NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0586

RICHARD E. FOURNET

VERSUS

CHRISTOPHER A. SMITH, ET AL.

DATE OF JUDGMENT: JAN 15 2009

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
473,197 DIV. J, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

THE HONORABLE CURTIS A. CALLOWAY, JUDGE

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BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Disposition: **AMENDED AND, AS AMENDED, AFFIRMED.**

Guidry, J. concurs in the result.

KUHN, J.

This appeal involves a personal injury suit arising from a two-car intersectional collision. Following a jury trial, plaintiff appealed the jury's allocation of fault and assessment of general damages and lost wages/diminished earning capacity. In an answer to the appeal, defendants also contest the allocation of fault, as well as the award for past medical expenses. We amend in part and affirm, as amended.

FACTS

At approximately 10:30 p.m. on June 12, 1999, Christopher A. Smith (Smith), accompanied by his brother, Jeffrey D. Smith, drove a co-worker home to the latter's apartment on Darryl Drive in Baton Rouge, Louisiana. To reach the apartment, Smith drove northbound on North Sherwood Forest and turned left at its intersection with Darryl Drive. At that time, North Sherwood Forest, a four-lane roadway, was under construction. Only the two inside lanes, going in opposite directions, were open to traffic. To gain access to Darryl Drive, Smith had to traverse the closed outside lane of North Sherwood Forest, which consisted of a gravel surface and was lower than the paved inside lane.

After dropping off his co-worker, Smith immediately proceeded back down Darryl Drive the short distance to its intersection with North Sherwood Forest. Darryl Drive is the inferior street and is controlled by a stop sign. However, Smith, who indicated he did not see the stop sign, failed to stop before pulling out into the southbound lane of North Sherwood Forest. Within seconds, the Chevrolet Suburban he was driving was hit broadside by a Nissan Pathfinder driven by Richard E. Fournet (Fournet).

Smith was slightly injured in the collision, suffering bruising and a small laceration to his shoulder. His brother was not injured. Both vehicles were heavily

damaged. Fournet's Pathfinder had to be towed from the scene. The cost of the Pathfinder's repairs totaled between $7,000 – $8,000.

Fournet testified that, although he was wearing his seatbelt, the force of the impact threw him to the right and his head struck an object, causing a stinging sensation all over his body. He did not seek medical treatment that night, but two days later consulted a doctor with complaints of a headache, neck pain, and bilateral knee pain. Since that date he has received extensive medical treatment for complaints of pain in his neck, back, shoulders, knees, hands, head and jaw. In July 2001, Fournet had surgery on his neck that included removal of the disk and a fusion at C5-C6.

Thereafter, in September 2002, Fournet was involved in another vehicular accident. The impact caused his vehicle to hit a culvert, and was severe enough that his vehicle was totaled. He momentarily lost consciousness and was taken from the scene by ambulance to Summit Hospital, where he was treated and released the same evening. Although he testified that he felt like his neck was broken in that accident, subsequent tests revealed no breaks or fractures.

Several weeks after this second accident, Fournet was involved in a third vehicular accident as he exited Interstate Highway 10 onto College Drive. As he was entering the intersection, a car passed a red light and clipped the front grill of his rental car. He described the accident as minor and was able to drive away from it. He did not schedule any additional doctor visits as a result of the accident, but merely continued with his regularly scheduled visits.

Fournet continued to experience symptoms in his neck, back, and knees. In February 2005 he underwent a second cervical surgery that included removal of the disk and a fusion at C6-C7.

PROCEDURAL HISTORY

On June 8, 2000, Fournet filed a personal injury suit against Christopher Smith (Smith) and State Farm Mutual Automobile Insurance Company (State Farm), his liability insurer. Also named as defendants were the City of Baton Rouge/Parish of East Baton Rouge and C.R. Kirby Contractors, Inc., the general contractor allegedly hired by the City/Parish to perform construction at the intersection in question (collectively the City/Parish).[1] In the petition, Fournet alleged he sustained injuries to his neck, back, knees, shoulders, upper extremities, head and jaw as a result of the June 1999 accident. A jury trial was held on June 20-June 23, 2005.[2] Following deliberations, the jury returned a verdict that found Smith, the City/Parish, and Fournet all guilty of negligence that was a cause of the June 1999 accident. The jury allocated fault as follows: 10% to Fournet, 45% to the City/Parish, and 45% to Smith. The jury further concluded the June 12, 1999 accident caused injury to Fournet and awarded him damages of $25,000 for past and future pain and suffering, $50,000 for past and future lost wages and diminished earning capacity, and $141,717 for past and future medical expenses. Although the verdict form provided spaces for awards for past and future mental anguish and loss of enjoyment of life, the jury declined to award any damages for these particular items. The trial court entered judgment on the jury's verdict on July 14, 2005.

Thereafter, Fournet filed a motion for judgment notwithstanding the verdict

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[1] The verdict form makes no distinction between these parties, referring to them as a single entity as follows: "the City of Baton Rouge/Parish of East Baton Rouge/C.R. Kirby Contractors, Inc.

[2] No appearances were made at trial by the City/Parish and C.R. Kirby Contractors, Inc. or their counsel. The briefs suggest a settlement and release occurred before trial.

or, alternatively, a new trial, which the trial court denied.[3] Fournet then appealed the trial court's judgments, and Smith and State Farm answered the appeal. However, upon examination of the July 14, 2005 judgment, this Court determined it was not a valid, final judgment because it neither identified the defendants who were cast in judgment nor ordered any defendants to pay damages to Fournet. Accordingly, the appeal and answer were dismissed. See ***Fournet v. Smith***, 06-1075 (La. App. 1st Cir. 5/4/07) (unpublished).

Subsequently, the trial court signed a new judgment on September 6, 2007, in favor of Fournet and against Smith and State Farm that incorporated the original jury verdict. Additionally, the judgment specifically dismissed, with prejudice, the City/Parish and Kirby "due to the prior Settlement [between] these parties." After reduction for the percentages of fault assigned to Fournet and the City/Parish, the judgment ordered Smith and State Farm to pay Fournet the sum of $97,522.65. Fournet has now appealed, contending: 1) the jury erred in finding him to be at fault; 2) the jury erred in finding the City/Parish to be at fault; 3) the jury committed legal error in refusing to award damages for mental anguish and loss of enjoyment of life; 4) the $25,000 award for past and future pain and suffering was abusively low; and 5) the $50,000 award for lost wages and diminished earning capacity was abusively low.[4] In an answer to the appeal, Smith and State Farm

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[3] Fournet alleges in his specifications of error that the trial court erred in denying his motion for judgment notwithstanding the verdict on the issues of allocation of fault and assessment of general damages, but makes no arguments in brief concerning the denial of this motion. Under Rule 2-12.4 of the Uniform Rules of the Louisiana Courts of Appeal, this court may consider as abandoned any specification of error that has not been briefed. Accordingly, we deem as abandoned those specifications of error relating to the denial of the motion for judgment notwithstanding the verdict. See ***Champagne v. Roclan Systems, Inc.***, 06-1928, p. 4 (La. App. 1st Cir. 2/20/08), 984 So.2d 808, 814 n.1, ***writ denied***, 08-1356 (La. 9/26/08), 992 So.2d 989.

[4] Although it was not assigned as error, Fournet complains in brief that the trial court erred in refusing to allow the introduction of the office records of the late Dr. Andrew Kucharchuk, an orthopedist who treated Fournet for his neck, back and knees from August 1999 to May 2000. Defense counsel objected to the admission of the records because Dr. Kucharchuk was deceased and could not be cross-examined. After the trial court sustained the objection, counsel proffered the records.

assert: 1) the jury erred in allocating any fault to Smith or, alternatively, that the percentage of fault assigned to him was too high; and 2) the jury erred in awarding medical expenses that were not causally connected to the accident at issue.

ALLOCATION OF FAULT

The jury found that Fournet, Smith, and the City/Parish were each at fault in causing the June 1999 accident. Fournet contends the jury committed reversible error in doing so, because Smith and State Farm failed to meet the burden of proving fault on either his part or that of the City/Parish. Alternatively, he contends the jury erred in assessing Smith with only 45% fault. In opposition, Smith and State Farm argue in their answer to this appeal that the jury was manifestly erroneous in assessing Smith with any fault under the circumstances. Alternatively, if Smith was at fault, they argue 10-15% was the highest percentage of fault the jury reasonably could have assigned to him.

A determination of negligence or fault is a factual determination that an appellate court will not disturb in the absence of manifest error. See ***Cazes v. Parish of West Baton Rouge***, 97-2824, p. 11 (La. App. 1st Cir. 12/30/98), 744 So.2d 54, 61. In order to reverse a factfinder's determinations, an appellate court must find from its review of the entire record that: 1) a reasonable factual basis does not exist for the factfinder's findings, and 2) the record establishes that the

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Fournet argues the records maintained by Dr. Kucharchuk in connection with his treatment of Fournet were admissible under the business record exception to the hearsay rule. See La. C.E. art. 803(6). However, we need not reach this issue because, under La. C.E. art. 103A, an error may not be predicated upon a ruling excluding evidence unless a substantial right of the party is affected. The test for determining whether a party was prejudiced by the court's alleged erroneous ruling is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. The party alleging prejudice from the evidentiary ruling bears the burden of so proving. ***Jennings v. Ryan's Family Steak House***, 07-0372, p. 10 (La. App. 1st Cir. 11/2/07), 984 So.2d 31, 39.

In the instant case, Fournet has made no showing of prejudice. Our examination of the proffered records in light of the entire record indicates none of his substantial rights were affected by the disputed evidentiary ruling. The material contained in Dr. Kucharchuk's records was largely cumulative of other medical evidence presented at trial. Considered in light of the entire record, the alleged erroneous ruling did not have a substantial effect on the outcome of the case.

finding is clearly wrong or manifestly erroneous. ***Ryan v. Zurich American Insurance Company***, 07-2312, p. 7 (La. 7/1/08), 988 So.2d 214, 219. The issue to be resolved by a reviewing court is not whether the trier-of-fact was right or wrong, but whether the trier-of-fact's conclusion was a reasonable one. Further, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. ***Adams v. Rhodia, Inc.***, 07-2110, p. 10 (La. 5/21/08), 983 So.2d 798, 806.

Fournet's Fault

The jury's finding that Fournet was guilty of fault is apparently based on its conclusion that he was driving in excess of the speed limit at the time of the accident. The investigating police officer testified the speed limit on North Sherwood Forest at the scene of the accident was 25 m.p.h. due to the ongoing construction. Fournet argues it was error for the jury to assess him with any fault when there was no expert testimony or other evidence establishing that the speed of his vehicle was unreasonable or constituted a legal cause of the accident. We disagree. Although no expert testimony was presented on this issue, the jury reasonably could have concluded from the evidence that Fournet was driving well in excess of the 25 m.p.h. speed limit.

At trial, Fournet testified he was driving at between 20 and 40 m.p.h., which was an admission that he could have been driving up to 15 m.p.h. in excess of the speed limit. In addition, on an information form he personally completed for one of his doctors, he described the June 1999 accident as follows: "Suburban ran stop sign. I broadsided him head-on about 45 mph." Although Fournet denied he meant that he was driving at 45 m.p.h., explaining he was only estimating the "total impact speed," the jury could have reasonably rejected that explanation as implausible. The trier-of-fact is charged with assessing the credibility of witnesses and, in so doing, is free to accept or reject, in whole or in part, the testimony of any

witness. See ***Pelican Point Operations, L.L.C. v. Carroll Childers Company***, 00-2770, pp. 7-8 (La. App. 1st Cir. 2/15/02), 807 So.2d 1171, 1176, ***writ denied***, 02-0782 (La. 5/10/02), 816 So.2d 293.

Thus, considering the evidence presented, the jury reasonably could have concluded that Fournet's speed was unreasonably excessive given the applicable 25 m.p.h. speed limit, as well as the fact that he was driving in a construction zone after dark, which were conditions calling for extra caution. Even a driver on the favored street can be found guilty of fault if his substandard conduct was a contributing cause of the accident. ***Hebert v. Old Republic Insurance Company***, 01-0355, p. 13 (La. App. 5th Cir. 1/29/02), 807 So.2d 1114, 1125.

Under the circumstances, the jury reasonably could have concluded that Fournet's excessive speed was a contributing cause of the accident. Fournet indicated he had very little time to react when Smith's vehicle pulled onto North Sherwood Forest. It is a permissible view of the evidence for the jury to have concluded that had Fournet been driving at the applicable speed limit of 25 m.p.h., he would have had more time to react and to avoid the accident.

City/Parish's Fault

Fournet further contends the jury erred in finding the City/Parish was guilty of negligence when the evidence failed to establish that a defective condition existed in the roadway. In brief, he emphasizes that no expert evidence was presented by defendants to meet their burden of proving the City/Parish's fault.[5]

As a governmental entity, the City/Parish is not the insurer for all injuries resulting from any risk posed by obstructions or defects in the roadways or its appurtenances. See ***Granda v. State Farm Mutual Insurance Company***, 04-1722,

[5] Fournet correctly points to jurisprudence which holds that once a plaintiff settles with and releases joint tortfeasors, the remaining defendants bear the burden at trial of proving the fault of the released parties and the degree thereof. See ***Hebert v. ANCO Insulation, Inc.***, 00-1929, p. 22 (La. App. 1st Cir. 7/31/02), 835 So.2d 483, 506, ***writs denied***, 02-2956, 02-2959 (La. 2/21/03), 837 So.2d 629.

p. 7 (La. App. 1st Cir. 2/10/06), 935 So.2d 703, 709, ***writ denied***, 06-0589 (La. 5/5/06), 927 So.2d 326. However, it is well-established that the City/Parish has a duty to motorists to maintain its roadways in a reasonably safe condition and to remedy conditions creating an unreasonable risk of harm. ***Williams v. Dean***, 96-1481, p. 9 (La. App. 1st Cir. 5/9/97), 694 So.2d 1195, 1200. This duty includes the obligation to keep stop signs clear and unobstructed at all times. ***Fontenot v. Soileau***, 567 So.2d 815, 816 (La. App. 3rd Cir.), ***writ denied***, 571 So.2d 656 (La. 1990). Additionally, a governmental authority that undertakes to control traffic at an intersection must exercise a high degree of care for the motoring public. ***Fuselier v. Matranga***, 01-0721, p. 6 (La. App. 5th Cir. 11/27/01), 803 So.2d 151, 155, ***writ denied***, 01-3393 (La. 3/15/02), 811 So.2d 908.

In the instant case, Smith admitted he failed to observe the stop sign that controlled Darryl Drive at its intersection with North Sherwood Forest. However, the evidence indicates the stop sign was not standing properly upright at the time. Both Smith and Fournet testified the stop sign was either bent back or leaning over at the time of the accident, and was not standing straight. Moreover, Smith's brother, who was a guest passenger, stated that the position of the stop sign was below eye level.

Photographs of the scene taken within a few days of the accident were introduced into evidence. The photographs indicate the stop sign was obscured by tall weeds, although the degree of obstruction varied depending on the position from which the photographs were taken. According to the testimony, more of the stop sign was visible in those photographs purportedly taken at an angle from the driver's perspective. However, upon viewing a photograph purportedly taken from the driver's vantage point, the investigating officer testified the stop sign could still be considered as obscured.

Accordingly, there is a reasonable factual basis in the record for the jury's determination as to the fault of the City/Parish. While no expert testimony was offered on this particular issue, the jury was entitled to use its common sense and judgment in making its fault determinations. See ***Ryan***, 07-2312 at p. 12, 988 So.2d at 222; ***Green v. K-Mart Corporation***, 03-2495, p. 5 (La. 5/25/04), 874 So.2d 838, 843. These facts alone are sufficient to provide a basis for the jury's decision. See ***Theriot v. Lasseigne***, 93-2661, p. 10 (La. 7/5/94), 640 So.2d 1305, 1313. Based on our review of the record, we are unable to say the jury was manifestly erroneous in concluding the City/Parish was guilty of fault that was a contributing cause of the June 1999 accident.

Smith's Fault

In their answer, Smith and State Farm contend the jury was manifestly erroneous in assessing any fault to Smith since he was faced with an extremely dark intersection that was under construction where the stop sign was bent over and obstructed by tall weeds.

Initially, we note that, even though the stop sign facing Darryl Drive may have been obscured and bent over, this fact did not relieve Smith of his obligation to yield the right-of-way to the favored street and to not enter the intersection until he had ascertained it was safe to do so. See ***Wilson v. Transportation Consultants, Inc.***, 04-0334, pp. 6-7 (La. App. 4th Cir. 3/2/05), 899 So.2d 590, 597, ***writ denied***, 05-0827 (La. 5/13/05), 902 So.2d 1025; ***Bessard v. Marcello***, 467 So.2d 2, 5 (La. App. 4th Cir.), ***writs denied***, 472 So.2d 38, 39 and 40 (La. 1985). A favored street does not lose its preferred status due to an obscured stop sign. ***Bessard***, 467 So.2d at 5; ***Burrow v. Commercial Union Assurance Companies***, 419 So.2d 479, 483-84 (La. App. 3rd Cir.), ***writ denied***, 423 So.2d 1162 (La. 1982). Further, all motorists have a never-ceasing duty to maintain a sharp lookout to see that which in the exercise of ordinary care should be seen.

Theriot v. Bergeron, 05-1225, p. 6 (La. App. 1st Cir. 6/21/06), 939 So.2d 379, 383. When a motorist is confronted with what he erroneously believes is an uncontrolled intersection, the motorist traveling on an inferior street still has a duty to determine if he can proceed safely before entering the intersection of a major street. See ***Stallion v. Morris***, 546 So.2d 563, 566 (La. App. 1st Cir. 1989); ***Wilson***, 04-0334 at p. 7, 899 So.2d at 597; ***Pepitone v. State Farm Mutual Automobile Insurance Co.***, 369 So.2d 267, 270 (La. App. 4th Cir.), ***writ denied***, 371 So.2d 1343 (La. 1979).

In the instant case, none of the parties dispute that traffic on North Sherwood Forest had the right of way at its intersection with Darryl Drive, an inferior street controlled by a stop sign. Smith acknowledged that North Sherwood Forest was a major roadway compared to Darryl Drive. Thus, even if the stop sign was obscured, Smith still had a duty not to enter the intersection until he had ascertained he could safely do so.

Smith claims as extenuating circumstances that there were no signs leading up to the intersection warning motorists of the construction, the intersection was dark, and he was unfamiliar with it. First, we note that no evidence was offered to suggest that warning signs advising motorists of the construction were warranted under the circumstances. Moreover, even though there may have been no warning signs, Fournet testified he remembered there being orange and white construction barrels in the area, although Smith did not recall seeing them. Regardless, because Smith had driven through the intersection minutes earlier, he was already aware of the fact that it was under construction. Second, the investigating police officer indicated that, while it was dark, the lighting in the area was fair with continuous street lighting. He made no notation in the accident report of the lighting being inadequate.

Additionally, although Smith contends he was unfamiliar with the intersection, as previously noted, he had driven through the intersection only minutes before the accident. Further, he admitted that he felt the transition when he left the asphalt portion of Darryl Drive and entered the gravel. Since he had just traversed the intersection, the change in the road surface should have alerted him that he was about to enter onto North Sherwood Forest and should proceed only after determining it was safe to do so. Nevertheless, Smith, who estimated he was driving at approximately 35 m.p.h., testified he did not recall even applying his brakes in an attempt to stop or slow down before the impact, even when he felt his vehicle move from asphalt to gravel. Given these circumstances, we find no manifest error in the jury's determination that Smith was at fault in causing the June 1999 accident.

Smith and State Farm also argue, in the alternative, that if Smith was at fault, the jury erred in assigning too high a percentage of fault to him. They maintain the highest percentage of fault that the jury reasonably could have assigned to Smith was 10% to 15%. On the other hand, Fournet argues the jury was manifestly erroneous in assessing Smith with only 45% fault.

In determining percentages of comparative fault, the trier-of-fact should consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. Further, in assessing the nature of the parties' conduct, various factors may influence the degree of fault assigned to each, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. ***Watson v. State Farm Fire and Casualty Insurance Co.***, 469 So.2d 967,

974 (La. 1985). The trier-of-fact's determination of the allocation of fault is a factual finding that will not be disturbed in the absence of manifest error. See ***Snearl v. Mercer***, 99-1738, p. 27 (La. App. 1st Cir. 2/16/01), 780 So.2d 563, 584, ***writs denied***, 01-1319, 01-1320 (La. 6/22/01), 794 So.2d 800, 801.

After reviewing the entire record, and considering the respective parties' conduct in light of the ***Watson*** factors, we cannot say the jury's allocation of fault in this case was clearly wrong or manifestly erroneous. Since Smith and the City/Parish were assigned the same degree of fault, the jury obviously concluded that Smith's actions in proceeding into the intersection without ascertaining it was safe to do so was as significant a factor in causing the accident as the City/Parish's failure to properly maintain the stop sign at Darryl Drive. Smith acknowledged that North Sherwood Forest was a major roadway compared to Darryl Drive. Yet, despite his awareness of this fact, he entered North Sherwood Forest without ascertaining that it was safe to do so. In fact, Smith failed to apply his brakes, even when he felt his vehicle enter the gravel surface of the closed lane.

Finally, the jury concluded that Fournet's speed, while a contributing factor in causing the accident, was not as substantial a factor as the conduct of the City/Parish and Smith. This conclusion was reasonable, especially since the duty of the motorist on the favored street is not as great as that of the motorist on the non-favored street. See ***McElroy v. Wilhite***, 39,393, pp. 3-4 (La. App. 2d Cir. 5/18/05), 903 So.2d 627, 631.

Thus, we find the jury's allocation of fault is supported by a reasonable factual basis and was not clearly wrong or manifestly erroneous. Accordingly, we find no error in the jury's findings and allocation of fault.

MEDICAL EXPENSES

In their answer to Fournet's appeal, Smith and State Farm allege the jury's award of $141,717 for past and future medical expenses constituted manifest error.

Specifically, they contend the award included medical expenses that have no causal connection to the June 1999 accident.

In support of their argument, Smith and State Farm emphasize that Fournet had pre-existing, degenerative back and neck conditions that they allege caused him chronic back and neck pain prior to the June 1999 accident. They note, in particular, that four months before the accident Fournet went to a hospital emergency room complaining of severe pain in his shoulder blades radiating into his neck and cramping in his hands. They maintain his pre-existing conditions were at least a partial cause of the cervical surgery Fournet underwent in July 2001, at a cost of $28,938.75. Smith and State Farm also point out that Fournet had two vehicular accidents after the June 1999 accident, and that these subsequent accidents necessitated some of the medical treatment he thereafter received. Thus, they argue that recovery for the medical expenses Fournet incurred after the second and third accidents should have been reduced due to his pre-existing conditions and his subsequent accidents, especially the approximately $86,000 in expenses associated with Fournet's second cervical surgery in February 2005.

Thus, the jury was required to determine which of Fournet's injuries were caused or exacerbated by the June 1999 accident and which, if any, were attributable to pre-existing conditions and/or his subsequent accidents. In a personal injury suit, a plaintiff bears the burden of proving the causal connection between an accident and the resulting injuries. ***Oden v. Gales***, 06-0946, p. 6 (La. App. 1st Cir. 3/23/07), 960 So.2d 114, 118. However, a defendant takes the plaintiff as he finds him and is responsible for all natural and probable consequences of his tortious conduct. When the defendant's negligent action aggravates a preexisting injury or condition, he must compensate the victim for the full extent of that aggravation. Whether the accident caused the plaintiff's injuries is a factual question that should not be reversed on appeal absent manifest error.

Pena v. Delchamps, Inc., 06-0364, p. 10 (La. App. 1st Cir. 3/28/07), 960 So.2d 988, 994, ***writ denied***, 07-0875 (La. 6/22/07), 959 So.2d 498.

At trial, Fournet testified as to the alleged injuries he sustained in the June 1999 accident as follows. Initially he experienced deep nerve pain and muscle spasms in his neck, lower back and knees. Shortly thereafter, he also began having problems with his arms. He indicated his back pain was not as severe as his neck pain. Moreover, the symptoms in his back "just about completely subsided" within six to nine months after the June 1999 accident. However, he testified his neck pain was almost constant until the time of his first surgery. While the surgery provided him with some relief, he continued to have symptoms and to receive medical treatment for them.

According to Fournet, the neck problems he experienced as a result of the June 1999 accident still had not resolved at the time of his second accident. In fact, he had received physical therapy for his neck as recently as two months before the second accident. He explained he had no physical therapy during the two months immediately preceding the second accident in September 2002 because he generally felt better during warmer weather and tried to schedule his work then.

Although he attributed the largest majority of his problems to the June 1999 accident, Fournet admitted he was not claiming that "the second wreck didn't exacerbate things for a while." He testified that after the September 2002 accident his neck pain increased, but by approximately the following summer it subsided to the same level it had been prior to the September 2002 accident. Additionally, he testified that the September 2002 accident made his low back pain much worse.

In making the award for medical expenses, the jury was required to determine which of the claimed past medical expenses were attributable to injuries caused or exacerbated by the June 1999 accident and what amount, if any, Fournet

was entitled to for future medical expenses. We note that Fournet presented no specific evidence as to the cost of any possible future medical treatment, other than the deposition testimony of an orthopedic surgeon who saw him on two occasions and testified that he would probably need arthroscopic surgery on his knees, costing approximately $10,000, at some point in the future. However, Fournet did present past medical bills totaling $151,717.41, of which approximately $29,000 was attributable to his first surgery, approximately $23,000 was attributable to non-surgical medical expenses he incurred between the time of the June 1999 accident and the 2002 accidents, approximately $86,000 was attributable to his second surgery, and approximately $13,000 was attributable to non-surgical medical expenses he incurred after the 2002 accidents. Fournet admitted that a portion of the medical expenses he incurred for treatment of his back after September 2002 were attributable to his second accident. His attorney apparently suggested to the jury that $10,000 was a reasonable amount to be deduced from the medical bills for this additional treatment.[6]

The jury chose to award Fournet $141,717 for past and future medical expenses, which was the total amount of his past medical expenses minus $10,000.41. Since this case was tried before a jury, there are no reasons for judgment explaining the jury's award. However, given the sparse evidence as to future medical expenses, the only logical interpretation of the award is that the majority, if not all, of it was for past medical expenses. Further, the difference between the total amount of past medical expenses incurred and the amount awarded by the jury corresponds almost exactly with the amount plaintiff's counsel suggested was attributable to the back injuries Fournet sustained in the second accident. Accordingly, we deduce from the fact that the jury awarded the full

[6] Although this suggestion is not included in the trial transcript, the parties each refer to it in brief. We note a transcript of the closing arguments was not included in the appellate record.

amount of past medical expenses minus $10,000.41 that it concluded these expenses were attributable to injuries caused or exacerbated by the June 1999 accident.

The total amount of medical expenses awarded was consistent with a determination by the jury that the greater part of the non-surgical medical expenses incurred after the 2002 accidents was attributable to the second accident, but that all of the remaining medical expenses were attributable to injuries resulting from the June 1999 accident. We note specifically that, since the jury allowed recovery for the vast majority of the past medical expenses, which included over $115,000 in costs associated with Fournet's two surgeries, the conclusion is inescapable that the jury found that the cervical injuries, including two disk herniations that necessitated the surgeries, were caused or exacerbated by the June 1999 accident.

After reviewing the record in its entirety, we find no manifest error in the jury's implicit findings. When Fournet sought medical treatment the day after the June 1999 accident complaining of neck pain, he exhibited moderate to severe spasms in his neck and a 50% loss of range of motion. According to Fournet, he thereafter experienced almost constant neck pain until his first surgery was performed. Further, an MRI taken approximately two months after the accident revealed disk herniations at C5-C6 and C6-C7, as well as some degenerative changes. Fournet's first surgery in July 2001 involved the removal and fusion of C5-C6, while his second surgery in February 2005 involved the removal and fusion of C6-C7. Even though the second surgery occurred after Fournet's 2002 accidents, the consistent opinion of all doctors questioned on the issue was that the MRI taken in August 1999 and the MRI taken after the 2002 accidents were very similar and revealed the same cervical herniations.

Additionally, in his deposition, Dr. Steven Zuckerman, a neurologist who treated Fournet from October 2000 to July 2002, attributed the medical necessity of

the first surgery to the June 1999 accident, despite Fournet's pre-existing degenerative changes, because the change in the disk at C5-C6 was acute and Fournet had suffered chronic and somewhat incapacitating neck pain since that accident. The deposition of Dr. Robert Nicholson, the orthopedic surgeon who performed Fournet's first surgery, indicated he also was of the opinion that the majority of Fournet's neck and arm pain was caused by the June 1999 accident, even though Fournet had degenerative changes and some history of neck symptoms before the accident. Additionally, Dr. Stefan Pribil, the neurosurgeon who performed Fournet's second surgery, testified by deposition that the disk herniations were "clearly caused by a sudden trauma." He further opined that the significant herniation at C5-C6 justified the decision to perform surgery at that level.

Smith and State Farm argue strenuously that Fournet's neck problems were caused by pre-existing degenerative conditions and his subsequent accidents. However, the medical evidence indicated the disk herniations that were primarily responsible for Fournet's neck problems were present when an MRI was taken approximately two months after the June 1999 accident and that these herniations were essentially unchanged after the 2002 accidents. As noted, there was also medical evidence to the effect that these herniations were caused by sudden trauma rather than the degenerative changes that the MRIs also revealed. Additionally, Smith and State Farm presented no opposing medical evidence on the issue of causation.

Smith and State Farm further assert that any reliance on Dr. Nicholson's and Dr. Pribil's opinions as to the causation of Fournet's injuries was misplaced because Fournet did not inform them of his history of chronic neck and back problems. Additionally, they point out that Fournet has filed a separate lawsuit as

a result of his September 2002 accident in which he appears to be claiming essentially the same injuries as in the instant suit.

However, we note that the jury heard evidence as to Fournet's pre-existing degenerative changes, his prior history of neck and back pain, and the fact that he did not fully disclose that history to some of his doctors. It also heard testimony regarding the subsequent lawsuit Fournet filed as a result of his September 2002 accident. Nevertheless, after weighing the totality of the evidence and evaluating credibility, the jury apparently concluded that Fournet's cervical injuries were caused by the June 1999 accident. Under these circumstances, the jury's implicit finding was a permissible view of the evidence. Even though Fournet may have had some degenerative changes prior to the June 1999 accident, that fact alone does not defeat his recovery. A tortfeasor takes a victim as he finds him. The tortfeasor is responsible for the injuries he caused, including any aggravation to a pre-existing condition caused by the tortfeasor. ***Thibodeaux v. Wal-Mart Stores, Inc.***, 98-0556, p. 4 (La. App. 1st Cir. 4/1/99), 729 So.2d 769, 772, ***writ denied***, 99-1244 (La. 6/18/99), 745 So.2d 28. Our review of the entire record reveals no manifest error in the jury's implicit finding that Fournet's neck problems and associated medical expenses, including his second cervical surgery, were caused by the June 1999 accident.

We likewise find no error in the jury's implicit findings that Fournet incurred medical expenses attributable to back and knee injuries caused by the June 1999 accident. At his first doctor's visit two days after the accident, Fournet complained of pain in both knees. A MRI taken several months after the accident indicated a possible medial meniscus tear in the left knee. A MRI taken in May 2001 also indicated a medial meniscus tear in the right knee. Further, Dr. Gerald Murtagh, an orthopedic surgeon, testified by deposition that this injury was consistent with Fournet's description of the June 1999 accident.

Within a month of the June 1999 accident, Fournet began complaining of lower back pain, which he testified took six to nine months to subside. Dr. Douglas Davidson, Sr., a general practitioner, diagnosed an acute lumbar strain. Fournet admitted he had suffered back pain for several years prior to the June 1999 accident, including the incident four months before the accident that precipitated his visit to a hospital emergency room complaining of severe pain between his shoulder blades radiating into his neck. However, the record reveals that he was diagnosed with gastritis on that occasion rather than any condition related to his back or neck. Further, Fournet explained that a liver condition he suffered from sometimes causes inflammation and pain that radiated underneath his right ribs and into his right shoulder blade. Smith and State Farm presented no opposing medical evidence. Further, as previously noted, a tortfeasor must take a victim as he finds him, and is responsible for any aggravation to a pre-existing condition that he causes. See ***Thibodeaux***, 98-0556 at p. 4, 729 So.2d at 772.

Under the circumstances, there is a reasonable factual basis in the record for the jury's implicit findings that Fournet sustained two cervical disk herniations, an acute lumbar strain, and injuries to both knees as a result of the June 1999. These findings represent a permissible view of the evidence that is not clearly wrong or manifestly erroneous. Thus, we find no manifest error in the jury award allowing recovery for the medical expenses attributable to those injuries.

GENERAL DAMAGES

In the instant case, the jury assessed Fournet's damages as follows:

A. Past and Future Pain and Suffering	$25,000
B. Past and Future Mental Anguish and Anxiety	$ 0
C. Past and Future Health and Medical Expenses	$141,717
D. Past and Future Lost Wages and Diminished Earnings Capacity	$50,000

E. Damages for Loss of Enjoyment of Life $ 0

On appeal, Fournet asserts it was legal error for the jury to award medical expenses while refusing to award damages for mental anguish and loss of enjoyment of life. He further asserts the award of only $25,000 for past and future pain and suffering was abusively low. In opposition, Smith and State Farm argue that $25,000 was a reasonable award in view of Fournet's pre-existing medical problems and degenerative conditions, as well as his two subsequent accidents.

The jury's determination of the appropriate amount of damages is entitled to great deference on appeal. La. C.C. art. 2324.1; ***Wainwright v. Fontenot***, 00-0492, p. 6 (La. 10/17/00), 774 So.2d 70, 74. The role of an appellate court in reviewing such awards is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier-of-fact. Before an appellate court can disturb the quantum of an award, the record must clearly reveal that the trier-of-fact abused its discretion in making the award. ***Wainwright***, 00-0492 at p. 6, 774 So.2d at 74.

In ***Wainwright***, the Supreme Court considered for the first time the anomalous situation in which a jury determined that the defendant was legally at fault and awarded the plaintiff medical expenses he incurred, but declined to award him any general damages. In holding that a verdict awarding medical expenses yet denying general damages is not per se invalid, the Supreme Court explained that:

> [We] do not dispute that, as a general proposition, a jury verdict such as the one currently before us may be illogical or inconsistent. However, ... a jury, in the exercise of its discretion as factfinder, can reasonably reach the conclusion that a plaintiff has proven his entitlement to recovery of certain medical costs, yet failed to prove that he endured compensable pain and suffering as a result of defendant's fault. It may often be the case that such a verdict may not withstand review under the abuse of discretion standard. However, it would be inconsistent with the great deference afforded the factfinder by this court and our jurisprudence to state that, as a matter of law, such a verdict must always be erroneous. **Rather, a reviewing court faced with a verdict such as the one before us must ask whether the jury's determination that plaintiff is entitled to certain**

medical expenses but not to general damages is so inconsistent as to constitute an abuse of discretion.

Wainwright, 00-0492 at p. 8, 774 So.2d at 76. (Emphasis added.)

The First Circuit has indicated that the same considerations are applicable when the jury awards medical expenses but fails to award damages for mental anguish and loss of enjoyment of life. See ***Oden,*** 06-0946 at p. 13, 960 So.2d at 122.

Loss of enjoyment of life encompasses detrimental alterations of a person's lifestyle or a person's inability to participate in activities or pleasures that he formerly enjoyed prior to his injury. ***McGee v. A C and S, Inc.***, 05-1036, p. 5 (La. 7/10/06), 933 So.2d 770, 775. As previously discussed, the jury's determination that Fournet was entitled to in excess of $141,000 in medical expenses incurred for treatment of his neck, back and knee injuries indicates the jury also found those particular injuries, including two cervical disk herniations, were caused or exacerbated by the June 1999 accident. In our opinion, a finding that Fournet sustained two cervical disk herniations that eventually required surgery, in addition to other injuries, is irreconcilable with a finding that he suffered no detrimental lifestyle change as a result of those injuries, even if only during the period from the June 1999 accident until his surgeries. Despite Fournet's pre-existing medical conditions,[7] given the severity of the injuries he sustained as a result of the June 1999 accident, it would be unreasonable to conclude there was no detrimental alteration in his lifestyle. Accordingly, we conclude the jury's failure to award damages for loss of enjoyment of life, when considered together with its substantial award for medical expenses, was so inconsistent as to constitute an abuse of the jury's discretion.

Whether the jury also abused its discretion in refusing to award damages for mental anguish is more difficult to determine since the verdict form used in this

[7] Fournet's unrelated health conditions included depression, anxiety, high blood pressure, ulcers, gastritis and hyperbilirubinemia.

case makes no distinction between physical and mental pain and suffering. Thus, the jury could have intended the $25,000 award for "past and future pain and suffering" to encompass both physical and mental pain and suffering. See ***Oden***, 06-0946 at p. 14, 960 So.2d at 122. However, regardless of whether or not the jury intended this award to include mental anguish, the amount was inadequate to compensate Fournet for the pain and suffering he endured as a result of the injuries the jury obviously attributed to the June 1999 accident, as reflected in its award for medical expenses. Based on the evidence presented, we find the amount of $25,000 awarded by the jury for pain and suffering to be abusively low.

Accordingly, this court must correct the jury verdict, since the jury abused its discretion both in awarding an inadequate amount for pain and suffering and in making a general damage award that was inconsistent with its award of medical expenses. When a jury has abused its much discretion by making an inadequate or inconsistent damage award, an appellate court can only disturb the award to the extent of raising (or lowering) it to the lowest (or highest) point that is reasonably within the jury's discretion. See ***Wainwright***, 00-0492 at p. 6, 774 So.2d at 74; ***Harris v. Delta Development Partnership***, 07-2418, p. 21 (La. App. 1st Cir. 8/21/08), 994 So.2d at 69, 83. Rather than making separate awards for each element of general damages, we choose to correct the jury verdict by making one undifferentiated award encompassing all elements of general damages.

The jury's award of medical expenses is consistent with a finding that Fournet sustained two herniated cervical disks, an acute lumbar strain, and injuries to both his knees. According to Fournet, his neck caused him almost constant pain from the time of the June 1999 accident until his first surgery in July 2001, a period of over two years. That surgery involved removal of a portion of his bone from the hip area for use in the fusion performed at C5-C6. The removal of this bone caused Fournet to suffer extreme pain in the hip area for a period of two to

three weeks in addition to the normal pain associated with cervical surgery. Even though he testified his neck pain improved by approximately 50% after the surgery, he continued to suffer some symptoms. The surgeon who performed the surgery indicated Fournet had an anatomical impairment rating of 9-12% of the whole body as a result of the surgery. In February 2005, Fournet underwent a second surgery on his neck, which resulted in a substantial improvement in his condition.

Fournet testified he also experienced back pain for a period of six to nine months after the June 1999 accident, although it was not as severe as his neck pain. Dr. Davidson diagnosed an acute lumbar strain. Fournet also sought treatment for injuries to his knees following the accident, and testified he was on crutches for a few months thereafter due to inflammation in his knees. Moreover, there was testimony from Dr. Murtagh that Fournet would probably require arthroscopic knee surgery in the future.

At trial, Fournet testified his leisure activities were greatly diminished after the June 1999 accident. According to his testimony, before the June 1999 accident, he frequently played golf and pool, but now rarely does so. In the almost six year period since the accident, he has only played golf twelve to fifteen times. Additionally, he testified his injuries and resulting pain have also limited his ability to participate in activities with his son, who was fifteen at the time of trial.

Given the particular facts and circumstances present in this case, we believe the lowest amount reasonably within the jury's discretion for general damages is $239,500. Therefore, the judgment of the trial court will be amended to so provide.

ECONOMIC LOSS

The jury awarded Fournet $50,000 for past and future lost wages and diminished earning capacity. He argues this amount was inadequate and should be

increased to a minimum of $346,438 based on the testimony of his expert economist. Smith and State Farm counter that the amount awarded was within the jury's discretion, given that Fournet produced no reliable records establishing his pre-accident wages or earning capacity. They also point out that the jury may have apportioned some of Fournet's lost wages to his subsequent accidents.

At the time of the June 1999 accident, Fournet was operating his own company, which was in the business of installing phone systems, under the name of A-Tech. Before he started that business in 1996, he worked for a family business doing the same type of work. In addition to working at A-Tech, Fournet also worked part-time as a video poker machine repairman for Seabuckle, Inc. Fournet continued to work to some extent in his business after the June 1999 accident, but testified he eventually shut it down at the end of 2000 because he was overwhelmed by his physical condition, particularly his neck problems. However, even before the accident, A-Tech never made a profit, although there was evidence that business was increasing.

At trial, Fournet presented the testimony of Dr. Randolph Rice, an expert economist, to establish the amount of his economic loss. At the time, Fournet was fifty years old with a work life expectancy of 12.59 years. Taking into account the part-time work Fournet had performed since the June 1999 accident, Dr. Rice calculated the amount of his past lost wages at $155,855. He was also asked by Fournet's counsel to calculate the amount of future lost wages and diminished earning capacity based on an assumption that Fournet would be able to return to work twenty hours a week. Counsel indicated that was the amount he intended to request from the jury. On that basis, Dr. Rice calculated the amount of future lost wages to be $190,583. Thus, Fournet argues he is entitled to a total of $336,438 for past and future lost wages and diminished earning capacity.

Smith and State Farm presented the testimony of Ronald Gagnet, a CPA who was accepted as an expert in accounting. His examination of Fournet's tax and business records led him to disagree with Dr. Rice's calculation of the average annual income Fournet earned before the accident. He believed the tax records provided by Fournet were unreliable because they did not always match the earnings records obtained from the Social Security Administration.[8] He calculated Fournet's past lost earnings to be $87,400. He did not calculate future lost wages, based on an assumption that no diminution in earning capacity had occurred.

The jury did not fully accept the opinion of either expert and choose to award a total of $50,000 for past and future loss wages and diminished earning capacity. The trier-of-fact is not bound by the testimony of an expert, and may accept or reject in whole or in part the opinion expressed by an expert. ***Harris***, 07-1566 at p. 10, 994 So.2d at 77. In the instant case, both experts calculated past lost wages for the full period of time from the June 1999 accident until the trial in June 2005. However, the jury could have found that a portion of the lost wages should be apportioned to the September 2002 accident in which Fournet admittedly sustained additional injury. Such a conclusion is consistent with the jury's apparent decision that most of the non-surgical medical expenses Fournet incurred after the September 2002 accident should be apportioned to that accident.

As to future lost wages and diminished earning capacity, it appears Fournet took the position at trial that he would only be able to return to work part-time working twenty hours a week. However, the jury could have concluded Fournet failed to sufficiently prove he would be limited to working that number of hours in the future. At the time of trial, Fournet was still under doctor's restrictions as to lifting, climbing and getting into cramped spaces. However, the trial took place

[8] We find no merit in Fournet's assertion that the allegedly excessive questioning regarding his tax returns, with attendant insinuations that he was not completely truthful on his tax returns, was so prejudicial as to warrant a de novo review by this court. The accuracy of the tax returns was a legitimate area of inquiry by defense counsel.

only four months after his second cervical surgery, and Fournet offered no medical evidence to support his position that he would be permanently limited to working no more than twenty hours per week. Moreover, the testimony of Dr. Pribil indicated that most of the problems Fournet continued to experience after the second surgery were related to his back. According to Fournet's own testimony, the back problems he experienced from the June 1999 accident had subsided within nine months, but reoccurred after the September 2002 accident. Thus, the jury could have attributed most of any residual disability that Fournet may have had after his second surgery to the back injuries he sustained in the September 2002 accident.

An award of lost wages is subject to the manifest error standard of review because such damages must be proven with reasonable certainty. ***Boudreaux v. State, Department of Transportation***, 04-0985, p. 13 (La App. 1st Cir. 6/10/05), 906 So.2d 695, 705, ***writs denied***, 05-2164 (La. 2/10/06), 924 So.2d 174 and 05-2242 (La. 2/17/06), 924 So.2d 1018. Moreover, awards for loss of earning capacity are inherently speculative by nature and cannot be calculated with mathematical certainty. Therefore, the trier-of-fact must be given much discretion in fixing such awards. ***Knabel v. Lewis***, 00-1464, p. 5 (La. App. 1st Cir. 9/28/01), 809 So.2d 314, 317, ***writ denied***, 01-2892 (La. 3/8/02), 811 So.2d 886. Under the circumstances of this case, our review of the record reveals no manifest error or abuse of discretion in the jury's award for lost wages and diminished earning capacity.

CONCLUSION

For the above reasons, that portion of the trial court judgment awarding $25,000 for past and future pain and suffering and allowing no separate recovery for past and future mental anguish and loss of enjoyment of life is set aside, and the judgment is hereby amended to provide for an award for all elements of general

damages in the amount of $239,500, subject to a reduction of 55% due to the comparative negligence of Fournet and the City/Parish. The judgment of the trial court is affirmed in all other respects. One-half of the costs of this appeal are to be paid by Fournet, with the remaining one-half to be paid by Smith and State Farm.

AMENDED AND, AS AMENDED, AFFIRMED.