NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 CA 1201

MIKE FLOWERS AND SHANNON FLOWERS, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, HANNAH FLOWERS AND BROOKLYN FLOWERS

VERSUS

BRYAN MILLER, LAURA BODEAUX, NATIONAL AUTOMOTIVE INSURANCE COMPANY, AND ALLSTATE INSURANCE COMPANY

Judgment Rendered: March 25, 2011

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Appealed from the
23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Case No. 87405

The Honorable Jane Triche-Milazzo, Judge Presiding

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Karl E. Krousel **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellee Mike Flowers and Shannon Flowers, individually and on behalf of their minor children, Hannah Flowers and Brooklyn Flowers**
Kevin Christensen **New Orleans, Louisiana**	**Counsel for Defendant/Appellant Bryan Miller**

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The driver of an automobile that struck another automobile from the rear appeals a judgment rendered against him and in favor of the driver of the other automobile. The driver of the automobile struck has answered the appeal, seeking exemplary damages and sanctions for allegedly frivolous defenses. For the following reasons, we amend the trial court's judgment in part, affirm the judgment in all other respects, and deny the answer to the appeal.

FACTS AND PROCEDURAL HISTORY

On April 28, 2007, at approximately 5:58 p.m., the defendant, Bryan Miller, was operating an automobile owned by his mother southbound on U.S. Highway 61, approaching its intersection with Louisiana Highway 42 in Prairieville, Louisiana. The intersection was controlled by a traffic light. The plaintiff, Shannon Flowers, was driving her automobile in the same lane, ahead of the automobile operated by Mr. Miller, and had stopped at the intersection in obedience to a red traffic signal. While Ms. Flowers was stopped, her automobile was struck from the rear by that operated by Mr. Miller. At trial, Ms. Flowers testified that the traffic signal remained red through the time of the collision.

Immediately prior to the accident, Mr. Miller had dropped a cigarette and bent down to retrieve it, taking his eyes from the road ahead for a few seconds. According to Mr. Miller, the traffic signal ahead had just changed to green at that time, and upon returning his attention ahead, he was unable to avoid striking Ms. Flowers's automobile. Following the accident, he advised the investigating state trooper that he had smoked crack cocaine shortly before the accident, and the state trooper found evidence suggestive of the presence of illegal drugs.

Ms. Flowers and her two minor children, who were passengers in her automobile, were injured as a result of the accident. On October 11, 2007, Ms. Flowers (plaintiff) and her husband filed suit against Mr. Miller, his mother, their liability insurer, National Automotive Insurance Company (National Automotive), and plaintiff's underinsured motorists (UIM) insurer, Allstate Insurance Company (Allstate). National Automotive's policy issued to Mr. Miller's mother provided bodily injury liability coverage with limits of $10,000.00 per person/$20,000.00 per accident. Mr. Miller had no other liability coverage available. Allstate provided UIM coverage to plaintiff with limits of $10,000.00 per person/$20,000.00 per accident. In their petition, plaintiff and her husband sought damages for her personal injury, his loss of consortium, society and affection related to her injury, and the injuries of their minor children. They also sought exemplary damages from Mr. Miller and National Automotive based upon his claimed intoxication at the time of the accident. Answers were filed on behalf of the respective named defendants.

On April 8, 2008, plaintiff and her husband filed a motion to strike allegations made by Mr. Miller in his answer, asserting the affirmative defense of contributory negligence on plaintiff's part, on the grounds that those allegations had no factual basis and were frivolous. The motion was set for hearing on May 19, 2008, but was apparently continued without date, according to a minute entry of that date.

On December 15, 2008, plaintiff and her husband filed a supplemental and amending petition, adding a claim for statutory penalties and attorney fees against Allstate.

Plaintiff and her husband subsequently settled their claims against National Automotive and Mr. Miller's mother, but reserved their rights against Mr. Miller personally and against Allstate.

The case was set for bench trial on May 28, 2009. Plaintiff and her husband settled their claims for the minor children's injuries on the day of trial, and plaintiff's husband waived his claims for loss of consortium, society, and affection against all parties. At the conclusion of the trial, the trial court requested post-trial memoranda and took the matter under advisement for decision.

On November 19, 2009, the trial court issued its judgment in favor of plaintiff and against Mr. Miller and Allstate, incorporating its written reasons.[1] Mr. Miller was found solely at fault, and the trial court found that plaintiff's general damages amounted to $40,000.00, her past medical expenses were $9,603.50, and her future medical expenses were $11,000.00, for a total of $60,603.50. After crediting National Automotive's prior settlement in the amount of $10,000.00 and a medical payments coverage payment of $2,000.00 by Allstate, Mr. Miller was cast in judgment for $38,603.50, plus interest and costs.[2] Allstate subsequently satisfied the judgment against it for its UIM coverage limits of $10,000.00 and for statutory penalties and attorney fees.

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[1] It is technically improper for a trial court to incorporate its reasons for judgment in the judgment itself, rather than in an opinion separate from the judgment. *Payne v. Hurwitz*, 07-0081, p. 4 n.1 (La. App. 1st Cir. 1/16/08), 978 So.2d 1000, 1003 n.1, citing La. C.C.P. art. 1918. Such does not affect the validity of the judgment, however, nor the appeal of the actual judgment, apart from the findings of fact and stated reasons. *Id.*

[2] For reasons that are unclear from the record, the trial court evidently credited Mr. Miller with an additional $10,000.00 representing Allstate's UIM coverage limits, although he and Allstate were solidarily liable for that amount of damages. However, plaintiff has not raised that issue in this appeal, and Allstate as solidary obligor has satisfied the judgment for that amount without seeking indemnity. Thus, Mr. Miller would ultimately be entitled to the benefit of the credit. *See Fertitta v. Allstate Ins. Co.*, 462 So.2d 159, 164 n.7 (La. 1985).

Mr. Miller (defendant) has appealed, and plaintiff has answered the appeal.

ASSIGNMENTS OF ERROR

We summarize defendant's assignments of error as follows:

1. The trial court committed manifest error in finding defendant solely at fault in causing the accident, as the uncontradicted evidence showed that plaintiff remained stopped at the intersection while the traffic light went through several sequences of changing signals.

2. The trial court abused its discretion by awarding excessive general damages, including damages for periods of time that plaintiff did not receive medical treatment, in light of comparable awards to similarly-situated plaintiffs.

3. The trial court committed manifest error in awarding future medical expenses to plaintiff, as the evidence at trial did not support such an award.

In her answer to the appeal, plaintiff requests that this court "evaluate the propriety of defenses filed by defendant," presumably for the purpose of imposition of sanctions under La. C.C.P. art. 863 or La. C.C.P. art. 2164, and to amend the trial court's judgment by awarding exemplary damages pursuant to La. C.C. art. 2315.4.

DISCUSSION

Liability

A determination of negligence or fault is a factual determination. In order to reverse a factual determination by the trier of fact, the appellate court must apply a two-part test: (1) the appellate court must find that a reasonable factual basis does not exist in the record for the finding; and (2) the appellate court must further determine that the record establishes that the

finding is clearly wrong (manifestly erroneous). *Stobart v. State through Dep't of Transp. & Dev.*, 617 So.2d 880, 882 (La. 1993). Further, when factual findings are based upon determinations regarding the credibility of witnesses, the manifest error standard demands great deference to the trier of fact's findings. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989).

Plaintiff testified at trial that she had been stopped for one to two minutes before the collision occurred because of the red traffic signal, and that the signal remained red for some time following the collision. Defendant claimed that the traffic signal had changed to green shortly before he bent down to retrieve the dropped cigarette. The investigating state trooper testified that defendant admitted dropping his cigarette and pressing the accelerator immediately after the traffic signal changed to green, and that defendant performed poorly on a field sobriety test. According to the state trooper, during his investigation, Ms. Flowers confirmed that the traffic signal had changed to green immediately before the accident.

Defendant presented the testimony of Javier Perez, a law clerk employed by his defense counsel. Mr. Perez testified that he went to the intersection at issue the day prior to trial and timed the sequence of the southbound traffic signals for traffic on U.S. Highway 61. According to the witness, the time the red traffic signal was lit varied between 16 to 26 seconds over five sequences, and the green traffic signal was lit for approximately one minute and 20 seconds over two sequences. Based upon this evidence, defendant contends that if plaintiff, by her own account, was stopped for a minute to two minutes, the traffic light went through several sequences and she failed to proceed through the intersection when she should have, thereby contributing in some degree to the occurrence of the accident.

Even if the trial court accepted defendant's proposition that plaintiff failed to move forward through the intersection despite several sequences of the traffic light, the circumstances of the accident support a conclusion that such action, if it occurred, was not a contributing legal cause of the accident, nor would such action serve to excuse defendant's inattentiveness. Thus, because there is a reasonable evidentiary basis for the trial court's decision on liability, it cannot be manifestly erroneous. This assignment of error has no merit.

Quantum of General Damages

Defendant contends that the trial court's award of general damages is excessive for plaintiff's soft-tissue injuries, emphasizing the photographs of the rear of plaintiff's automobile showing no obvious damage and the irregular nature of plaintiff's treatment following the accident. He also emphasizes the fact that plaintiff sustained an intervening injury to her low back from repetitive lifting of her children while on a family vacation to Disney World in December 2008.

The trier of fact is accorded much discretion in fixing general damage awards. La. C.C. art. 2324.1; *Cheramie v. Horst*, 93-1168, p. 6 (La. App. 1st Cir. 5/20/94), 637 So.2d 720, 723. The discretion vested in the trier of fact is "great," even vast, so that an appellate court should rarely disturb an award of general damages. *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).

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. *Wainwright v. Fontenot*, 00-0492, p. 6 (La. 10/17/00), 774 So.2d 70, 74. 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 order to make this determination, the reviewing court looks first to the individual circumstances of the injured plaintiff. *Theriot v. Allstate Ins. Co.*, 625 So.2d 1337, 1340 (La. 1993). Reasonable persons frequently disagree about the measure of general damages in a particular case. *Youn*, 623 So.2d at 1261. 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 decrease the award. *Id.* Only after analysis of the facts and circumstances peculiar to the particular case and plaintiff may an appellate court conclude that the award is inadequate or excessive. *See Theriot*, 625 So.2d at 1340. And it is only after such a threshold determination of an abuse of discretion that the appellate court should examine prior awards for similar injuries to modify the award within the range of reasonable discretion. *See Reck v. Stevens*, 373 So.2d 498, 500-01 (La. 1979), and *Coco v. Winston Indus., Inc.*, 341 So.2d 332, 335-36 (La. 1976). We therefore must first review the particular circumstances of plaintiff's injuries and treatment.

Although the photographs of plaintiff's automobile show no obvious damage, plaintiff testified that the impact of the collision propelled her automobile approximately five feet forward from its stopped position, that her rear bumper was "poked up," and that the repair estimate amounted to $1,200.00. In his trial testimony, defendant acknowledged that plaintiff's rear bumper was "scratched," that the impact was "enough to jolt [plaintiff and her daughters] around," that he "bumped them pretty good," and that the collision did cause plaintiff's automobile to move forward.

Plaintiff first sought medical treatment on May 1, 2007, three days after the accident. She saw her family physician, Dr. Donald Brignac, complaining of neck, back, and left shoulder pain, as well as headaches. According to Dr. Brignac's notes, introduced into evidence, plaintiff had no pain initially following the accident, but developed it later. He diagnosed a thoracic, cervical, and lumbar strain, prescribed a muscle relaxer, and recommended non-prescription pain medication. X-ray films taken on May 1, 2007 revealed mild degenerative disc changes at one level of the cervical spine, as well as findings of scoliosis in the lower thoracic and lumbar spine.

Plaintiff was next treated by Dr. Ned J. Martello, a chiropractor, who first examined and treated her on May 11, 2007. She was still experiencing neck pain that radiated into her shoulders, as well as low back pain. He diagnosed a cervical whiplash injury and a lumbar strain and treated plaintiff with electrical muscle stimulation, spinal manipulation, ultrasound therapy, and traction. Although she experienced some improvement, plaintiff was still symptomatic when she last received treatment on June 22, 2007, and Dr. Martello was of the opinion that she would continue to experience neck and back pain indefinitely.

On August 27, 2007, plaintiff consulted Dr. John Clark, a physician specializing in physical medicine and rehabilitation, at the recommendation of her attorney. Dr. Clark's deposition and medical records were introduced into evidence. His initial diagnostic impression was that she sustained a cervical whiplash syndrome with post-traumatic myofascial ligamentous pain of the cervical spine, thoracolumbar junction, and lumbar spine. Dr. Clark prescribed pain and muscle relaxer medication. An MRI study performed on September 5, 2007, revealed mild or minimal degenerative disc bulging at four levels of the cervical spine, which Dr. Clark considered

normal for a person plaintiff's age. He attributed her neck pain to ligamentous facet irritation with nerve root irritation and recommended cervical epidural steroid injections to attempt to relieve her neck pain and radiating shoulder pain.

Plaintiff underwent the first recommended epidural steroid injection on September 20, 2007. On a follow-up office visit of October 8, 2007, plaintiff told Dr. Clark that she had approximately a 50% reduction in her pain. A second epidural steroid injection procedure was performed on April 21, 2008. Dr. Clark was of the opinion that the epidural steroid injections gave plaintiff significant relief that lasted a few months. She did not return until December 29, 2008, when she reported a flareup of low back pain that she attributed to repetitive lifting of one of her children while on vacation at Disney World earlier that month. Dr. Clark again prescribed medication. On February 22, 2009, plaintiff was still experiencing the same cervical and upper back pain previously reported. She underwent a lumbar steroid injection on February 24, 2009, which gave her partial relief of her low back pain.

By May 11, 2009, Dr. Clark felt that plaintiff had a chronic myofascial pain condition of the cervical spine. He defined "chronic" as having a duration of over six months. Dr. Clark expressed the opinion that if plaintiff still experienced neck pain a year after the accident, she would likely experience some degree of neck pain for the rest of her life, and would be more susceptible to aggravation of her symptoms by any new injury in the future. Dr. Clark last saw plaintiff before trial on May 11, 2009. At that time she still had chronic left-sided myofascial cervical pain radiating into her left shoulder region. Dr. Clark recommended that plaintiff undergo a cervical medial branch block to determine if she was a candidate for a

cervical facet rhizotomy, a procedure in which radiofrequency is used to "burn" the medial branches to sensory nerves to relieve pain.

By the time of trial, over two years after the accident, plaintiff's low back was doing much better, but she still complained of neck, upper back, and left shoulder pain. The trial court in its reasons for judgment concluded that plaintiff's lumbar symptoms attributable to the accident had resolved prior to the lifting incidents in December 2008 and that her lumbar symptoms after that date were attributable to those incidents.

In his appellate brief, Mr. Miller complains that the award of $40,000.00 in general damages to plaintiff was excessive, in that it amounted to "$5,714.29 per month of actual active care" or "$2,000.00 per month" for a "period of roughly 20 months between the date of the accident" and the lifting incidents at Disney World. He contends that the former figure is almost three times the general damages that our courts generally award for soft-tissue injuries. Initially, we must note that although the duration of the lumbar complaints may have been 20 months, plaintiff was still complaining of cervical pain at the time of trial, some 24 months after the accident, and had a return appointment with Dr. Clark for the month after trial.

Certainly, the duration of a plaintiff's injury symptoms and the duration of treatment are relevant factors for a trier of fact to consider in awarding general damages. But they are not the only relevant factors; the nature and relative severity and extent of injuries are qualitative factors that must be considered. *Gillmer v. Stuckey*, 09-0901, p. 9 (La. App. 1st Cir. 12/23/09), 30 So.3d 782, 788. We have previously disapproved of the use of a mathematical formula, or simple multiplication, to arrive at an appropriate award of general damages, as such a "shortcut" approach presupposes

uniformity of symptoms over the course of time and fails to take account of each victim's unique and subjective injuries and course of recovery. *Id.*, 09-0901 at pp. 9-10, 30 So.3d at 788, citing *Lee v. Briggs*, 08-2120, pp. 4-5 (La. App. 1st Cir. 9/10/09), 23 So.3d 362, 365. Similarly, there is no convincing authority for the proposition that an injured plaintiff must actually seek and receive treatment as a prerequisite to recovery of general damages for a given time period during which such damages are sought. While the existence of medical treatment generally provides corroborating evidence of injury and attempted mitigation of damages, the absence of treatment for a given time period does not necessarily prove absence of pain or other symptoms of injury.

The character and duration of plaintiff's injuries attributable to the involved accident were factual issues subject to the trial court's assessment of the credibility of plaintiff and her health care providers. We find no abuse of discretion in the trial court's conclusion that plaintiff was entitled to $40,000.00 in general damages, considering its findings as to the character and overall duration of plaintiff's diagnosed injuries. While the award may arguably be liberal and generous in light of the pronounced gaps in treatment, we cannot conclude under the circumstances of this case that it constitutes an abuse of the vast discretion vested in the trier of fact. Thus, it is inappropriate and unnecessary for us to undertake a comparison of the award in this case with past awards of general damages for generically similar medical injuries. *See Youn*, 623 So.2d at 1260-61.

Future Medical Expenses

The trial court awarded plaintiff $11,000.00 for future medical expenses. Its judgment did not itemize the components of the award, and its

reasons for judgment did not explain the factual findings supporting the amount of the award.

In order to recover future medical expenses, the appellate record must establish that future medical expenses will be necessary and inevitable. *Jenkins v. State ex rel. Dep't of Transp. & Dev.*, 06-1804, p. 43 (La. App. 1st Cir. 8/19/08), 993 So.2d 749, 776, *writ denied*, 08-2471 (La. 12/19/08), 996 So.2d 1133. An award of future medical expenses will not be supported in the absence of medical testimony that they are indicated and setting out their *probable* cost. *Id.*

Dr. Clark testified that it was likely that plaintiff would have to take prescription pain and muscle relaxer medications intermittently for the rest of her life. Plaintiff confirmed in her testimony that she incurred pharmaceutical expenses for those types of medication prescribed by Dr. Clark, although she did not introduce copies of her receipts at trial. Dr. Clark testified that it was a "certainty" that plaintiff would undergo the recommended cervical medial branch block "to see if the rhizotomy will work for her." Depending upon the result of that diagnostic test, plaintiff might then need the cervical facet rhizotomy procedure, which "may" have to be repeated three to four times over her lifetime, at a cost of $2,500.00 each. Given Dr. Clark's testimony, the trial court most likely based its award of $11,000.00 on the cost of $1,500.00 for the cervical medial branch block and $2,500.00 each for three cervical facet rhizotomies, with the balance of $2,000.00 representing a reasonable estimate of future expenses for prescription medication that Dr. Clark felt would probably be necessary for intermittent pain relief.

However, the evidence simply does not support a finding that it is probable, or more likely than not, that plaintiff will undergo the first and any

repeat rhizotomy procedures contemplated by Dr. Clark, given the undetermined outcome of the proposed diagnostic medial branch block. Dr. Clark did not express any opinion on the likelihood that the medial branch block would in fact be positive for purposes of recommending a facet rhizotomy. Additionally, as Dr. Clark made clear in his testimony, the latter procedure is elective in nature and ultimately dependent upon plaintiff's decision to undergo it based upon her symptom level. Plaintiff therefore failed to prove that those palliative procedures would be necessary and inevitable by a preponderance of the evidence. Accordingly, we must reduce the trial court's award of future medical expenses by $7,500.00 to $3,500.00, representing the estimated cost of $1,500.00 for the diagnostic medial branch block and $2,000.00, a reasonable figure for the probable future pharmaceutical expenses over her remaining lifetime.[3]

Sanctions for Frivolous Defenses

Plaintiff urges us to evaluate the propriety of the defense of contributory negligence raised by defendant and, presumably, to impose appropriate sanctions under the authority of La. C.C.P. art. 863(D), as originally sought in her motion to strike filed on April 8, 2008.[4] Before any sanction can be imposed pursuant to La. C.C.P. art. 863(D), a contradictory hearing is required, "at which any party or his counsel may present any evidence or argument relevant to the issue of imposition of the sanction." La. C.C.P. art. 863(E).

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[3] Plaintiff was 36 years old at the time of trial.

[4] Louisiana Code of Civil Procedure article 863(B), prior to its amendment by Acts 2010, No. 540, § 1, effective August 15, 2010, provided that an attorney's signature constituted a certification that the pleading signed was "well grounded in fact;" "warranted by existing law or a good faith argument for extension, modification or reversal of existing law;" and "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Paragraph (D) of the article provides for the imposition of "an appropriate sanction" if the court determines that a certification was made in violation of the foregoing requirements.

The original hearing on the motion to strike was apparently continued without date. A review of the record fails to show that the motion to strike was ever reset for hearing after that time or that the trial court referred the issue to the merits at trial. The trial court's judgment and reasons for judgment are silent on the issue. Plaintiff did not seek to have her motion heard prior to trial on the merits and thus cannot complain at this late juncture about the necessity of presenting evidence on the issue of liability. As an appellate court, we cannot hear testimony or receive evidence. The issues raised in plaintiff's motion to strike were issues for the trial court to determine. *See Johnson v. Johnson*, 08-0060, pp. 4-5 (La. App. 4th Cir. 5/28/08), 986 So.2d 797, 800-01, *writ not considered*, 08-1418 (La. 10/3/08), 992 So.2d 1001. To the extent that plaintiff's answer to the appeal relates to her motion to strike, specifically referred to in her appellate brief, we consider the issues raised in her motion as abandoned and moot.

Arguably, although not expressly presented as such, plaintiff's answer to the appeal might be viewed as seeking damages for frivolous appeal on the issue of liability under La. C.C.P. art. 2164 and Rule 2-19 of the Uniform Rules of Louisiana Courts of Appeal. The imposition of sanctions under these procedural rules is discretionary. Damages for frivolous appeal will not be awarded unless it appears that the appeal was taken solely for the purpose of delay or that the appellant's counsel does not seriously believe in the position he advocates. *Guarantee Sys. Constr. & Restoration, Inc. v. Anthony*, 97-1877, p. 13 (La. App. 1st Cir. 9/25/98), 728 So.2d 398, 405, *writ denied*, 98-2701 (La. 12/18/98), 734 So.2d 636.

We cannot conclude that the foregoing criteria exist with regard to this appeal. Defendant's assertion of some contributory negligence on plaintiff's part is rather unusual, unquestionably weak on factual grounds,

and, upon review of the evidence, ultimately without merit, but we cannot conclude on the record that a reasonable trier of fact could not have made a credibility determination and factual finding that plaintiff was guilty of some, albeit minimal, percentage of contributory negligence. Accordingly, we cannot conclude that defendant's allegations in that regard rise to the status of being frivolous and made in bad faith for purposes of imposition of sanctions. We deny this claim in plaintiff's answer to the appeal.

Exemplary Damages

In her answer to defendant's appeal, plaintiff also challenges the trial court's refusal to award her exemplary damages under La. C.C. art. 2315.4, which provides:

> In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries.

Recovery of exemplary damages requires proof of three elements: (1) the defendant was intoxicated or had consumed a sufficient quantity of intoxicants to make him lose normal control of his mental and physical faculties; (2) the intoxication was a cause-in-fact of the accident resulting in the injuries; and (3) the injuries were caused by the defendant's wanton or reckless disregard for the rights and safety of others. *Minvielle v. Lewis*, 610 So.2d 942, 946 (La. App. 1st Cir. 1992). The article has the dual purpose to both penalize (and thus deter) intoxicated drivers and to provide damages for the victims of such drivers. *Brumfield v. Guilmino*, 93-0366, p. 14 (La. App. 1st Cir. 3/11/94), 633 So.2d 903, 912, *writ denied*, 94-0806 (La. 5/6/94), 637 So.2d 1056. The decision to award exemplary damages under La. C.C. art.

2315.4 rests within the sound discretion of the trier of fact. *Khaled v. Windham*, 94-2171, p. 12 (La. App. 1st Cir. 6/23/95), 657 So.2d 672, 681.

The trial court made a factual determination that Mr. Miller was impaired at the time of the accident, but found that his impairment was not a cause-in-fact of his inattentiveness, which actually caused the accident. We find no manifest error on the part of the trial court in that regard. Accordingly, we affirm its judgment denying exemplary damages, and deny plaintiff's answer to the appeal on that issue.

DECREE

The judgment of the trial court in favor of the plaintiff-appellee, Shannon Flowers, and against the defendant-appellant, Bryan Miller, is amended in part to reduce the award of future medical expenses from $11,000.00 to $3,500.00, thereby reducing the total judgment amount to $31,103.50. As so amended, the judgment is affirmed. All costs of this appeal are assessed to the defendant-appellant.

JUDGMENT AMENDED AND, AS AMENDED, AFFIRMED.