NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 1495

BYARD EDWARDS, JR.

VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY

Judgment Rendered: APR 26 2013

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On Appeal from the
21ST Judicial District Court,
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 2007-750 "D"

The Honorable M. Douglas Hughes, Judge Presiding

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* * * * *

BEFORE: GUIDRY, CRAIN, AND THERIOT, JJ.

CRAIN, J.

Louisiana Farm Bureau Mutual Insurance Company appeals a summary judgment finding insurance coverage for exemplary damages and a subsequent judgment based on a jury verdict rendered in favor of Byard Edwards, Jr. Edwards answered the appeal and seeks an increase in the award of general damages and a reversal of the trial court's denial of a bad faith claim against Farm Bureau. For the following reasons, we reverse and render on the summary judgment, vacate the award of exemplary damages, and affirm in all other respects.

FACTS AND PROCEDURAL HISTORY

Edwards was involved in an automobile accident on June 5, 2006 with a vehicle operated by Kellie Dean. Edwards sustained injuries, and Dean admitted she was driving under the influence of cocaine. Dean was proceeding south on Pontchartrain Drive in Slidell, Louisiana, when her vehicle left the roadway, crossed a parking lot, struck a tree and hit two other automobiles before coming to rest upside down against a telephone pole. Edwards was a guest passenger in the second automobile impacted in the collision, and his ex-wife, Stephanie Kraemer, was the driver.

Dean's negligence was the sole and proximate cause of the accident, as determined by a summary judgment that was not appealed. Neither Dean nor the owner of the vehicle she was driving had automobile liability insurance. Farm Bureau provided uninsured/underinsured motorist insurance (UM) to Edwards through three polices: an automobile policy issued to him, an automobile policy issued to Kraemer and covering the vehicle occupied by Edwards, and an umbrella policy issued to Edwards. Prior to this litigation, Farm Bureau tendered $400,000.00 in UM benefits and $10,000.00 in medical payments coverage to Edwards, which exhausted the combined limits of the two automobile policies.

Edwards then filed suit against Farm Bureau seeking additional UM benefits under the umbrella policy. Edwards amended his petition to also seek exemplary damages under the umbrella policy pursuant to Louisiana Civil Code article 2315.4 based upon allegations that the accident and injuries were caused by Dean's operation of a motor vehicle while under the influence of an illicit substance.[1]

Farm Bureau denied coverage for exemplary damages under the umbrella policy, and both parties filed summary judgment motions on that issue. The trial court found coverage for exemplary damages and granted a summary judgment in favor of Edwards.

The case proceeded to a jury trial that resulted in a verdict for Edwards in the amount of $820,000.00, consisting of the following awards: $100,000.00 in medical expenses, $200,000.00 in past loss of wages, $160,000.00 in future loss of wages and/or earnings capacity, $160,000.00 in general damages, and $200,000.00 in exemplary damages. The general damage award was itemized as $20,000.00 for past and future physical pain and suffering, $40,000.00 in past mental anguish, $50,000.00 for "disability," and $50,000.00 for loss of enjoyment of life. The jury did not award damages for future mental anguish. Edwards filed a motion for judgment notwithstanding the verdict (JNOV) seeking an award for that item, which the trial court denied.

Pursuant to a pre-trial stipulation, Edward's bad faith claim was tried separately to the trial court, who found in favor of Farm Bureau. A single judgment was signed that set forth the judgment on the jury verdict, the denial of the JNOV, and the denial of the bad faith claim. After deducting the pre-suit tender, the net amount of the judgment in favor of Edwards and against Farm Bureau was $410,000.00, plus legal interest.

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[1] By a separate Amended Petition for Damages, Edwards added Dean and Cedric Ducre, the owner of the vehicle she was driving, as defendants; however, they were never served with citation or process and were never cast in judgment.

Farm Bureau appealed and asserted five assignments of error: (1) the trial court erred in granting Edwards' motion for summary judgment and denying Farm Bureau's motion for summary judgment based upon a finding that the umbrella policy covered exemplary damages; (2) the award of exemplary damages was manifestly erroneous because Edwards failed to satisfy his burden of proof; (3) the award of exemplary damages was abusively high; (4) the award for past lost wages was manifestly erroneous and not supported by the evidence; and (5) the award for future lost wages and loss of earning capacity was manifestly erroneous and not supported by the evidence.

Edwards answered the appeal and asserted four assignments of error: (1) the trial court erred in ruling in favor of Farm Bureau on the bad faith claim; (2) the trial court abused its discretion by refusing to permit an expert witness to testify about the damages sustained by Edwards as a result of Farm Bureau's alleged bad faith; (3) the trial court abused its discretion by failing to grant the JNOV; and (4) the jury's award of general damages was an abuse of discretion.

INSURANCE COVERAGE

Farm Bureau argues that the trial court improperly granted a summary judgment finding coverage for exemplary damages under the umbrella policy. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. Pro. art. 966B(2). Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. *All Crane Rental of Georgia, Inc. v. Vincent*, 10-0116 (La. App. 1 Cir. 9/10/10), 47 So. 3d 1024, 1027, *writ denied*, 10-2227 (La. 11/19/10), 49 So. 3d 387.

A summary judgment may be rendered on the issue of insurance coverage alone, although there is a genuine issue as to liability or damages. *McMath Const. Co., Inc. v. Dupuy*, 03-1413 (La. App. 1 Cir. 11/17/04), 897 So. 2d 677, 680-81 *writ denied*, 04-3085 (La. 2/18/05), 896 So. 2d 40. Interpretation of an insurance policy usually involves a legal question which can be resolved properly in the framework of a motion for summary judgment. *Bonin v. Westport Ins. Corp.*, 05-0886 (La. 5/17/06), 930 So. 2d 906, 910. Summary judgment declaring a lack of coverage under an insurance policy may not be rendered unless there is no reasonable interpretation of the policy, when applied to the undisputed material facts shown by the evidence supporting the motion, under which coverage could be afforded. *McMath Const. Co., Inc.*, 897 So. 2d at 681.

An insurance policy is a contract between the parties and should be construed using the general rules of interpretation of contracts set forth in the Civil Code. The judicial responsibility in interpreting insurance contracts is to determine the parties' common intent. Words and phrases used in an insurance policy are to be construed using their plain, ordinary and generally prevailing meaning, unless the words have acquired a technical meaning. La. Civ. Code arts. 2045 and 2047; *Bonin*, 930 So. 2d at 910.

An insurance policy should not be interpreted in an unreasonable or a strained manner so as to enlarge or to restrict its provisions beyond what is reasonably contemplated by its terms or so as to achieve an absurd conclusion. *Bonin*, 930 So. 2d at 910-911. Unless a policy conflicts with statutory provisions or public policy, it may limit an insurer's liability and impose and enforce reasonable conditions upon the policy obligations the insurer contractually assumes. *Bonin*, 930 So. 2d at 910-911. If an ambiguity remains after applying the other general rules of construction, the ambiguous contractual provision is to be construed against the insurer and in favor of coverage. However, for this rule of

strict construction to apply, the insurance policy must be susceptible to two or more reasonable interpretations. *Bonin*, 930 So. 2d at 911.

The parties do not dispute that the underlying automobile policy provides UM coverage but excludes exemplary damages from the coverage.[2] The automobile policy sets forth the UM coverage in "PART IV," which is captioned "PROTECTION AGAINST UNINSURED/UNDERINSURED MOTORIST" and consists of eight pages of terms, conditions and definitions that specify and define the extent of the UM coverage provided by the policy. The UM section begins with an insuring agreement whereby Farm Bureau agrees to "pay all sums, except punitive and/or exemplary damages, which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured or underinsured automobile . . . ." The ensuing pages define numerous key terms, impose exclusions, set limits of liability, and provide other coverage-related conditions, all pertaining to the UM coverage.

In contrast, the umbrella policy contains no terms and conditions in the basic policy that set forth any UM coverage. The insuring agreement provides for indemnity for liability to others, with Farm Bureau agreeing to indemnify Edwards for the "ultimate net loss in excess of the applicable underlying or retained limit" which Edwards may sustain "by reason of liability imposed . . . for damages" because of personal injury or property damage. The umbrella policy contains no corresponding insuring agreement providing UM coverage in the policy. Thus the only source of UM coverage in the umbrella policy is found in the language of an endorsement, "Endorsement #13," which provides:

AUTOMOBILE LIABILITY FOLLOWING FORM

EXCEPT TO THE EXTENT THAT COVERAGE IS AVAILABLE TO THE INSURED IN THE UNDERLYING POLICIES AS

[2] Policy language excluding exemplary or punitive damages from UM coverage does not conflict with the objective of the UM statute. *Pike v. National Union Fire Ins. Co.*, 00-1235 (La. App. 1 Cir. 6/22/01), 796 So. 2d 696, 700.

> STATED IN THE SCHEDULE OF UNDERLYING INSURANCE, THIS POLICY DOES NOT APPLY TO THE OWNERSHIP, MAINTENANCE, OPERATION, USE, LOADING OR UNLOADING OF ANY AUTOMOBILE WHILE AWAY FROM PREMISES OWNED BY, RENTED TO, OR CONTROLLED BY THE INSURED.

This endorsement eliminates coverage under the umbrella policy for the use of an automobile away from the insured's premises "except to the extent that coverage is available to the insured in the underlying policies" identified in the schedule of underlying insurance. The phrase "except to the extent that coverage is available to the insured in the underlying policies" provides the sole basis for any UM coverage in the umbrella policy, as the policy is otherwise devoid of any terms or conditions setting forth that coverage.

The schedule of underlying insurance is the second page of the umbrella policy documents and identifies several underlying insurance policies by number, term, limits, and type of coverage. The Farm Bureau automobile policy is an identified policy, and the listed coverages include "Owned Autos," "Hired Autos," "Non-Owned Autos," and "Uninsured/Underinsured Motorist" with corresponding underlying policy limits for each coverage.

Based upon the endorsement's reference to the underlying automobile policy and the absence of any UM provisions in the umbrella policy, the only reasonable interpretation of the endorsement is that the terms and conditions of the underlying automobile policy determine "the extent" of the UM coverage "available to the insured" under the umbrella policy. The endorsement effectively adopts the terms of the underlying automobile policy into the umbrella policy to establish UM coverage. In fact, the adoption of the automobile policy's UM coverage terms is essential to the creation of UM coverage in the umbrella policy. Without those adopted terms, the umbrella policy otherwise has no provisions setting forth UM coverage.

This endorsement was addressed in *Evins v. Louisiana Farm Bureau Mut. Ins. Co.*, 04-0282 (La. App. 1 Cir. 2/11/05), 907 So. 2d 733, wherein this court held that an umbrella policy did not provide liability coverage for an accident because the occupied automobile "did not have underlying coverage with Farm Bureau, as required by the umbrella policy." *Evins*, 907 So. 2d at 735. After recognizing that the endorsement "limits coverage under the umbrella policy," the court determined that the policy did not provide coverage because the automobile was insured under a policy that "is not listed on the schedule of underlying insurance." *Evins*, 907 So. 2d at 735. The court in *Evins* thus considered coverage by the underlying automobile policy to be a prerequisite to coverage by the umbrella policy. We interpret the endorsement in the same manner in the present case.

We also note that the endorsement's caption labels the provision as "AUTOMOBILE LIABILITY FOLLOWING FORM." Our interpretation of the endorsement is consistent with jurisprudence interpreting "following form" excess liability policies which "follow" or adopt the conditions and agreements of the underlying primary liability insurance policy. *See*, *State ex rel. Div. of Admin., Office of Risk Mgmt. v. Nat'l Union Fire Ins. Co. of La.*, 10–0689 (La. App. 1 Cir. 2/11/11), 56 So. 3d 1236, 1244, *writ denied*, 11–0849 (La. 6/3/11), 63 So. 3d 1023; *Rivere v. Heroman*, 96–1568, (La. App. 4 Cir. 2/5/97), 688 So. 2d 1293, 1294. Unless there is an express exception to the form of the underlying insurance, the excess carrier in a follow form policy must act according to the underlying insurance policy's terms. *Toston v. Nat'l Union Fire Ins. Co. of Louisiana*, 41,567 (La. App. 2 Cir. 11/3/06), 942 So. 2d 1204, 1207.

Edwards argues that the umbrella policy is not limited by the underlying automobile policy. He relies primarily on the last sentence of the "other insurance" clause contained in the umbrella policy, which provides:

> **Other Insurance:** The insurance afforded by this policy shall be excess insurance over any other valid and collectable insurance available to the INSURED, whether or not described in the schedule of underlying insurance . . . and applicable to any part of ultimate net loss, whether such other insurance is stated to be primary, contributing, excess or contingent. Nothing herein shall be construed to make this policy subject to terms, conditions or limitations of such other insurance.

"Other insurance" clauses are typically used to determine the order and allocation of responsibility among insurers when multiple policies apply to the same claim. *See*, *Penton v. Hotho*, 601 So. 2d 762 (La. App. 1 Cir. 1992); William Shelby McKenzie & H. Alston Johnson, III, *Insurance Law & Practice*, § 7:19, 15 Louisiana Civil Law Treatise 699 (4th Ed.). The application of the umbrella policy's "other insurance" clause is not necessary in this case because the umbrella policy's insuring agreement and associated definitions establish that it is a true "excess" policy over and above the policies listed in the schedule of underlying insurance.

The final sentence of the clause also must be construed with due regard to the automobile policy endorsement, which reserves automobile coverage in the umbrella policy only "to the extent that coverage is available to the insured in the underlying policies" listed in the schedule. The umbrella policy document has no UM coverage provisions or terms except to the extent they are adopted from the automobile policy pursuant to the endorsement. Consequently, if the final sentence of the other insurance clause was construed to apply to the automobile policy, then the only terms setting forth UM coverage in the umbrella policy would be eliminated. Such an interpretation would defeat any UM coverage in the umbrella policy and would be contrary to the parties' intentions expressed in the endorsement. To the extent any conflict exists between the endorsement and the other insurance clause in the policy, the endorsement must prevail. *Corkern v. Main Ins. Co., Chicago, Ill.*, 268 So. 2d 138, 140 (La. App. 1 Cir. 1972), *writ not*

considered, 263 La. 608, 268 So. 2d 673 (1972); *Bailsco Blades & Casting Inc. v. Fireman's Fund Ins. Co.*, 31,876 (La. App. 2 Cir. 5/5/99), 737 So. 2d 164, 166; *Zeitoun v. Orleans Parish Sch. Bd.*, 09-1130 (La. App. 4 Cir. 3/3/10), 33 So. 3d 361, 365, *writ denied*, 10-0752 (La. 6/4/10), 38 So. 3d 303; *Chicago Property Interests, L.L.C. v. Broussard*, 08-526 (La. App. 5 Cir. 1/3/09), 8 So.3d 42, 49.

Edwards relies upon *Allen v. Allstate Ins. Co.*, 08-1451 (La. App. 3 Cir. 5/6/09), 10 So. 3d 374, 377, *writ denied*, 09-1264 (La. 9/18/09), 17 So. 3d 977, for the proposition that the "question of coverage under the umbrella policy is resolved by the express terms of the umbrella policy itself." However, consistent with that statement of law, the endorsement that determines the extent of the UM coverage in the Farm Bureau umbrella policy is included in the express terms of the umbrella policy. The court in *Allen* was not confronted with an endorsement defining the amount of automobile coverage offered by an umbrella policy. Rather, the court considered conflicting definitions of "insured" which appeared in the underlying policy and the umbrella policy. As stated previously, the Farm Bureau umbrella policy contains no "express terms" applicable to UM coverage except the endorsement's reference to the underlying schedule of insurance, so no conflicting terms are presented by the umbrella policy and the underlying automobile policy.

For these reasons, we hold that the umbrella policy does not provide coverage for exemplary damages, and we reverse the granting of the summary judgment in favor of Edwards and render summary judgment in favor of Farm Bureau. We likewise vacate and set aside the award of exemplary damages against Farm Bureau contained in the judgment.[3]

[3] In light of this ruling, we do not consider Farm Bureau's two remaining assignments of error concerning the exemplary damage award.

DAMAGES

Both parties assert multiple assignments of error concerning the damages awarded by the jury. Farm Bureau contends that the awards for past and future loss of wages and/or earning capacity were manifestly erroneous and not supported by the evidence. Edwards argues that the jury's general damage award was an abuse of discretion and that the trial court erred in failing to grant a JNOV to award damages for future mental anguish.

The parties presented extensive evidence to the jury relevant to the issue of damages. The testimony and photographs confirmed a substantial impact of the vehicle occupied by Edwards. He was transported from the accident scene to Northshore Regional Medical Center where he was admitted overnight and diagnosed with a concussion and a non-displaced skull fracture identified by a CT scan.

Eight days later on June 13, 2006, he presented to Dr. Charles R. Genovese, Jr., an internal medicine specialist, with a history of head trauma from the automobile accident and two subsequent episodes when his hands began shaking and he was unable to speak. He also reported complications with his left knee, blurred vision in his right eye, and shoulder pain. Dr. Genovese ordered an EEG to explore possible seizure activity and another CT scan of Edward's head. The EEG was normal, and the CT scan revealed cerebral edema at the site of the skull fracture. Dr. Genovese diagnosed Edwards with a moderate brain injury and post-concussion syndrome with possible seizure activity. At the suggestion of Dr. Genovese, Edwards sought additional treatment with several specialists, two of whom, Dr. Richard P. Texada, an orthopedic surgeon, and Dr. John T. Couvillion, had treated Edwards in recent months before the automobile accident.

Dr. Texada first treated Edwards about nine months before the automobile accident for shoulder and left knee pain after a horse reportedly fell on Edwards.

During the course of the prior treatment, Edwards underwent physical therapy and an MRI of his left knee that showed degenerative changes of his medial meniscus. His last visit prior to the June 2006 automobile accident was November 17, 2005.

After the accident, Edwards presented to Dr. Texada on July 18, 2006 with a history of pain in his shoulder and left knee related to the accident. Approximately one week later, Dr. Texada performed arthroscopic surgery on the knee. According to Dr. Texada, the procedure confirmed significant degenerative changes in the knee but revealed nothing to suggest Edwards had suffered a new injury in the automobile accident. Although Dr. Texada did not believe the degenerative condition was caused by the accident, he did believe that the surgery was necessitated by the accident because the trauma aggravated the pre-existing knee condition. Edwards last treated with Dr. Texada on August 15, 2006.

With respect to his vision, Edwards treated with Dr. Couvillion on May 12, 2006, about three weeks prior to the automobile accident. At that time Edwards reported a history of vision problems described as a "blind spot" and "waves" that began after he was bucked off a horse and landed on his head earlier in the year. Dr. Couvillion's examination together with an optical coherence tomography (OCT) study performed on May 19, 2006 revealed a cyst or "pseudohole" of the macula in Edwards' right eye. Dr. Couvillion stated that the cyst, which is a complication of the vitreous separation process, can progress to a macular hole which requires surgical repair. Dr. Couvillion also diagnosed cataracts in both eyes.

Edwards treated with Dr. Couvillion after the accident on July 7, 2006, at which time the clinical exam indicated that the macula cyst may have developed into a macular hole. A second OCT did not confirm a hole. Nevertheless, based upon Edwards' course to date, Dr. Couvillion recommended surgery because he felt that a macular hole "was going to come." Ultimately, Dr. Couvillion

performed five surgical procedures involving the macula repair. Another surgeon, Dr. Eric Griener, operated to remove a cataract, which Dr. Couvillion confirmed was a by-product of the macula procedures. As of May 5, 2011, Edwards' visual acuity in his right eye was 20/200 without glasses.

As to the etiology of the macular hole, Dr. Couvillion acknowledged that the head trauma sustained from the horse incident could have been sufficient "to start the process," but he believed the automobile accident "aggravated it" or "caused that to be more aggressive . . . causing the hole." Edwards remains under the care of Dr. Couvillion and continues to use eye drops.

Edwards' neurological condition was the focus of care provided by a number of healthcare providers, including three neurologists, Dr. Arthur Neil Smith, III, Dr. Michael Becker, and Dr. Marc E. Hines; one neurosurgeon, Dr. Donald D. Dietz; and a neuropsychologist, Dr. Susan Andrews.

Edwards treated with Dr. Smith shortly after the accident on June 26, 2006, presenting a history of head trauma in the accident with a loss of consciousness and three seizures after his discharge from the hospital. According to Dr. Smith, the initial clinical examination and an EEG performed on July 7, 2006 were both normal. Edwards underwent another EEG on September 29, 2006, and an MRI of his brain on October 2, 2006, both of which were again reported as normal.

Dr. Smith testified that the automobile accident caused a mild to moderate cerebral concussion, a skull fracture, and post-concussive syndrome with some headache and difficulty with balance; however, during the course of his treatment over several months, Dr. Smith could not find anything to corroborate that many of Edwards' symptoms were related to trauma. He also did not see anything that was consistent with Edwards having seizures, and he thought that some of the reported symptoms were psychosomatic, meaning real to the patient but not to the doctor. Edwards last treated with Dr. Smith on October 25, 2006.

Edwards continued treating with Dr. Genovese and reported more episodes of seizures. Dr. Genovese referred Edwards to Dr. Hines, a neurologist in Iowa, who treated Edwards on April 14, 2007. Dr. Hines diagnosed a moderate closed head injury and increased Edwards' anticonvulsant medications. Edwards had several subsequent telephone consultations with Dr. Hines but did not treat in person with him again.

On May 17, 2007, Edwards saw Dr. Dietz, a neurosurgeon who would continue to treat Edwards through the date of the trial. According to Dr. Dietz, Edwards sustained a moderate traumatic brain injury, a concussion, post-traumatic stress disorder, and post-traumatic seizure disorder, all as a result of the automobile accident. He believes that Edwards will continue to require anti-seizure medication. By referral from Dr. Dietz, Edwards saw Dr. Becker on April 27, 2010, to review the results of an EEG performed on March 10, 2010. Dr. Becker testified that the EEG demonstrated evidence of a likely seizure disorder.

Dr. Andrews, a neuropsychologist, performed an evaluation of Edwards on July 9, 2009 and concluded that Edwards had a cognitive disorder, personality changes, and mood disorder, all secondary to traumatic brain injury. She also diagnosed an anxiety disorder with limited symptom panic attacks.

Edwards testified about numerous seizures he experienced after the automobile accident, but medication eventually brought these under control. He has continuing difficulty concentrating, which makes reading and writing difficult. He has balance problems, cannot drive very far, and is no longer able to hunt. He acknowledged that the only restriction his physicians have placed on him is that he can no longer participate in riding horses in rodeos.

The etiology of Edwards's neurological symptoms was complicated by evidence of other accidents in which Edwards sustained head trauma. In addition to the two horse riding incidents prior to the subject accident, the evidence

reflected two subsequent accidents. On September 28, 2007, Edwards presented to the emergency room of North Oaks Medical Center with a history of "fell off horse landing on head, confused x 10 – 15 minutes, redness noted to top of head . . . ." The emergency room physician noted that "he struck his head rather hard," ordered a CT scan, which was normal, and diagnosed Edwards with a concussion. Less than a year later on June 16, 2008, Edwards presented to Northshore Eye Associates and reported, "Hit head really hard on boat a few weeks ago[.] Had a mild concussion."

When asked about the fall that occurred in 2006 before the automobile accident, Edwards initially testified that he landed on his foot. After considering Dr. Couvillion's medical record, he then testified that he landed on his face. As for the 2007 incident, Edwards disputed the accuracy of the emergency room records and said he fell on his back, did not strike his head, and was not confused.

The defense also introduced evidence of Edwards' long term alcohol use and its possible impact on his cognitive abilities. Edwards' daughter, Ashley Edwards Sandage, testified about experiences with her father during her childhood and adult years. She described him as "always drinking" and recounted multiple incidents involving excessive drinking and aggressive behavior. Edwards' ex-wife, Stephanie Kraemer,[4] testified that on an average day Edwards consumed five or six drinks containing whiskey and increased his consumption on weekends. He usually remained in bed on Mondays and would not go to work. As recently as 2010, she traveled with Edwards on vacation and observed no difference in his drinking habits. On cross-examination, however, Kraemer admitted to lying during her deposition about her destination at the time of the accident in order to collect worker's compensation benefits. She also admitted to corroborating Edwards' symptoms and condition in her earlier deposition.

[4] At the time of trial, Kraemer's full name was Stephanie Kraemer Muller.

Dr. Smith, the first neurologist to treat Edwards, testified that an EEG administered to Edwards "had a lot of Beta activity which you see in people who drink a lot." The defense also introduced an excerpt from a hospital admission in 1999 where the attending physician documented that he suspected that Edwards was experiencing early alcohol withdrawal symptoms and then ordered Edwards two ounces of vodka. Edwards testified that he drank the ordered vodka to improve his pain tolerance. Lastly, the defense introduced excerpts of medical records from Tulane Medical Center from 1989 reflecting that Edwards reported a history of alcohol abuse when he presented to that facility with complaints of memory impairment for one year and episodes of "trance-like" states. Edwards disputed the accuracy of the Tulane medical records and denied being an excessive drinker.

Farm Bureau also presented testimony from three experts retained to perform independent medical examinations or evaluations. Dr. Juan E. Rubio, Jr., an ophthalmologist, reviewed Edwards' medical records and the OCT studies. He testified that Edwards had a pre-macular hole before the accident that naturally progressed to a macular hole after the accident, however the accident played no role in that process. According to Dr. Rubio, only 10% of macular holes result from trauma and most of those occur in people much younger than Edwards.

Dr. Kenneth J. Gaines, a neurologist, examined Edwards and reviewed his medical records. He believed Edwards suffered a concussion and a skull fracture with some residual injury, but he could not confirm that Edwards had experienced seizures based upon the testing to date. Dr. Gaines concluded that Edwards' current cognitive condition is the result, to some degree, of the automobile accident, some of the prior injuries, depression, and alcohol use. At trial he assigned Edwards an impairment rating of 12% related to his cognitive problems.

Dr. Kevin J. Bianchini, a neuropsychologist, evaluated Edwards and testified that Edwards' symptoms persisted longer than normal because of the subsequent episodes of head trauma in 2007 and 2008. He also believed that chronic alcohol use contributed to the continuing cognitive symptoms.

Having reviewed the evidence, we now turn to the assignments of error concerning the damage awards. Farm Bureau asserts that the jury's award of $200,000.00 in past loss of wages and/or earning capacity and $160,000.00 in future loss of wages and/or earning capacity were manifestly erroneous and not supported by the evidence. The fact finder is accorded broad discretion in assessing awards for lost earnings, but there must be a factual basis in the record for the award. *Driscoll v. Stucker*, 04-0589 (La. 1/19/05), 893 So. 2d 32, 53. To recover for actual wage loss, a plaintiff must prove that he would have been earning wages but for the accident in question. *Boyette v. United Services Auto. Ass'n*, 00-1918 (La. 4/3/01), 783 So. 2d 1276, 1279. The amount of lost earnings need not be proved with mathematical certainty, but by such proof as reasonably establishes the claim, and such proof may consist only of the plaintiff's own testimony. *Driscoll*, 893 So. 2d at 53. An award for lost wages is subject to the manifest error standard of review because such damages must be proven with reasonable certainty. *Boudreaux v. State, Dept. of Transp. & Dev.*, 04-0985 (La. App. 1 Cir. 6/10/05), 906 So. 2d 695, 705, *writ denied*, 05-2164 (La. 2/10/06), 924 So. 2d 174, and 05-2242 (La. 2/17/06), 924 So. 2d 1018.

An award for loss of future earning capacity is not predicated only on the difference between a person's earnings before and after the disabling injury. It encompasses the loss of the person's earning potential or capacity, the loss or reduction of a person's capability to do that for which he is equipped by nature, training, and experience and for which he may be recompensed. *Morris v. State, Dept. of Transp.*, 94-2545 (La. App. 1 Cir. 10/6/95), 664 So. 2d 1192, 1198, *writ*

denied, 95-2982 (La. 2/9/96), 667 So. 2d 537. An award for loss of earning capacity is inherently speculative and cannot always be calculated with mathematical certainty. Thus, the trier of fact must exercise sound discretion in making the award, in light of the facts and circumstances. Great deference should be given to the trial court in reviewing an award for loss of earning capacity, and it should not be set aside absent an abuse of discretion. *Morris*, 664 So. 2d at 1198.

Edwards is a lawyer. He testified that his neurological limitations arising after the accident have prevented him from maintaining his law practice and that he exhausted his supply of cases. Donna Noto, a secretary for Edwards for approximately 16 years, testified that Edwards had a busy practice before the accident and worked long hours; but after the accident she observed that he has trouble concentrating and gets depressed and agitated. He struggles to write briefs and cannot organize cases for trial. Edwards described himself before the accident as "the most successful trial lawyer in this part of the world, and now, I'm almost a joke . . . nobody comes to me." Edwards and Noto both testified that Edwards had to hire other attorneys to help him work on files and had to pay those lawyers fees totaling $319,330.43, which was corroborated by documentary evidence consisting of checks and disbursement statements.

Edward A. Shamis, Jr., a friend and attorney who represented Edwards at one time in this proceeding, testified that Edwards was an innovative and aggressive trial attorney before the accident; but after the accident his "judgment isn't like it used to be," he is not as attentive, and is "not the same person." Dr. Dietz testified that Edwards' neurological conditions would make trial work very difficult, and he did not think Edwards could continue to effectively handle trials and court appearances.

The defense presented evidence that Edwards continued to pursue his litigation practice after the accident. Edwards' daughter, Sandage, confirmed

several suits filed by Edwards in the year prior to this trial, including two suits against a hospital she represents, a suit against her and her brother, and a suit against her husband. Under cross-examination, Edwards acknowledged appearing in court on behalf of a client as recently as one week prior to the subject trial.

The defense also called Dr. George Randolph Rice, an expert economist, who reviewed Edwards' tax returns, a deposition of his accountant, and the list of fee disbursements to other lawyers hired by Edwards. Due to the lack of detail in the documents, Dr. Rice was unable to definitely determine how much income Edwards would have realized from those disbursements; however, he estimated a figure of $18,298.00 based upon a profit percentage of 5.5 % calculated for several years of Edwards' practice. Dr. Rice acknowledged that he had to make certain assumptions and was "swinging by my heels a little bit" because Edwards had not filed income tax returns for certain years.

Although the defense presented evidence to the contrary, multiple fact and expert witnesses testified that Edwards' cognitive impairments interfere with his ability to pursue his trial practice in the same or similar manner he did prior to the accident. Edwards and Noto also testified that these limitations required Edwards to hire other lawyers to help him with files, and the fees paid to those lawyers were documented by an exhibit. Based upon the evidence presented and in light of the great deference accorded to the jury on these awards, we do not believe the jury abused its discretion in awarding $200,000.00 in past loss of wages and/or earning capacity and $160,000.00 in future loss of wages and/or earning capacity.

In Edwards' assignments of error, he argues that the jury's general damage award was an abuse of discretion and that the trial court erred in failing to grant a JNOV to award damages for future mental anguish. General damages are those which may not be fixed with pecuniary exactitude; instead, they involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or

physical enjoyment, or other losses of life or life-style which cannot be definitely measured in monetary terms. *Duncan v. Kansas City S. Ry. Co.*, 00-0066 (La. 10/30/00), 773 So. 2d 670, 682.

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. *Wainwright v. Fontenot*, 00-0492 (La. 10/17/00), 774 So. 2d 70, 71. 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. Mar. Overseas Corp.*, 623 So. 2d 1257, 1260 (La. 1993). The initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the much discretion of the trier of fact. *Youn*, 623 So. 2d at 1260. Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then for the purpose of determining the highest or lowest point which is reasonably within that discretion. *Youn*, 623 So. 2d at 1260.

In reviewing an attack on a general damage award, a court does not review a particular item in isolation; rather, the entire damage award is reviewed for an abuse of discretion, and if the total general damage award is not abusively low, it may not be disturbed. *Graham v. Offshore Specialty Fabricators, Inc.*, 09-0117 (La. App. 1 Cir. 1/8/10), 37 So. 3d 1002, 101; *Smith v. Goetzman*, 97-0968 (La. App. 1 Cir. 9/25/98), 720 So. 2d 39, 48.

A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion which is of

such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. *Anderson v. New Orleans Pub. Serv., Inc.*, 583 So. 2d 829, 832 (La. 1991).

When a JNOV is denied, the appellate court reviews the record to determine whether there is legal error or whether the trier of fact committed manifest error. *McCrea v. Petroleum, Inc.*, 96-1962 (La. App. 1 Cir. 12/29/97), 705 So. 2d 787, 793; *Autin's Cajun Joint Venture v. Kroger Co.*, 93-0320 (La. App. 1 Cir. 2/16/94), 637 So. 2d 538, 544, *writ denied,* 94-0674 (La. 4/29/94), 638 So. 2d 224.

The jury awarded Edwards $20,000.00 for past and future physical pain and suffering, $40,000.00 in past mental anguish, $50,000.00 for disability, and $50,000.00 for loss of enjoyment of life, resulting in a total award for general damages in the amount of $160,000.00. The jury heard considerable evidence of Edwards' injuries involving his knee, eye, and cognitive complications; however, some of that evidence suggested alternative or contributing causes for those conditions. Edwards' right eye, according to Dr. Couvillion, began to develop complications prior to the accident. Although Dr. Couvillion testified that the accident made the condition more aggressive and caused the macula hole, Dr. Rubio testified that the hole was a natural progression of Edwards' pre-accident condition and bore no causal relationship to the accident. With respect to the head injury, the medical experts agreed that Edwards sustained a skull fracture and a concussion in the accident; however, the etiology of his residual symptoms, particularly his cognitive impairment, was complicated by evidence of other instances of head trauma, both before and after the subject accident, and evidence of long term and excessive alcohol use by Edwards.

Both parties supported their respective positions on causation with ample evidence consisting of numerous fact and expert witnesses and scores of exhibits. The jury was required to evaluate the credibility of these witnesses and resolve

conflicting evidence; and, in doing so, the jury had the prerogative to accept or reject all or part of the testimony of any witness, including the testimony of the expert witnesses. *Fleniken v. Entergy Corporation,* 00–1824 (La. App. 1 Cir. 2/16/01), 780 So. 2d 1175, 1195-96, *writs denied,* 01–1268, 01–1305, 01–1317 (La. 6/15/01), 793 So. 2d 1250, 1253–54. After a review of all of the evidence presented during the trial, we find the jury did not abuse its vast discretion in the general damage award, nor did the trial court commit manifest error in denying the motion for JNOV.

BAD FAITH CLAIM

The final assignments of error relate to the bad faith claim asserted by Edwards against Farm Bureau. That claim was adjudicated by a separate bench trial that concluded with the trial court finding that Farm Bureau did not violate the statutory duties set forth in Louisiana Revised Statutes 22:1892 and 22:1973. Pursuant to written reasons, the trial court found that "there were substantial, reasonable and legitimate questions as to the insured's loss" and that Farm Bureau "had a reasonable basis to defend the claim and acted in good faith." We find no abuse of discretion in this determination.

Louisiana Revised Statute 22:1892A(1) (formerly Louisiana Revised Statute 22:658) requires insurers to pay the amount of any claim due any insured within thirty days after receipt of satisfactory proofs of loss. Section B(1) of this statute provides, in pertinent part:

> Failure to make such payment within thirty days after receipt of such satisfactory written proofs and demand therefor . . . when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of fifty percent damages on the amount found to be due from the insurer to the insured, or one thousand dollars, whichever is greater . . . .

Louisiana Revised Statute 22:1973 (formerly Louisiana Revised Statute 22:1220) imposes an obligation of good faith and fair dealing on an insurer,

including the affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant. An insurer may be subject to penalties not to exceed two times the damages sustained or five thousand dollars, whichever is greater, if the insurer fails to pay a claim due an insured within sixty days of receiving satisfactory proof of loss when such failure is arbitrary, capricious, or without probable cause. La. R.S. 22:1973B(5) and C.

The conduct prohibited by Louisiana Revised Statute 22:1892A(1) is virtually identical to the conduct prohibited in Louisiana Revised Statute 22:1973B(5): the failure to timely pay a claim after receiving satisfactory proof of loss when that failure to pay is arbitrary, capricious, or without probable cause. *Reed v. State Farm Mutual Automobile Ins. Co.,* 03–1007 (La. 10/21/03), 857 So. 2d 1012, 1020. The primary difference is the time periods allowed for payment. *Reed,* 857 So. 2d at 1020. Both statutes are penal in nature and must be strictly construed. *Reed,* 857 So. 2d at 1020.

The sanctions of penalties and attorney fees are not assessed unless a plaintiff's proof is clear that the insurer was in fact arbitrary, capricious, or without probable cause in refusing to pay. *Reed,* 857 So. 2d at 1021. Statutory penalties are inappropriate when the insurer has a reasonable basis to defend the claim and acts in good-faith reliance on that defense. *Reed,* 857 So. 2d at 1021. Especially when there is a reasonable and legitimate question as to the extent and causation of a claim, bad faith should not be inferred from an insurer's failure to pay within the statutory time limits when such reasonable doubts exist. *Reed,* 857 So. 2d at 1021. In those instances where there are substantial, reasonable and legitimate questions as to the extent of an insurer's liability or an insured's loss, failure to pay within the statutory time period is not arbitrary, capricious or without probable cause. *Louisiana Bag Co., Inc. v. Audubon Indem. Co.*, 08-0453 (La. 12/2/08), 999 So. 2d 1104, 1114.

The phrase "arbitrary, capricious, or without probable cause" is synonymous with "vexatious," and a "vexatious refusal to pay" means "unjustified, without reasonable or probable cause or excuse." *Louisiana Bag Co., Inc.,* 999 So. 2d at 1114. Whether a refusal to pay is arbitrary, capricious, or without probable cause depends on the facts known to the insurer at the time of its action. Because the question is essentially a factual issue, the trial court's finding should not be disturbed on appeal absent manifest error. *Reed*, 857 So. 2d at 1021.

A district claims manager for Farm Bureau, Douglas P. Delaune, testified at the bench trial about the adjustment of Edwards' UM claim. On July 27, 2006 during the early stages of the investigation of the claim, Farm Bureau paid Edwards $5,000.00 in medical payments coverage afforded by the Kraemer automobile policy. The first direct communication by Edwards with Farm Bureau was a telephone call thereafter on August 16, 2006, wherein he advised that he had sustained a fractured skull, bruises to and fluid on the brain, loss of sight in one eye, hearing loss, and left knee and shoulder injuries, all as a result of the accident. On August 17, 2006, Farm Bureau tendered $5,000.00 in medical payments coverage under the Edwards automobile policy.

On or about December 8, 2006, Edwards submitted a package of medical documentation to Farm Bureau. Edwards did not provide Farm Bureau with medical authorizations at that time that would have permitted the company to obtain medical records directly from the healthcare providers, so Farm Bureau's evaluation was limited to the information provided by Edwards. Based upon that documentation, Farm Bureau tendered to Edwards the Kraemer automobile policy UM limits of $100,000.00 and the Edwards automobile policy UM limits of $300,000.00 by checks dated December 18, 2006.

Farm Bureau received no further contact from Edwards until service of the subject suit on March 9, 2007. Thereafter, through the discovery process, Farm

Bureau gathered the complete medical records for Edwards, both pre-accident and post-accident, and learned of additional information that the company considered important to the evaluation of the claim. The records revealed the prior and subsequent accidents involving head trauma and that Edwards' treatment for his right eye condition began before the automobile accident. Similarly, Farm Bureau learned of the prior knee pain and associated treatment with Dr. Texada. Farm Bureau also obtained for the first time the note by Dr. Smith wherein he suggested that Edwards' symptoms might be psychosomatic. Delaune also testified that Farm Bureau received and relied upon an MRI of Edwards' brain ordered by Dr. Hines that was reported as normal. Farm Bureau retained Dr. Gaines, Dr. Rubio, and Dr. Bianchini to review the medical records and/or examine Edwards, and their opinions raised further questions in Delaune's evaluation about the causal relationship of the other accidents and the impact of Edwards' long-term alcohol use on his cognitive condition.

Based upon our review of the evidence presented during the bench trial, we find no manifest error in the trial court's determination that Farm Bureau's decision to withhold any further tenders was not arbitrary or capricious because substantial, reasonable and legitimate questions existed as to the extent of Farm Bureau's liability and the insured's loss. Accordingly, we affirm the judgment denying and dismissing the bad faith claim for penalties and attorney's fees. *See*, *Fontana v. Louisiana Sheriffs' Auto. Risk Program*, 96-2752 (La. App. 1 Cir. 6/20/97), 697 So. 2d 1037, 1040 (insurer not arbitrary or capricious for failing to make a tender where reasonable questions as to causation existed based upon normal diagnostic studies and two subsequent accidents); and *Duncan v. Allstate Ins. Co.*, 01-840 (La. App. 5 Cir. 12/26/01), 803 So. 2d 420, 426, *writ denied*, 02-0575 (La. 4/26/02), 814 So. 2d 562 (insurer's tender not arbitrary or capricious

where reasonable question of causation existed based upon pre-existing condition and similar symptoms).[5]

CONCLUSION

In conclusion, we find that the Farm Bureau umbrella policy does not provide coverage for exemplary damages, and we therefore reverse the summary judgment granted to Edwards on that issue, vacate the award of exemplary damages against Farm Bureau, and render summary judgment in favor of Farm Bureau on that coverage issue. We find no abuse of discretion in the jury's awards for past and future lost wages, earning capacity and general damages, and we affirm those awards along with the trial court's denial of the motion for JNOV. Finally, we affirm the trial court's judgment denying and dismissing Edwards' claim for penalties and attorney's fees pursuant to Louisiana Revised Statutes 22:1892 and 1973. Costs of this appeal are assessed equally to Edwards and Farm Bureau.

SUMMARY JUDGMENT REVERSED AND RENDERED; JUDGMENT VACATED IN PART AND AFFIRMED IN PART.

[5] In light of our decision to affirm the trial court's holding that Farm Bureau did not breach its statutory duties owed to Edwards, we do not consider Edwards' final assignment of error that the trial court erred in refusing to allow an expert witness to testify about the damages allegedly sustained by Edwards as a result of the alleged violation of those statutory duties.