

NOT DESIGNATED
FOR PUBLICATION

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

RE: Docket Number 2012-CA-1296

Thomas "Gene" Alexander

-- Versus --

Herman Washington, Economical Janitorial Supplies, Inc. &
Zurich American Insurance Company

19th Judicial District Court
Case #: 578945
East Baton Rouge Parish

On Application for Rehearing filed on 10/01/2013 by Thomas "Gene" Alexander

Rehearing GRANTED; REHEARING opinion attached.



Randolph H. Barro

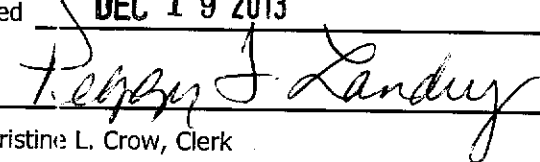


Jewel E. "Duke" Welch



William F. Kline
By R.H.

Filed DEC 19 2013



Christine L. Crow, Clerk

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1296

THOMAS "GENE" ALEXANDER

VERSUS

**HERMAN WASHINGTON, ECONOMICAL
JANITORIAL SUPPLIES, INC. AND
ZURICH AMERICAN INSURANCE COMPANY**

**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 578,945, Section 22
Honorable Timothy E. Kelley, Judge Presiding**

On Rehearing

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Janitorial Supplies, Inc., and
Zurich American Insurance Co.
of Illinois**

BEFORE: PARRO, WELCH, AND KLINE,¹ JJ.

KLINE, J., CONCURS AND ASSIGNS REASONS. By RKG

Judgment on Rehearing rendered

DEC 19 2013

¹ Judge William F. Kline, Jr., retired, is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.

PARRO, J.

The plaintiff, Thomas "Gene" Alexander, has applied for a rehearing in this matter, requesting this court to correct a clerical error in the amount of damages awarded and to reconsider and raise the amount of damages awarded for future medical expenses. For the following reasons, we grant a rehearing and amend our earlier judgment in this matter.

Alexander filed suit against the defendants on June 2, 2009, seeking damages for injuries he had suffered as a result of an automobile accident. After a five-day bench trial, the court rendered judgment in favor of Alexander and against the defendants *in solido*, ordering them to pay him the following amounts, plus legal interest from the date of judicial demand and all costs:

Past Medicals	\$ 322,672.04
Future Medicals	\$ 492,523.34
Past Wages	\$ 178,837.32
Future Wages	\$ 674,365.00
General Damages	<u>\$ 1,000,000.00</u>
Total	\$ 2,368,124.70

The rehearing application points out an error of calculation in the computation of damages. When the amounts of the above awards are added up, the total is \$2,668,397.70.

However, a more significant legal error makes a correction to that calculation irrelevant, for the following reasons. The plaintiff's application for rehearing points out that the trial court and this court implicitly relied on a potential collateral source to pay some of the plaintiff's future medical expenses for prescription medications. As noted in our original opinion, the trial court only awarded one-third of the requested future medical costs for prescription medication, reasoning that there was evidence that Alexander could obtain future employment that would include medical benefits.² Our examination of the record indicated that two vocational rehabilitation counselors opined that Alexander could be employed on a full-time basis in the future, which led us to

² In addition, calling them "fringe benefits," the court did not award **any** amount for increased health insurance premiums that Alexander claimed he would incur due to his inability to obtain future employment. The application for rehearing did not request an award for this item of damages.

accept the trial court's explanation for awarding less than the amount requested for future prescription medications.

However, as noted by the plaintiff in his application for rehearing, this conclusion violates the "collateral source rule." Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of money received by the plaintiff from sources independent of the tortfeasor's contribution. Bozeman v. State, 03-1016 (La. 7/2/04), 879 So.2d 692, 698. The payments received from the independent source are not to be deducted from the award the aggrieved party would otherwise receive from the wrongdoer, and a tortfeasor's liability to an injured plaintiff should be the same, regardless of whether or not the plaintiff had the foresight to obtain insurance. Id. As a result of the collateral source rule, the tortfeasor is not able to benefit from the victim's foresight in purchasing insurance and other benefits. Id. Where insurance is provided by the employer, then that fringe benefit is in the nature of deferred compensation. The deferred compensation would have been available to the plaintiff as cash per paycheck, but for the existence of the deferred compensation plan. Likewise, the benefits of the deferred compensation would have been available, but for the injury. Id. at 699, citing Bryant v. New Orleans Pub. Serv., Inc., 406 So.2d 767, 768-69 (La. App. 4th Cir. 1981), aff'd, 414 So.2d 322 (La. 1982).

After consideration of this rule in relation to the award of future medical expenses, we conclude that the reduction of that award, due to the possibility that the plaintiff may obtain employment with health insurance benefits in the future, impermissibly ignored the collateral source rule. As stated in our original opinion, future medical expenses must be established with some degree of certainty, and a plaintiff must demonstrate that such expenditures will, more probably than not, be incurred as a result of the injury. Menard v. Lafayette Ins. Co., 09-1869 (La. 3/16/10), 31 So.3d 996, 1006. An award of future medical expenses is justified if there is medical testimony that they are indicated and that sets out their probable cost. Hanks v. Seale, 04-1485 (La.

6/17/05), 904 So.2d 662, 672. The trial court should award **all** future medical expenses that the medical evidence establishes that the plaintiff, more probably than not, will be required to incur. Hymel v. HMO of Louisiana, Inc., 06-0042 (La. App. 1st Cir. 11/15/06), 951 So.2d 187, 206, writ denied, 06-2938 (La. 2/16/07), 949 So.2d 425.

Our review of the record revealed that two of Alexander's treating physicians testified that he would need pain medications at approximately his current level for the rest of his life. At the time of trial, he was taking two strong opioid pain relievers twice a day, a muscle relaxer three times a day, a neuropathic pain reliever four times a day, a sedative two to three times a week, and approximately six pain patches each week. He had tried to reduce his dependence on these medications, but found that he could not reduce his pain medications without experiencing an immediate spike in his pain level. According to medical testimony in the record, in addition to continuing on his current regimen of pain medications for the rest of his life, Alexander would more probably than not also need regular follow-up visits with his treating physician, physical therapy, and epidural steroid injections.

In his answer to the appeal, the plaintiff requested \$979,009.34 for all future medical expenses, including future prescription medications. The deduction made by the trial court and affirmed by this court applied an offset of \$486,486 to that amount for employment-related medical insurance benefits that Alexander might eventually obtain, resulting in the award of \$492,523.34.³ After considering the collateral source rule, we conclude that the judgment of the trial court and our original opinion were legally erroneous in implicitly applying future payments from an independent source to reduce the amount of the award to Alexander for his future medical expenses. Accordingly, the amount of the award for future medical expenses will be increased from

³ The court indicated this offset was calculated by reducing the total future prescription medical expenses by two-thirds, or \$486,486. The remaining one-third of the total future medical expenses, or \$243,243, was then added to the amount for the other future medical expenses of \$249,280.34, to arrive at the sum of \$492,523.34 for the amount of all future medical expenses.

\$492,523.34 to \$979,009.34.⁴

Using this increase in the award for future medical expenses, the amended damage awards are:

Past Medicals	\$ 322,672.04
Future Medicals	\$ 979,009.34
Past Wages	\$ 178,837.32
Future Wages	\$ 674,365.00
General Damages	<u>\$ 1,000,000.00</u>
Total	\$ 3,154,883.70

As a result of this correction of a legally erroneous damage award, it is not necessary to correct the clerical error that existed in the judgment of the district court, as well as in this court's original judgment.

CONCLUSION

For the foregoing reasons, the plaintiff's application for rehearing is granted, and the original judgment of this court, as well as the March 15, 2012 final judgment of the district court, are amended to show that judgment in the amount of \$3,154,883.70, plus legal interest and costs, is rendered in favor of Thomas "Gene" Alexander and against Herman Washington, Economical Janitorial Supplies, Inc., and Zurich American Insurance Company of Illinois, *in solido*. In all other respects, the March 15, 2012 final judgment of the trial court is affirmed. All costs of this appeal are assessed to the defendants.

APPLICATION FOR REHEARING GRANTED; ORIGINAL APPELLATE COURT JUDGMENT AMENDED AND JUDGMENT RENDERED; FINAL DISTRICT COURT JUDGMENT AMENDED AND AFFIRMED AS AMENDED.

⁴ The record supports at least \$729,729 for future prescription medications, since Dr. Rice's estimate of the present value of all future prescription medications was \$730,134. Moreover, the present value of all future medical expenses, was estimated by Dr. Rice as \$983,450. Accordingly, the record also supports at least the amount sought by the plaintiff for all future medical expenses in this case.

THOMAS "GENE" ALEXANDER

NUMBER 2012 CA 1296

VERSUS

FIRST CIRCUIT

HERMAN WASHINGTON, ECONOMICAL
JANITORIAL SUPPLIES, INC. AND ZURICH
AMERICAN INSURANCE COMPANY

COURT OF APPEAL

STATE OF LOUISIANA

WFR
by R 100
KLINE, J., concurs and assigns reasons.

I concur with the grant of rehearing required by the error in mathematical calculation and in the language of the trial court relative to the collateral source rule.

The damage awards are subject to adjustment. The manner and extent of that adjustment depends on the analysis and interpretation of the record regarding future medical benefits, particularly prescription needs and fringe benefits (i.e. health insurance.)

It must be acknowledged that more than one perception and conclusion exist for justice in these awards.

Respectfully, I can only concur in this opinion.