

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0555

SHANNON BOURQUE

VERSUS

FIRE MOUNTAIN RESTAURANTS, L.L.C.

Judgment Rendered: October 29, 2010

APPEALED FROM THE SIXTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. MARY
STATE OF LOUISIANA
DOCKET NUMBER 119,421, DIVISION "B"

THE HONORABLE PAUL J. DEMAHY, JUDGE

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Pro Hac Vice

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCleendon, J. dissents in part and Assigns Reasons.

McDONALD, J.

On August 6, 2008, around 8:00 p.m., Shannon Bourque was dining with his family at Ryan's Steakhouse in Bayou Vista, Louisiana. Mr. Bourque carried his two-year old step-daughter, McKenzie, to the men's restroom to change her. At that time, the floor had just been mopped by the restaurant's dishwasher, as was customary thirty minutes prior to the restaurant closing at 8:30 p.m. When Mr. Bourque left the men's restroom holding McKenzie, he slipped and fell, striking his right shoulder and back and sustaining injuries to his low back, hips, right shoulder and right knee. McKenzie was not injured.

Mr. Bourque filed suit against Fire Mountain Restaurants, L.L.C., the owner and operator of Ryan's Steakhouse, Inc., asserting that the restaurant's negligence was the cause of his injuries and damages. Fire Mountain Restaurants, L.L.C., denied the allegations and asserted that Mr. Bourque was the sole or proximate cause of the incident, that he had failed to maintain a normal look-out for ordinary and reasonable conditions which might exist, that he had failed to mitigate his damages, that there was third-party negligence, and that negligence barred or reduced the amount of damages Mr. Bourque was entitled to receive, and further, asserted it was entitled to a credit for any payments by third parties.

After a trial on the merits, the trial court ruled in favor of Mr. Bourque, and against Fire Mountain Restaurants, L.L.C., awarding Mr. Bourque \$30,000.00 in general damages, \$3,310.38 in past medical expenses, and \$8,875.00 in lost wages, for a total award of \$42,185.38, together with legal interest from date of judicial demand until paid, and cast Fire Mountain Restaurants, L.L.C., with costs. Fire Mountain Restaurants, L.L.C., appealed the judgment, and sets forth four assignments of error. Fire Mountain Restaurants, L.L.C. asserts that the trial court erred in finding Mr. Bourque to be credible in connection with his wage loss and damage testimony; that the trial court erred in awarding lost wages based on Mr.

Bourque's testimony when it was uncorroborated, impeached by a prior sworn statement, as well as inconsistent and unreasonable; that the trial court's award for general damages was erroneous and should be reduced; and that the trial court erred in finding Mr. Bourque free from fault in the accident.

THE ALLOCATION OF FAULT

Shortly before Mr. Bourque entered the men's restroom that night, the floor had been mopped. The restaurant's general manager, Jason Henry, testified that he went into the men's restroom after being notified that Mr. Bourque had fallen. Mr. Henry testified that the floor was wet at that time and that although the restaurant policy was to have a wet floor sign out when the floor was being mopped, no sign had been put out that night.

The restaurant's assistant manager, Mary Lynn Johnson, testified that she went to look at the men's restroom immediately following Mr. Bourque's accident. She confirmed that the floor was damp, but no sign had been put out indicating the floor was wet, although the restaurant policy provided that signs should be utilized during mopping to indicate wet floors.

Mr. Bourque testified he had gone into the last stall in the restroom to use the changing table to change McKenzie and was proceeding to walk out when he encountered a wet area, and slipped and fell.

After a thorough review of the record, we cannot say that the trial court committed manifest error in finding that Mr. Bourque was free from fault in the accident.

THE GENERAL DAMAGES AWARD

On the night of the accident, Mr. Bourque went to the emergency room at Teche Regional Medical Center where x-rays were taken, and Mr. Bourque was given pain medication and released. On August 19, 2008, Mr. Bourque went to see an orthopedist, Dr. Jeffrey C. Fitter. Dr. Fitter diagnosed Mr. Bourque with lumbar

strain, strained hips, a strained right shoulder and a strained right knee. Dr. Fitter advised Mr. Bourque to limit his activities to what he could tolerate.

At the time he was injured, Mr. Bourque worked as a drummer, a disc jockey (DJ), and sometimes as a doorman at nightclubs. Mr. Bourque saw Dr. Fitter once a month for checkups for four months after his initial visit.

At his October 29, 2008 visit with Dr. Fitter, Mr. Bourque stated that he had returned to work as a doorman. Mr. Bourque was released by Dr. Fitter on January 13, 2009, at which time he was almost able to resume his normal activities.

After a through review of the record, we find that \$30,000.00 in general damages for a soft tissue injury that lasted five months was an abuse of discretion, and beyond that which a reasonable trier of fact could assess for the effects of this particular injury to this particular plaintiff under these particular circumstances. See 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). We find that \$20,000.00 is the highest award within the trial court's discretion, and thus, we amend the general damages award to \$20,000.00. See Coco v. Winston Industries, Inc., 341 So.2d 332, 335 (La. 1976).

THE LOST WAGES AWARD

Mr. Bourque and his wife, Felicia Bourque, testified as to his lost wages. His tax returns conflicted with his testimony, but he explained at trial that he worked as a musician and as a doorman for cash, and that he did not include that information on his tax return. The trial court found Mr. and Mrs. Bourque to be credible in their testimony of Mr. Bourque's lost wages, and also in their explanation for the loss of Mr. Bourque's earnings record book when they had to move suddenly. We find no abuse of discretion by the trial court in this award.

However, the trial court awarded Mr. Bourque \$8,875.00 for lost wages without deducting the \$100.00 a week that Mr. Bourque testified he earned from

November 2008 to January 2009 working as a doorman. Thus, the trial court should have deducted \$1,200.00 (\$100.00 per week times 12 weeks) from \$8,875.00 for a total lost wages award of \$7,675.00. We find that the trial court abused its discretion in not deducting that amount from the lost wages award, and we amend the lost wages award to \$7,675.00.

DECREE

For the foregoing reasons, we amend the general damages award to \$20,000.00, amend the lost wages award to \$7,675.00, and as amended, the trial court judgment in favor of Mr. Bourque and against Fire Mountain Restaurants, L.L.C., is affirmed. We assess the costs of this appeal against Mr. Bourque.

AMENDED, AND AS AMENDED, AFFIRMED.

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VERSUS

FIRE MOUNTAIN RESTAURANTS, LLC

McCLENDON, J., dissents in part.

I believe that the trial court erred in awarding lost wages where the only evidence supporting the lost wage claim was the self-serving testimony of the plaintiff and his wife, which was contradicted by plaintiff's tax return. Cf **Barfield v. Jacobs**, 527 So.2d 555, 559 (La.App. 3 Cir. 1988) and **Cooper v. Lacorte**, 99-1726, p.10 (La.App. 4 Cir. 5/17/00), 775 So.2d 4, 10.