway or which are approaching so closely on said highway as to constitute an immediate hazard.** (Emphasis added.)

The jurisprudence indicates that stopping is only half the duty; the other half is not to proceed until determining that the way is clear. Toston v. Pardon, 03-1747 (La. 4/23/04), 874 So.2d 791, 801-02.

In contrast to the above-cited duty of the motorist confronted with a stop sign, the duty of the favored motorist is quite minimal, as noted in Sanchez Fernandez v. General Motors Corp., 491 So.2d 633, 636 (La. 1986):

> A motorist on a right of way street is entitled to assume that motorists on the unfavored street approaching a stop sign will obey the traffic signal and will stop, look and yield the right of way to traffic proceeding on the favored street. ... [A] new duty thereafter devolves on the right of way motorist to take reasonable steps to avoid an accident if there is enough time to afford him a reasonable opportunity to do so. (Citation and footnote omitted).

Mrs. Nuss had a duty to follow all applicable traffic regulations and be alert and observant as she drove. The evidence shows that she did not violate any traffic regulations and looked to her left and right as she approached the intersection. She was aware that Ms. Zboril's vehicle was stopped at the stop sign. The evidence further shows that Mrs. Nuss's inability to avoid the accident was not the result of any inattention or other substandard conduct on her part; she simply did not have a reasonable opportunity to avoid the collision. Therefore, Mrs. Nuss did not breach any duty, nor did her conduct cause the accident. There is no evidence implicating fault on the part of Mrs. Nuss, and the jury's findings to the contrary are manifestly erroneous. The allocation of fault will be amended to show Ms. Zboril's fault was the sole cause of this accident.

Past Medical Expenses

The jury awarded $41,287.88 for past medical expenses. Mr. and Mrs. Nuss claim it was error not to award the full amount of the past medical expenses she incurred as a result of this accident.

We note first that the amount awarded by the jury is approximately 60% of the total past medical expenses that were in evidence.[3] During the jury deliberations, the jury sent the following question to the trial judge: "Was the $69,117.90 all 'out of pocket' expense to Mrs. Nuss, or was some of this covered by health insurance?" After conferring with counsel, the judge declined to give the jury a "collateral source rule" instruction and instead responded, "I'm not permitted under law to answer [the] above

[3] The amount awarded, $41,287.88, is 59.74% of $69,117.90.

– please continue deliberation." Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be diminished because of benefits received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. Sutton v. Lambert, 94-2301 (La. App. 1st Cir. 6/23/95), 657 So.2d 697, 706, writ denied, 95-1859 (La. 11/3/95), 661 So.2d 1384. Stated another way, a tortfeasor's liability to an injured plaintiff should be the same, regardless of whether or not that plaintiff had the foresight to obtain insurance. Louisiana Dep't of Transp. and Dev. v. Kansas City Southern Ry. Co., 02-2349 (La. 5/20/03), 846 So.2d 734, 740. Although it is not possible for this court to enter the minds of the jurors, it appears from the jury's inquiry to the judge that it was considering making an adjustment to the damages award for past medical expenses if some portion of those expenses were paid by insurance and were not "out-of-pocket" costs to Mr. and Mrs. Nuss. However, it is also possible that the jury examined all the medical invoices and made adjustments for medical expenses it felt were unrelated to the accident. Therefore, our decision cannot rest on a possible violation of the "collateral source rule," but requires an examination of the medical records, testimony, and invoices to determine if the jury's diminished award was based on the evidence.

The parties stipulated to the authenticity and admissibility of the medical records and invoices in the record. The invoices from the various health care providers totaled $69,117.90. We have reviewed those invoices and note that, with a few minor exceptions discussed below, there is medical testimony in the record establishing that all the expenses were attributable to medications, tests, and treatments for Mrs. Nuss's accident-caused injuries. One of the exceptions involves medication charges in the amount of $383.34 for hormone replacement therapy (Estratest), which could not be accident-related. There were also medication invoices in the amount of $15.56 for a sinus medication (Guiafen). Deducting the amounts for medications that appear to be unrelated to the accident, the medical bills totaled $68,719.00.

Those expenses must be awarded, unless there is contradictory evidence or a reasonable suspicion that the bills were unrelated to the accident. The defendants suggest that some of the treatments and medications were for a chronic, pre-existing

neurological condition suffered by Mrs. Nuss, rather than for accident-related problems. Mrs. Nuss was diagnosed in 2000 with chronic inflammatory demyelinating polyneuropathy (CIDP), an autoimmune disorder that causes pain and numbness in the extremities as the protective covering on the nerves is destroyed by the body's own immune system. After the accident, Mrs. Nuss did seek relief for her accident-related complaints from some of the same doctors who had been treating her for CIDP, and those visits included monitoring of her pre-existing condition. However, she and her doctors testified that by the time of the accident, her CIDP was stable and under control. Her post-accident visits to these doctors and others involved new complaints of pain in her back, neck, and shoulder, which differed from the pain attributable to her CIDP condition. She also testified that increased stress from the accident "inflamed" the CIDP, causing increased pain, although it did not worsen the disease itself. Therefore, her continued visits to the neurologist and pain management specialist were necessary to address any post-accident flare-ups in her CIDP and to monitor her pain medications. We conclude that the evidence would not justify a reduction in the award of past medical expenses based on her pre-existing condition, and thus, any such reduction would be manifest error.

There is only one other incident that the jury reasonably could have concluded was not directly caused by the automobile accident. Mrs. Nuss testified that in April 2005, while mopping a floor at her church, she experienced a severe pain down her back that caused her left leg to give out. She said the fall was caused by "[m]y left leg giving out and slipping in some water." She fell and cracked several teeth, requiring dental services from Dr. William J. Quinlan in the amount of $1091.00, treatment for her left shoulder from Dr. James Gosey in the amount of $395.20, and shoulder therapy from Northlake Physical Therapy in the amount of $242.00. Mrs. Nuss stated that her leg never gave out like that before she injured her lower back in the 2003 accident. The defendants point out that, based on her description of the incident, the jury could have believed that she simply slipped in the water and fell. Or the jury may have disbelieved that the accident caused her leg to give way, because her treating neurologist, Dr. Austin J. Sumner, testified that she had complained that her legs gave

way from CIDP on a number of occasions preceding the accident. Accordingly, we conclude that the jury could have had a reasonable suspicion that this incident was unrelated to the accident, such that deduction of these amounts from the past medical expense award would be appropriate.

Other than the adjustments described above, we have not found deductions that the jury could reasonably have made for medical expenses unrelated to the accident-caused injuries. We certainly cannot find reasonable deductions to account for a $27,830.02 difference in the jury's award. In light of the deductions described above and our review of the record in its entirety, we find no reasonable factual basis for the other deductions and will amend the damage award for past medical expenses to $66,990.80.

Future Medical Expenses

Mr. and Mrs. Nuss further contend the jury erred in failing to award any damages for future medical costs, when the evidence showed Mrs. Nuss would need some continuing medical treatment as a result of her injuries. Two months before the trial, Dr. David C. Lee, the neurosurgeon who performed the L3-4, L4-5 decompression and fusion surgery, testified in his deposition that Mrs. Nuss had one follow-up visit with him scheduled and would also need to return six months after that. He said she would also need at least six weeks of physical therapy to rehabilitate her back. However, Dr. Lee did not estimate the cost of such treatments. Therefore, although there was medical testimony that additional treatment was indicated, there was no evidence setting out the probable cost of such treatment. We conclude the jury did not err in failing to award damages for future medical expenses.

General Damages

Mrs. Nuss was 50 years old when this accident occurred in April 2003. She testified that she had been a high school athlete, participating in volleyball, basketball, track, and softball. As an adult, she continued an active lifestyle, including boating, fishing, camping, and hiking with her friends and family. Her husband said "she did just about everything that anyone could do and then a lot more," and described her as "[r]eally outdoorsy and very game." Over the years, in addition to raising two children,

she had been employed in various financial-related jobs. When she was afflicted with CIDP in 2000, she had to stop working and struggled for several years with pain in her forearms, hands, feet, and legs below the knee. Her condition was eventually stabilized, using an appropriate type and level of pain, anti-inflammatory, and muscle relaxing medications. She also received regular intravenous immune globulin (IVIG) treatments to provide antibodies to prevent her own immune system from destroying her nerve sheaths. With proper treatment for CIDP, by the time of the accident, she had been able to resume most of her normal activities.

Her treating neurologist, Dr. Austin J. Sumner, testified that when he began seeing Mrs. Nuss in August 2000, he ordered an MRI of her lower back, because "insidious degenerative disease in the lower spine can mimic CIDP" and make it "difficult to try to distinguish between the two conditions." Although the MRI showed evidence of early disc deterioration and osteoarthritic changes, Dr. Sumner stated that he "regarded the degenerative disease as contributing either not at all or to a minor degree in terms of her symptomatology." By the time of the accident three years later, he described her CIDP as "stable as far as all of the objective parameters that we had were concerned ... ." After the accident, Dr. Sumner ordered repeat MRIs, this time including the "cervical spine, the lumbar spine, and the left shoulder for possible rotator cuff injury," because these areas of her body had become symptomatic following the motor vehicle accident. The left shoulder MRI showed a bone spur with impingement of subacromial space and a small incomplete tear of the rotator cuff. The lumbar MRI showed mild to moderate spinal stenosis at L4-5 relative to posterior disc bulge.

Immediately after the accident, Mrs. Nuss complained of pain all along her left side and arm, neck pain, and lower back pain radiating into her left leg. With respect to her left shoulder, she said her symptoms "kept getting worse and worse," and it became increasingly difficult for her to use her left arm. She could not lift and move her left shoulder without pain, and it felt "torn up inside." For the next year, Mrs. Nuss had continuing treatments for her shoulder symptoms from her neurologist, her pain management specialist, a chiropractor, and two orthopedists. In January 2004, after cortisone injections, chiropractic treatments, pain patches, and other medications failed

to relieve her shoulder pain and limitation of motion, Dr. Timothy P. Finney, an orthopedic surgeon, performed left shoulder arthroscopy to reduce the bone spur and repair the tear in the rotator cuff. After several months of recuperation from that surgery, Mrs. Nuss regained unrestricted use of her left arm and shoulder.[4] She testified at the trial in July 2006 that her left shoulder problems were completely resolved.[5]

Mrs. Nuss's other major new complaint after the accident was severe lower back pain with radiating pain and numbness into her left leg. She testified that there were times that she would put her weight on her left leg and "would get a shooting pain up my back," causing the leg to "just go out" and cause her to fall. She could not sleep in her bed and had to sleep in a recliner. She could no longer participate in boating or other water sports and, because of the pain, was unable to enjoy interacting with her family at holiday functions. Mr. Nuss said that at family dinners, she would "make a cameo appearance and isolate herself because of the pain." She had to walk with a cane; she also experienced some anal leakage and urinary problems due to the lower back injury. Her efforts to relieve the lower back symptoms included chiropractic treatments, lidoderm patches, physical therapy, pain medications, electrical stimulation, nerve conduction studies, facet blocks, and three epidural steroid injections from Dr. David Shawa, the pain management specialist. Some of the treatments were, in themselves, extremely painful and debilitating. Yet several of the doctors who treated her lower back problem did not believe she needed surgery. Indeed, Dr. Sumner said, "I wasn't convinced in my own mind that her low back problem rose to the level that would be ameliorated by surgery." However, because her symptoms did not abate, she continued to seek relief from various doctors.

In the fall of 2005, an orthopedist referred her to Dr. David J. Yeh, a neurosurgeon. After examining her and reviewing her MRIs, Dr. Yeh scheduled her for lumbar surgery on September 15, 2005. However, he lost his home and was displaced

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[4] She also had several weeks of shoulder pain and related treatments after her fall in April 2005.

[5] Mrs. Nuss also said she had regular chiropractic treatments from Dr. Robert Beck for whiplash, and that these treatments helped her neck pain.

from his New Orleans practice by Hurricane Katrina, so at the recommendation of the same orthopedist, she consulted with Dr. Bert R. Bratton, a board certified neurosurgeon. After examining her and reviewing her records, Dr. Bratton agreed that Mrs. Nuss needed surgery. However, he was no longer performing surgery himself, so he referred her to a neurosurgeon in Hattiesburg, Mississippi, Dr. David C. Lee. Dr. Lee testified by deposition that, based on his comparison of MRIs conducted before and after the accident, he believed she had a pre-existing degenerative condition in the lumbar spine that was aggravated by the accident, in that a disk bulge occurred at that time and caused the resulting lower back problems.

In January 2006, Dr. Lee performed decompression and fusion surgery on the left side of her L3-4, L4-5 vertebrae. Dr. Lee testified that during the surgery, he could see the bulging disk extruding into the spinal canal and putting pressure on the nerve. His post-operative diagnosis was that Mrs. Nuss had lumbar disk bulging with spinal stenosis that had caused pain to radiate into her left leg. On her first follow-up visit one month after the surgery, the pain in her left hip, groin, and thigh were gone and her back pain was substantially decreased. Some swelling at the surgical site was noted at her two visits in March, and during those visits, Dr. Lee aspirated spinal fluid to reduce that condition. Nine weeks post-surgery, Dr. Lee said she had no complaints of leg pain, but still had some muscle spasms in the back, for which he scheduled physical therapy. Mrs. Nuss visited her neurologist in May 2006. Dr. Sumner testified in his deposition that, "Quite frankly, she was like a different person to me ... . [C]ertainly, for whatever reason, she has been improved since she had that low back surgery." Mrs. Nuss testified at trial that after the surgery, her back was "great." She said, "It was a miracle, as far as I'm concerned. Everything I had after the accident, as far as the back is concerned, gone." She said that her physical condition had returned to the way she was before the accident.

Mr. and Mrs. Nuss contend that the jury abused its discretion in awarding only $45,000 in general damages, which included $25,000 for her physical pain and suffering, $10,000 for her mental anguish, and $10,000 for her loss of enjoyment of life. After a thorough review of the record, we agree. Mrs. Nuss suffered for almost a

year with pain and limitation of motion in her left shoulder, and this injury required surgical intervention in order to correct the damage caused by the accident. More significantly, her lower back injury caused her severe pain and significantly impacted her daily life. The pain in her lower back, groin, thigh, and left leg continued virtually unabated for almost three years, while she consulted doctor after doctor and endured test after test and treatment after treatment, trying to get relief. Finally, the damage to her lower back was corrected by L3-4, L4-5 left side decompression and fusion surgery. Mrs. Nuss did not exaggerate her pain in her testimony; it is clear from the medical records that her physical pain and suffering were intense and continued for almost three years until she regained her pre-accident health. Moreover, she testified that she had been determined not to allow her CIDP condition to put her in a wheelchair, and the instability and pain caused by her lower back problems made her despair that all those efforts to stabilize the CIDP had been in vain. For three years, she could not participate with her family in the activities they had enjoyed together. Therefore, the general damage award must be increased.

We have reviewed general damage awards for comparable injuries, and note that the variations in the awards are great, reflecting the varying factual circumstances surrounding each situation. However, based on our review, we conclude that a general damage award of $175,000, including $125,000 for physical pain and suffering, $25,000 for mental anguish, and $25,000 for loss of enjoyment of life, is the lowest amount that the jury could reasonably have awarded. The general damages will be amended accordingly.

Loss of Consortium

Mr. and Mrs. Nuss also contend that the jury abused its discretion in awarding Mr. Nuss only $5,000 for loss of consortium. At the time of trial, the couple had been married eight years. Mr. Nuss testified that they enjoyed doing outdoor activities together, but acknowledged that their relationship had been significantly impacted by the problems she encountered with CIDP. He said that after her CIDP diagnosis, there was "the initial shock and depression knowing you have an incurable degenerative nerve disease which is eventually going to rob you of your mobility," as well as the

period of medication adjustments. He candidly admitted that it affected their marriage "a great deal," but said this was a temporary situation until the CIDP was stabilized. Dr. Sumner's observations reflect this period also, noting that during his treatment of her CIDP, Mrs. Nuss was also depressed. He attributed this primarily to stress that was related to "troubled marital relations" with Mr. Nuss. However, Dr. Sumner further testified that with the passage of time, their relationship had improved.

As Michael Nuss described it, when the CIDP had been stabilized, "we were pretty much hitting on all cylinders again." However, after the accident, the pain in her lower back again made it impossible for her to participate in their outdoor activities. He also said that their sexual activity decreased to "maybe one-tenth of what was a normal to slightly above normal sex life." According to Mr. Nuss, before the accident, she did a lot for him, stating, "I always said that I'm spoiled." But after the accident, she was unable to give him the kind of attention he was used to. When asked if he had ever stopped loving her during this period, he replied:

> Mr. Perry, that was not even an option. I've been divorced. I've been through an awful lot of pain; she also has. I don't think our love has ever come in question. No matter how rocky the road gets, that's just not an option. The love is there.

Based on the evidence in the record, we agree that the jury award for Mr. Nuss's loss of consortium was an abuse of discretion. After struggling through a difficult period due to the CIDP pain and medication adjustments, the couple had regained their equilibrium and normal life, only to have it completely disrupted again for three years as a result of the automobile accident. During that time, Mr. Nuss was unable to enjoy the recreational activities, family gatherings, companionship, affection, household services, and sexual relations they had previously enjoyed. Based on our review of awards for loss of consortium in similar cases, we conclude that the lowest reasonable amount the jury could have awarded was $15,000. The judgment will be amended accordingly.

CONCLUSION

The judgment of August 3, 2006, is amended to allocate 100% of the fault to Christine Zboril and to order Christine Zboril and the State of Louisiana, through the Department of Public Safety and Corrections, to pay Lynn and Michael Nuss past

medical expenses in the amount of $66,990.80; Mrs. Nuss general damages in the amount of $175,000; and Mr. Nuss $15,000 in damages for his loss of consortium. In all other respects, the judgment is affirmed. All costs of this appeal are assessed to Ms. Zboril and DPSC.

AMENDED AND AFFIRMED AS AMENDED.