

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1117

MARION BRIGNAC AND THERESA BRIGNAC

VERSUS

**DAVID WILLIAMSON, JR., KELLY DUGAS AND SONS WRECKER
SERVICES, DANA DUGAS INDIVIDUALLY, TOWING AND RECOVERY
PROFESSIONALS OF LOUISIANA TRUST AND PERFORMANCE
INSURANCE SERVICES**

Judgment Rendered: FEB 11 2011

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On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Livingston
State of Louisiana
Docket No. 109321

Honorable Bruce C. Bennett, Judge Presiding

*** * * * ***

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*** * * * ***

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

In this appeal arising out of an automobile accident, the defendants appeal from a judgment rendered in favor of the plaintiff following a jury verdict that awarded him damages totaling \$1,172,900.00. For the reasons that follow, we amend in part and, as amended, affirm.

FACTS AND PROCEDURAL HISTORY

On November 29, 2004, the plaintiff, Marion Brignac, was driving a 1992 Honda Accord in a westerly direction on U.S. Highway 190 in Walker, Louisiana, traveling the speed limit at approximately fifty-five miles per hour. The defendant, David Williamson, Jr., was traveling in an easterly direction on the same highway and operating a Ford F-450 towing truck owned by the defendant, Kelly Dugas & Sons Wrecker Service, Inc. (Dugas). Williamson slowed down and attempted to make a left hand turn at the intersection of Louisiana Highway 449. The vehicle driven by Brignac hit the truck, causing Brignac to sustain injuries.

On September 15, 2005, Brignac and his wife, Theresa, filed a petition for damages against Williamson, Dugas, Towing and Recovery Professionals of Louisiana Trust (TRPL Trust), and Performance Insurance Services (Performance).¹ A jury trial was held between September 29, 2009 and October 6, 2009, following which a verdict was rendered finding Williamson 100% at fault in the accident and awarding Brignac the following damages:

Past medical expenses:	\$122,900.00
Future medical expenses:	\$200,000.00
Past and future physical and mental pain and suffering:	\$500,000.00
Permanent disability:	\$100,000.00
Future loss of earning capacity, if any:	\$250,000.00

The jury also awarded Theresa Brignac \$25,000.00 for loss of consortium. A final judgment setting forth the damage amounts awarded by the jury was

¹ Dana Dugas was also named as a defendant in the petition, but was dismissed with prejudice in a consent judgment signed on June 1, 2009.

signed on February 2, 2010.² The defendants appealed, asserting that the jury erred in its award of damages.³ Specifically, the defendants contend:

1. The jury erred in awarding the plaintiff damages for loss of future earning capacity in the amount of \$250,000.00 when there was no evidence that Brignac suffered such a loss.
2. The jury erred in awarding \$500,000.00 for past and future physical and mental pain and suffering to the plaintiff.
3. The jury erred in awarding the plaintiff the entire amount of past medical specials sought, when the evidence suggested that a portion of the medical expenses was unrelated to the accident.
4. The jury erred in awarding future medical expenses of \$200,000.00.

DISCUSSION

The fundamental principle of tort liability in Louisiana is that every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. LSA-C.C. art. 2315. Further, a defendant takes his victim as he finds him and is responsible for all natural and probable consequences of his tortious conduct. **Wainwright v. Fontenot**, 00-0492, p. 5 (La. 10/17/00), 774 So.2d 70, 74.

The term "damages" refers to pecuniary compensation, recompense, or satisfaction for an injury sustained. The most common type of damages in the delictual context is compensatory damages, which encompasses those damages designed to place the plaintiff in the position in which he would have been if the tort had not been committed. **Id.** Compensatory damages are further divided into the broad categories of special damages and general damages. Special damages are those which either must be specially pled or have a ready market

² On its own motion, the trial court ordered a new trial for argument only on the issues of whether Performance should be cast in judgment and the language of the judgment against TRPL Trust. Following argument and in written reasons, the trial court concluded that no judgment should be entered against Performance as there was no evidence of its liability and it was not a legal person under Louisiana law. The court also determined that judgment would be entered against TRPL Trust expressly limited to the extent of its contractual coverage provided.

³ The plaintiffs also filed an appeal, which was granted on March 10, 2010. However, because the plaintiffs failed to file an appellant's brief, their appeal was dismissed on September 13, 2010, in accordance with Rule 2-8.6 of the Uniform Rules of the Louisiana Courts of Appeal.

value, i.e., the amount of the damages supposedly can be determined with relative certainty, including medical expenses and lost wages. On the other hand, general damages are those which are inherently speculative in nature and cannot be fixed with mathematical certainty. These include pain and suffering. **Id.**, 00-0492 at pp. 5-6, 774 So.2d at 74.

The assessment of "quantum," or the appropriate amount of damages, by a trial judge or jury is a determination of fact, one entitled to great deference on review. As such, the role of an appellate court in reviewing general damages 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. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1260 (La. 1993).

The reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts. **Guillory v. Lee**, 09-0075, p. 14 (La. 6/26/09), 16 So.3d 1104, 1116-17; **Perkins v. Entergy Corp.**, 00-1372, p. 10 (La. 3/23/01), 782 So.2d 606, 612-13. Because the discretion vested in the trier of fact is so great, and even vast, an appellate court should rarely disturb an award on review. **Youn**, 623 So.2d at 1261.

Reasonable persons frequently disagree about the measure of damages in a particular case. 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. **Guillory**, 09-0075 at pp. 15-16, 16 So.3d at 1117; **Youn**, 623 So.2d at 1261. In effect, the award must

be so high or so low in proportion to the injury that it "shocks the conscience." **Cheramie v. Horst**, 93-1168, p. 6 (La.App. 1 Cir. 5/20/94), 637 So.2d 720, 723.

An appellate court, in reviewing a jury's factual conclusions with regard to special damages, must satisfy a two-step process based on the record as a whole: there must be no reasonable factual basis for the trial court's conclusions, and the finding must be clearly wrong. **Guillory**, 09-0075 at p. 16, 16 So.3d at 1118; **Kaiser v. Hardin**, 06-2092, pp. 11-12 (La. 4/11/07), 953 So.2d 802, 810 (per curiam).

With these principles in mind, we must review the evidence in the record and determine if the jury's special and general damages awards in this matter were contrary to the evidence contained in the record or constituted an abuse of discretion.

The record shows that following the accident on November 29, 2004, Brignac was taken by ambulance to Summit Hospital in Baton Rouge. Dr. Jorge E. Isaza examined Brignac in the emergency room. X-rays and a CT scan showed a right acetabular fracture as well as a right hip posterior dislocation. Brignac was sedated, but conscious, and his right hip was put back in the socket. Thereafter, he was admitted to the surgical unit, and his right leg was placed in traction. Dr. Niels J. Linschoten was consulted regarding the severe injury to his right hip. On December 2, 2004, Brignac was transferred to Our Lady of the Lake Hospital. The following day, Dr. Linschoten performed an open reduction and internal fixation of the acetabulum. In testifying by video deposition, Dr. Linschoten stated that during the operation the fractures to the bone were located and the pieces put back in their proper position. A metal plate secured the pieces in their proper placement with screws. He stated that typically a patient is out of work for about three months. Plaintiff, however, asked to return to work after about six weeks on January 14, 2005.

Brignac returned to work on January 17, 2005, for Shaw Sunland, an industrial company, as a darkroom x-ray technician regarding the welding of

large pipes. On February 11, 2005, Brignac returned to Dr. Linschoten complaining of back soreness. Brignac was referred to an orthopedist, Dr. F. Allen Johnston, who first saw Brignac on March 4, 2005. Brignac complained of neck, back, and right hip pain. He described his hip pain as constant. An MRI of the low back showed a disc herniation at the L5-S1 level projecting to the back. Dr. Johnston continued to treat Brignac through 2005 for his hip and back. He testified that he last saw Brignac on May 14, 2009, at which time x-rays showed fairly significant degenerative changes in his hip. The x-rays also revealed that part of the head of the femur was missing. The MRI of the right hip showed heterotopic ossification, meaning that extra bone was being formed. Thus, Dr. Johnston was of the opinion that Brignac was having pain from several areas: low back, degenerative hip, and the heterotopic ossification. Dr. Johnston further stated that the size of the heterotopic ossification was not the problem, but that it was the location, next to the sciatic nerve. He testified that he could remove the heterotopic ossification, which is major hip surgery. Additionally, anti-inflammatory medications would be needed indefinitely, as heterotopic bone tends to grow back.

Dr. Johnston tried epidural injections to relieve Mr. Brignac's lower back pain. However, because Brignac's complaints of pain continued, Dr. Johnston referred Brignac to Dr. Arnold Feldman, a chronic pain specialist. Dr. Feldman, who also testified by video deposition, was qualified as an expert in the field of anesthesiology. Dr. Feldman treated Brignac primarily for his back and leg pain, but also treated Brignac for his hip pain. The April 2005 MRI of Brignac's low back showed three levels that were problematic areas, at the L3-4, L4-5, and L5-S1 levels. The disc at the L5-S1 level was herniated with a "very significant protrusion." Dr. Feldman stated that the disc went backwards and downwards, causing the nerves in the spinal canal to have pressure on them, resulting in pain in Brignac's back and leg.

Brignac underwent a discogram performed by Dr. Feldman in October of 2005. Dr. Feldman testified that, unlike an epidural injection where the needle

goes into the epidural space, in a discogram, the needle goes into the disc itself. According to Dr. Feldman, the leakage or annular tear demonstrated on the MRI at the L5-S1 level was confirmed with the discogram. Because of this finding, Dr. Feldman recommended that Brignac undergo endoscopic discectomy surgery, which was performed on January 25, 2006.⁴ Dr. Feldman testified that the concept of the discectomy is to remove the herniation and therefore remove the pressure and subsequent inflammation. Dr. Feldman stated that Brignac did obtain relief with the procedure.

Dr. Stephen M. Wilson, an expert in orthopedics, reviewed the medical records of the other doctors in this matter and examined Mr. Brignac on January 14, 2008. It was his opinion that Brignac had a twenty percent permanent disability because of his back and hip injury.

Loss of Future Earning Capacity

The defendants initially contend that the jury erred in awarding the plaintiff damages for loss of future earning capacity in the amount of \$250,000.00 when there was no evidence that Brignac suffered such a loss.

A loss of future earning capacity award is not based merely upon the difference between a plaintiff's earnings before and after a disabling injury, but also on the loss or reduction of an injured person's ability to earn money. Earning capacity is not necessarily determined by actual loss. Damages may be assessed for the deprivation of what the injured person could have earned despite the fact that he may never have seen fit to take advantage of that capacity, if the injury has deprived him of a capacity he would have been entitled to enjoy, even though he never profited from it. **Hobgood v. Aucoin**, 574 So.2d 344, 346 (La. 1990); **Jackson v. Frisard**, 96-0547, p. 12 (La.App. 1 Cir. 12/20/96), 685 So.2d 622, 628, writs denied, 97-0193, 97-0201 (La. 3/14/97), 689 So.2d 1386, 1387. It also encompasses the loss of the person's earning

⁴ Dr. Feldman testified that a graduated series of hollow needles were inserted into the disc, each needle slightly larger than the one before, until it reached about seven and one-half millimeters in diameter, or the size of his little finger, so that he could then use an instrument to pull out the herniated disc.

potential or capacity, that is, the loss or reduction of a person's capability to do that for which he is equipped by nature, training, and experience. **David v. Our Lady of the Lake Hosp., Inc.**, 02-1945, p. 7 (La.App. 1 Cir. 6/27/03), 857 So.2d 529, 533.

Because awards for loss of future earning capacity are inherently speculative and are intrinsically incapable of being calculated with mathematical certainty, the trial court is given much discretion in fixing such an award. **Jenkins v. State ex rel. Dept. of Transp. and Dev.**, 06-1804, pp. 36-37 (La.App. 1 Cir. 8/19/08), 993 So.2d 749, 772-73, writ denied, 08-2471 (La. 12/19/08), 996 So.2d 1133. Nevertheless, a projection of loss of future earning capacity must have a factual basis in the record, and an award may not be based upon speculation, possibility, or conjecture. **Jenkins**, 06-1804 at p. 41, 993 So.2d at 775.

Brignac, who was forty-one at the time of trial, testified that he continues to work as an industrial film technician. He is on his feet at work. He stated that he is an excellent employee and currently makes more per hour than he did at the time of the accident. Brignac also stated that he has never turned down working overtime, as he needs the money to support his family. He stated that the job may now take a little longer, but it gets done. Brignac also testified regarding an earlier accident he was involved in 1986 that resulted in closed-head brain injury. He stated that he now has coordination problems and has issues with his speech. He testified that his current job is repetitive and is something he can do. He acknowledged that there are only so many jobs that he can do.

Since the accident, Brignac has had to make adjustments for his work and daily activities. Although Brignac offered no testimony that he could not perform his job, accommodations have been made for him, and he now uses a wagon or cart and runners to help him lift heavy objects. Further, the medical evidence confirms that the accident impaired Brignac's ability to work as vigorously and energetically as he did prior to the accident. We cannot say that the jury was

unreasonable to conclude that Brignac could earn more money if he did not have his present physical limitations. See Hobgood, 574 So.2d at 348. Accordingly, we cannot find that the jury erred in making an award for loss of future earning capacity.

However, while all awards for impairment of future earning capacity necessarily must involve some speculative assumptions, the extent of the loss found by the jury in this case is not justified by the record, and therefore constitutes an abuse of discretion. After carefully reviewing the record, we reduce the amount of the jury's award to \$50,000.00, the highest amount reasonably within the jury's reasonable discretion and supported by the evidence. See Jenkins, 06-1804 at p. 42, 993 So.2d at 775.

Medical Expenses

In their third assignment of error, the defendants contend that the jury erred in awarding the plaintiff the entire amount of past medical specials sought, when the evidence suggested that a portion of the medical expenses was unrelated to the accident. Specifically, the defendants contend that Brignac's back problems are unrelated to the 2004 accident. The defendants also assert that the jury erred in awarding future medical expenses of \$200,000.00.

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. 1 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. 1 Cir. 3/28/07), 960 So.2d 988, 994, writ denied, 07-0875 (La.6/22/07), 959 So.2d 498.

In this matter, Dr. Johnston found that Brignac's back problems were clearly related to the accident. He found the disc herniation at the L5-S1 level projecting to the back, consistent with the type of trauma suffered by Brignac in the accident. Dr. Johnston testified that the accident was severe enough to not only pop the ball of the hip out of the joint, but to force the ball of the hip through the joint and the bone and into the buttocks. Although Brignac had some wear and tear on his back, Dr. Johnston was of the opinion that the trauma from the accident injured his back. Further, he believed that although the back pain did not manifest itself for three months, that could be explained because Brignac was inactive after the surgery, in a wheelchair or non-weight bearing on crutches. Brignac was also taking pain medication for his hip, including morphine and oxycodone, which could have masked the pain.

Dr. Feldman testified that the hip bone of a man of Brignac's age, who was thirty-nine years old at the time of the accident, is very thick at approximately one-half inch. Therefore, he stated, it takes a lot of force to fracture and shove the femur through the back of the acetabular socket. Thus, Dr. Feldman testified that it was reasonable to conclude that the soft tissue structures would be subject to a certain amount of the forces, considering the connection of the pelvis to the spine. Dr. Feldman was of the opinion that it was possible, if not probable, and made "great sense" to him, that the soft tissue injury to Brignac's low back occurred at the time of the accident. Dr. Feldman also noted that in speaking to Brignac, Brignac indicated that he had no significant back problems prior to this accident.

Dr. Feldman further explained that when a patient has two injuries it is possible that he or she not feel the less severe pain. He opined that when the more severe pain subsides, the other pain then takes front position. Dr. Feldman further testified that pain medication, especially morphine and oxycodone, tends to lessen a patient's perception of the less severe pain. He also noted that Brignac was limited in his activities, in bed, on the couch, and with his wife helping him.

Dr. Wilson, the IME, testified that Brignac's bad back is connected to the accident, although he could not definitely say that it began to hurt because of the accident. He understood that plaintiff had degenerative back problems before this accident and his back could have started hurting without the trauma of the accident. In his video deposition, Dr. Anthony S. Ioppolo, another IME, testified that Brignac had evidence of degenerative disc disease. Dr. Ioppolo also opined that because of Brignac's abnormal gait due to an earlier accident in 1986, the additional stress on his back could cause him back pain. Dr. Ioppolo stated that there was nothing in the record to allow him to say that it was more probable than not that Brignac's back problem came from the 2004 accident as opposed to these other factors.

Brignac testified that his back pain from the 1986 accident was resolved after one to two years and that he had no back pain prior to the 2004 accident. Once he returned to work after the 2004 accident, Brignac had someone else lift the chemicals and take the film out of the cassettes. Although his back began hurting a few weeks after Brignac returned to work, he testified that he worked through the pain, knowing that he had a responsibility to his family.

The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Stobart v. State, Dept. of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Id.**, 617 So.2d at 882-83. Accordingly, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. **Id.**, 617 So.2d at 883.

The jury clearly believed that Brignac's back troubles were related to the accident. After reviewing the record in its entirety, we find no manifest error in this finding by the jury. Accordingly, we find no error in the jury's award of \$122,900.00 for past medical expenses.

With regard to the jury's award for future medical expenses, Dr. Johnston testified that surgery to cut out the heterotopic ossification, in the sciatic nerve notch, would give Brignac some pain relief. However, that procedure had no relation to Brignac's groin and hip pain due to his degenerative hip as a result of the accident. Dr. Johnston stated that that was a separate total hip replacement surgery, necessary when plaintiff could not stand the pain any longer. He also stated that if Brignac had hip replacement surgery in the near future, he would probably require three hip replacement surgeries. However, he was also of the opinion that with the removal of the heterotopic ossification, Brignac's first hip replacement surgery could possibly be delayed. Therefore, according to Dr. Johnston, Brignac might only require two hip replacement procedures if he underwent the bone removal procedure. Dr. Johnston estimated the cost of the removal of the heterotropic bone to be between \$20,000.00 and \$30,000.00. Further, Dr. Johnston was in agreement with Dr. Linschoten that a hip replacement would cost approximately \$70,000.00 to \$80,000.00 for each procedure.

Dr. Wilson, the IME, also recognized the need for a hip replacement. He testified that considering plaintiff's age, his work, and his activity levels, there was a good possibility that Brignac would have to have two hip replacement surgeries in the future at an estimated cost of \$70,000.00 to \$80,000.00 per surgery.

Considering that Brignac is facing two, and possibly three, hip replacements in his lifetime, at a cost of \$70,000.00 to \$80,000.00 each, and that he is also looking at an operation to remove the heterotopic ossification in his hip, at a cost of \$20,000.00 to \$30,000.00, we cannot say that the jury erred in awarding \$200,000.00 to Brignac for future medical expenses.

General Damages

In their remaining assignment of error, the defendants contend that the jury erred in awarding Brignac \$500,000.00 for past and future physical and mental pain and suffering.

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. **Boudreaux v. Farmer**, 604 So.2d 641, 654 (La.App. 1 Cir.), writs denied, 605 So.2d 1373, 1374 (La. 1992). The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. **Jenkins**, 06-1804 at p. 26, 993 So.2d at 767.

The medical evidence and testimony offered in this matter was extensive regarding the severe injuries suffered by Brignac, the numerous medical procedures he has undergone, and the procedures he can anticipate in his future. Brignac's right acetabulum was shattered as a result of the accident. The impact of the accident was severe enough to not only dislocate the hip, but to also cause the head of Brignac's femur to break apart the bone and go into Brignac's buttocks. This caused a loss of blood supply to the femoral head, resulting in avascular necrosis, or blood death. The femoral head is no longer round but scalloped, or scooped out, affecting the weight-bearing ability of the hip and leading to its deterioration. Brignac will have to bear the pain from this unstable hip until it becomes intolerable, at which time he will have to have a hip replacement and live with the artificial hip until that one deteriorates requiring another replacement. His hip will never be normal. Besides the chronic pain caused by the deterioration of the hip and resulting arthritis, soft tissue around the hip has turned to bone. This heterotopic ossification is around the sciatic nerve. Further, injury to Brignac's back, which the jury found was related to the November 2004 accident, has caused him constant pain.

In addition to the extensive medical evidence introduced in this matter, the jury also heard from Mr. Brignac and his wife regarding the impact this accident has had on his life. Mr. Brignac testified that he works through the pain. He stated that he is scared, knowing that a hip replacement lasts only ten to fifteen years. Theresa Brignac testified that her husband is not a complainer, but she can see in his face the pain he suffers. She stated that since the

accident, he hurts all the time. He comes in from work, eats, showers, and goes to bed. Mrs. Brignac described it as having "no life."

We have thoroughly reviewed the medical evidence in this case. It is clear that Brignac suffered substantial pain and suffering resulting from the injuries he sustained in the November 2004 accident. He has undergone numerous surgical procedures and stoically endured the surgeries and the attendant recoveries. He can also anticipate three or possibly four surgeries in his future. Although Brignac remains active, he has been left with chronic hip and low back pain. In light of the nature, extent and duration of Mr. Brignac's injuries, we are unable to find that the jury abused its discretion in the award of general damages. While the award may be on the high side, we are unable to say that it shocks the conscience or is so high as to constitute an abuse of the factfinder's vast discretion. See Cheramie, 93-1168 at p. 6, 637 So.2d at 723. Given the "particular injuries and their effects under the particular circumstances" on the plaintiff, the jury's general damage award is not beyond that which a reasonable trier of fact could assess. See Youn, 623 So.2d at 1260.

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court is amended to reduce the amount of the award for loss of future earning capacity to \$50,000.00. In all other respects, the judgment is affirmed. Costs of this appeal are assessed to the defendants.

AMENDED IN PART AND, AS AMENDED, AFFIRMED.