NOT DESIGNATED FOR PUBLICATION

WARREN GIBSON	*	**NO. 2001-CA-1256**
VERSUS	*	**COURT OF APPEAL**
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, RUSSELL WALKER, JR. AND DAVID PHILLIPS	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-2970, DIVISION "N"
Honorable Ethel Simms Julien, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)

ARMSTRONG, J., CONCURS
MURRAY, J., CONCURS

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AFFIRMED IN PART, REVERSED AND AMENDED IN PART

David Phillips ("Phillips"), appellant, seeks to reverse the trial court's judgment rendered in favor of Warren Gibson ("Gibson"), appellee and the City of New Orleans, against him, Russell Walker and their insurer, State Farm Insurance Company ("State Farm"). State Farm also appeals separately. For the reasons provided we affirm in part, reverse and amend in part, the judgment of the trial court.

STATEMENT OF THE CASE

Plaintiff, Gibson, was employed as a Narcotics Detective with the New Orleans Police Department in the District Investigating Unit (DIU) on

May 29, 1998 when a vehicle driven by Phillips and owned by Walker collided with the vehicle in which Gibson was a passenger. Gibson was on duty at the time of the accident. Gibson and his partner, Arthur Powell were investigating drug activity at the intersection of North Robertson and St. Phillips. Gibson and Powell were in an unmarked rental car driving up North Robertson when they noticed several unidentified males standing on the corner of North Robertson and St. Phillips. The men walked by Gibson and Powell who had pulled the police vehicle to the side of the street. Another unidentified man was observed walking toward a parked vehicle when the group of unidentified males signaled to him that the police were present in the area. The unidentified male did not approach the vehicle instead he turned and walked away. Powell and Gibson drove around the corner in order to see what was going on, they stopped at Basin and North Robertson. They observed several cars parked on the street. Powell was turning the vehicle when one of the parked cars, which was driven by Phillips and owned by Wallace, rear-ended the vehicle in which he was riding. Both Powell and Gibson sustained injuries as a result of the accident. Gibson filed suit against Phillips, Walker and their insurer, State Farm. Discovery continued for several years.

Trial was held on September 25, 2000 and concluded on September

27, 2000 with a jury verdict in favor of Gibson and against Walker, Phillips and their insurer, State Farm. The jury assessed Phillips 85% of the fault and Walker 15% of the fault. The jury awarded $250,000.00 in general damages, $31,000.00 in past medical expenses, $25,000.00 in future medical expenses, $20,000.00 in past loss earnings and $100,000.00 for future loss of earnings/impairment of earning capacity, $50,000.00 in punitive damages, $14,271.74 the net amount for intervention for the City of New Orleans, $2,140.76 for the City of New Orleans against Walker, $12,130.98 for the City of New Orleans against Phillips and $100,000.00 in favor of the City of New Orleans against the insurer, State Farm. Also, judgment in favor of Gibson in the amount of $66,040.76 plus interest and all court costs against Walker and judgment in favor of Gibson $349,969.02 plus interest and court costs against Phillips, Expert fees-$1,100.00.

Walker filed a motion of judgment notwithstanding the verdict, alternative to new trial, alternative to motion to amend judgment. The motion for JNOV and motion for new trial were both denied. The motion to amend judgment, was later, granted by the trial court. The judgment was amended by the trial court to correct the calculation of the judgment in favor of Gibson and against Walker of $66,040.76, which was amended to $61,759.24. The amended judgment was signed on January 19, 2001. The

trial court denied the motion for new trial. Phillips and State Farm timely appealed.

ANSWER TO APPEAL

Gibson filed an answer to the appeal taken by Phillips and State Farm In his answer, Gibson contends that Walker and State Farm should be liable in solido with David Phillips for the full amount of the damages. Gibson contends that Walker as the owner of the vehicle is guilty of negligent entrustment. Therefore, Walker, and State Farm are liable in solido with Phillips for the full amount of the damages.

Gibson cites *Veazey v. Elmwood Plantation Associates*, Ltd, 93-2818 (La. 11/30/1994), 650 So.2d 712, in support of his contention. Gibson argues that as a matter of law, given the relationship of the defendant-owner to the vehicle and his knowledge of the defendant-driver's propensity for causing injury, under such circumstance, a negligently entrusting owner must be fully liable for the damages.

MOTION TO DISMISS THE ANSWER TO APPEAL

Walker filed a Motion to Partially Dismiss the Answer to the Appeal filed by Gibson. Walker argues that Gibson is procedurally barred from seeking alteration of the trial court judgment against him. Walker cites *Francois v. Ybarzabal*, 483 So.2d 602 (La. 1986) in support of its motion to

partially dismiss.

Phillips filed a motion in opposition to the motion to dismiss the answer to the appeal. Phillips argues that State Farm is solidarily liable with Walker and that it is proper for Gibson to file an answer to State Farm ‘s appeal and request against State Farm and Walker.

Under LSA-C.C.P. art. 2133, plaintiffs may, by answering an appeal, seek alteration of the judgment vis-à-vis appellant. Plaintiffs' answer, however, does not have the effect of an appeal as to any portion of the judgment rendered either in favor of, or against, a party who has not appealed. *Vicknair v. Hibernia Bldg. Corp.*, 479 So.2d 904 (La., 1985). The Louisiana Supreme Court in *Francois, supra,* stated that;

> "... Under LSA-C.C.P. art. 2133 an answer to an appeal is in the character of a cross appeal in which the appellee takes advantage of an appeal entered and perfected by an appellant, in the hope of procuring an alteration or amendment of the judgment rendered in a manner beneficial to the appellee.
>
> "An answer to an appeal does not have the effect of an appeal with respect to any portion of the judgment rendered in favor of a party not an appellant. Inasmuch as Protective Casualty Insurance Company is not an appellant herein, appellees' answer to the Sentry appeal would not permit a review of the judgment as to the other

insurer, which did not appeal. [Citations omitted]."

However, once Phillips chose to challenge its unfavorable judgment, it became incumbent upon Gibson to separately appeal against State Farm and Walker in order to protect his position against those parties. Neither, Gibson nor Walker appealed the trial court's judgment. Accordingly, for the foregoing reasons Gibson's answer to the appeal is partially dismissed as to Walker only.

PHILLIPS' APPEAL

On appeal, Phillips contends the following:

(1) Whether the trial court erred in excluding the testimony of Dr. Scott Krenrich without conducting an evidentiary hearing.

(2) Whether the testimony of Dr. Scott Krenrich is admissible under *Daubert/Foret* standards.

(3) Whether the trial court erred in excluding the surveillance video and the testimony from the investigator that obtained the surveillance video.

(4) Whether the jury erred in it's finding that the plaintiff met his burden of proof.

(5) Whether the award of general damages was excessive

(6) Whether the jury in awarding future medical expenses, future loss of earnings/impairment of earning capacity and punitive damages.

EXPERT TESTIMONY

The first two issues raised by the appellant are similar and will be addressed together. The appellant contends the trial court erred in excluding the testimony of Dr. Scott Krenrich without conducting an evidentiary hearing and, that Dr. Scott Krenrich's testimony is admissible under *Daubert/Foret* standards. We disagree.

We review the trial court's decision to admit expert testimony pursuant to La. C.E. art. 702, "A trial judge has wide discretion in determining whether to allow a witness to testify as an expert, and his judgment will not be disturbed by an appellate court unless it is clearly erroneous." *Mistich v. Volkswagen of Germany, Inc*., 95-0939 p. 9, (La.1/29/96), 666 So.2d 1073, 1079.

Louisiana Code of Evidence article 702 states the general rule for the admissibility of expert testimony in Louisiana: "[I] f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Louisiana adopted the United States Supreme Court's interpretation of Federal Rule of Evidence 702, which mirrors Louisiana Code of Evidence Article 702 in State *v. Foret*, 628 So.2d 1116 (La.1993). *See White v. State Farm Mutual Automobile Ins. Co.*, 95-551 (La.App. 3 Cir. 7/17/96) 680 So.2d 1; See also *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In *Daubert*, the United State Supreme Court stated, "in order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation--i.e. 'good grounds' based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability." *Daubert* 113 S.Ct. at 2795. The standards imposed by *Daubert* require the trial court to perform a "gate keeping" function by deciding whether the expert evidence or testimony is both reliable and relevant. To qualify as scientific evidence, an inference, assertion, or opinion must be derived by a scientific method, we must determine whether the reasoning or methodology underlining the proposed testimony pertains to valid scientific knowledge by considering: (1) whether

the theory or technique that is the subject of the proposed testimony can be (and has been) tested;(2) whether the theory or technique has been subjected to peer review and publication; (3) a technique's known or potential rate of error; and (4) whether there is general acceptance of a theory or technique within the relevant scientific community. *Daubert, supra*.

Gibson argues Dr. Krenrich's opinion regarding the cause of his back injury fails to satisfy the standards imposed by *Daubert/ Foret* standard for determining the reliability of expert testimony. Gibson also argues that Dr. Krenrich's specialty of "injury causation analysis" does not exist. Dr. Krenrich is a board certified Medical Examiner who specializing in accident reconstruction and injury causation analysis. He is licensed to practice medicine in the States of California, Washington, Florida and has an application pending in Texas.

Dr. Krenrich opined that Gibson would have suffered only muscular strain, which would be a self-limiting injury that would resolve completely, spontaneously, and without complication within a few weeks; Gibson would not have sustained any other significant injuries as a consequence of this accident. Specifically, there would have been no biomechanical potential for the production of acute trauma to Gibson's lumbar spine as a result of the May 29, 1998 accident.

Dr. Krenrich's opinion was derived from his review of the accident report, repair appraisal, and photograph of the damaged vehicles. The inferences Dr. Krenrick drew from these materials adhere to no formal principles, specific calculations or "scientific method" which may be repeated or tested. Further, the record is devoid of any guidance as to whether Dr. Krenrich's inferences are accepted by the scientific community or the method employed by him to arrive at these inferences. Therefore, we find that Dr. Krenrich's opinion concerning the discipline of injury causation analysis does not meet the relevant test for admission of expert testimony. Accordingly, we find no abuse of discretion in the trial court's exclusion of Dr. Krenrich's testimony at trial. These assignments have no merit.

SURVEILLANCE VIDEO

The third issue presented by Phillips is whether the trial court erred in excluding the surveillance videos and the testimony from the investigator that obtained the surveillance videos.

The admission of surveillance tapes into evidence is largely within the discretion of the trial court. *Olivier v. LeJeune*, 95-0053 (La.2/28/96), 668 So.2d 347. Particularly, the trial court must consider whether the videotape accurately depicts what it purports to represent, whether it tends to establish a fact of the proponent's case, and whether it

will aid or confuse the jury's understanding. Weighed against those factors, the trial court must consider whether the videotape will unfairly prejudice or mislead the jury, confuse the issues, or cause undue delay. The trial court may exclude the evidence if the factors favoring admission are substantially outweighed by the factors disfavoring it. La. C.E. arts. 401-403; *Malbrough v. Wallace,* 594 So.2d 428, 431 (La.App. 1st Cir.1991), *U. S. Fidelity & Guar Co. v. Hi-Tower Concrete Pumping Service Inc.*, 574 So.2d 424 (La.App. 2d Cir.), *writs denied*, 578 So.2d 136, 137 (La.1991).

In this case, the record reflects that the surveillance video were not produced prior to the discovery deadlines set by the trial court to exchange and identify all physical evidence and exhibits. We find that showing these tapes to the jury without context or explanation, could, as the trial court concluded, create a prejudicial impression on the jury that outweighs any probative value they may have to impeach Gibson's testimony. *See* La. C.E. art. 607 D (2). As noted by the Louisiana Supreme Court, "evidence in the form of moving pictures or videotapes must be approached with great caution because they show only intervals of the activities of the subject, they do not show rest periods, and do not reflect whether the subject is suffering pain during or after the activity." *Orgeron v. Tri-State Road Boring, Inc.*, 434 So.2d 65 (La.1983). As such, the trial court

did not abuse its discretion in disallowing the tape. This assignment has no merit.

STANDARD OF REVIEW

An appellate court may not set aside a trial court's finding of fact absent "manifest error" or unless it is "clearly wrong." *Rosell v. ESCO*, 549 So.2d 840 (La.1989). The appellate court reviews the record in its entirety to determine whether the trial court's findings are reasonable. *Id*. A fact-finder's selection between permissible views of the evidence cannot be manifestly erroneous. *Watson v. State Farm Fire & Casualty Ins. Co*., 469 So.2d 967 (La.1985). Although a trial court's findings are accorded great deference, appellate courts have a duty to ascertain whether the record justifies those findings. *Mart v. Hill*, 505 So.2d 1120 (La.1987). If an appellate court concludes that the trial court's factual findings are clearly wrong, the mere fact that some evidence in the record supports the finding does not require the court to affirm. *Id.*

However, appellate courts afford less deference to a trial court's findings when the trial court fails to articulate the theory or evidentiary basis for its conclusions. "Although we may accord deference to a decision of less than ideal clarity if the trial court's path may reasonably be discerned, such

as when its findings, reasons and exercise of discretion are necessarily and clearly implied by the record, we will not supply a finding from the evidence or a reasoned basis for the trial court's decision that it has not found or that is not implied." *Bloxom v. Bloxom*, 512 So.2d 839, 843 (La.1987); *LeBlanc v. Acadian Ambulance Service. Inc*., 99-271 (La.App. 3 Cir. 10/13/99); 746 So.2d 665.

A Court of Appeal may not set aside a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." If the jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. However, where documents or objective evidence so contradict a witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the Court of Appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. *Rosell v. ESCO, supra*. Although great deference is to be afforded to the jury's determination, the manifest error standard of review does not mandate that the jury's factual determinations cannot ever, or hardly ever, be upset. *Ambrose v. New Orleans Police Dept. Ambulance Service*, 93-3099, p. 8

(La.7/5/94), 639 So.2d 216, 221.

Causation

The Louisiana Supreme Court articulated the burden of proof in establishing the source of an injury:

In a personal injury suit, plaintiff bears the burden of proving a causal relationship between the injury sustained and the accident, which caused the injury. Plaintiff must prove causation by a preponderance of the evidence. The test for determining the causal relationship between the accident and subsequent injury is whether the plaintiff proved through medical testimony that it is more probable than not that the subsequent injuries were caused by the accident. *Maranto v. Goodyear Tire & Rubber Co*., 94-2603, p. 3 (La.2/20/95), 650 So.2d 757, 759 (citations omitted); *Breaux v. Maturin*, 619 So.2d 174 (La.App. 3 Cir.1993); Johnson *v. Manuel*, 95-913 (La.App. 3 Cir. 1/31/96); 670 So.2d 273. The plaintiff is aided in meeting this burden by a presumption of causation:

> A claimant's disability is presumed to have resulted from an accident, if before the accident the injured person was in good health, but commencing with the accident the symptoms of the disabling condition appear and continuously manifest themselves afterwards, providing that the medical evidence shows there to be a reasonable possibility of causal connection between the accident and the disabling condition. *Lucas v. Insurance Co. of North America*, 342 So.2d 591, 596 (La.1977); *Housley* v. *Cerise*, 579 So.2d 973, 980 (La.1991); *Breaux,*

supra; *Johnson, supra*.

In order to defeat the presumption of causation, the defendant must show that some other particular incident could have caused the injury in question. *Maranto,* 650 So.2d.*at* 761.

In the instant case, we first must consider whether Gibson met his burden of proving that the accident caused his injuries. At trial, Gibson introduced evidence through testimony of his prior health condition, a police report, and expert medical testimony.

The evidence presented at trial established that Gibson was in good health prior to the accident with no history of back problems. Gibson began to experience back problems after the accident. This evidence is uncontradicted in the record. Further, the evidence presented at trial supports the trial court's judgment. Also, the record includes the testimony of Dr. Kenneth Vogel a Neurosurgeon that performed surgery on Gibson. He testified that Gibson's chief complaints were lower back pain and bilateral leg pain. Dr. Vogel testified that Gibson had limitation of motion, muscle spasm, and a positive straight leg raising test and facet joint pain. He stated that a positive straight leg-raising test means that when he lifted Gibson's leg and stretched his sciatic nerve it was painful. Dr. Vogel concluded after reviewing the Lumbar MRI and the information from

Gibson's previous treating physician that he suffered from a herniated lumbar disc. Dr. Vogel testified he performed surgery to remove the herniated lumbar disc on February 24, 1999. Dr. Vogel testified that it was more likely than not that Gibson's injuries were caused by the car accident on May 29, 1998.

Accordingly, Gibson met his burden of proving that his physical injuries were caused by the accident. Thus, we determine that he presented sufficient evidence to get the benefit of the legal presumption that the accident caused his injuries.

Once the plaintiff presents sufficient evidence to give rise to a presumption of causation*, the burden shifts to the defendant to show some other possible cause of the injury*. *Maranto*, *supra*. at 761. The defendants failed to produce any evidence of an alternate cause of the injury. The record is devoid of any evidence, which was presented by the defendant that was sufficient to rebut the presumption of causation.

After careful review of the record in its entirety, we find the expert medical evidence presented by Gibson and the defendants' failure to present a possible alternate cause of injury lead us to conclude Gibson's injuries were caused by the accident. Therefore, we hold that the trial court's conclusion was not manifestly erroneous or clearly wrong.

DAMAGES

Phillips contends that the jury abused its discretion in awarding general damages in the amount of $250, 000.00 Dollars, and additional sums for future medical expenses, future loss of earnings/impairment of earning capacity and punitive damages. We disagree.

Our jurisprudence has consistently held, in the assessment of damages, much discretion is left to the judge or jury. Such awards will be disturbed only when there has been a clear abuse of discretion. *Coco v Winston Industries, Inc*., 341 So.2d 332 (La.1976); *Foster v. Town of Mamou*, 616 So.2d 837 (La.App. 3Cir.1993). Only after articulated analysis of the facts and circumstances peculiar to the particular case discloses an abuse of discretion, may an appellate court amend an award of damages. *Reck v. Stevens*, 373 So.2d 498 (La.1979). It is not appropriate to resort to a review of prior awards without a prior finding that the trial court abused its discretion. *Theriot v. Allstate Ins. Co.*, 625 So.2d 1337 (La.1993).

The Louisiana Supreme Court in *Reck supra,* pointed out that 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. Each case is different, and should be determined by the facts or circumstances particular to the case under consideration.

GENERAL DAMAGES

Phillips contends the jury abused its discretion in awarding Gibson $250,000.00 in general damages. Phillips contends that award is excessive and should be reduced.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of life or lifestyle that cannot be measured definitively in terms of money. *Boswell v. Roy O. Martin Lumber Co. Inc*., 363 So.2d 506 (La.1978.

> The standard for appellate review of general damage awards is difficult to express and is necessarily non-specific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award. Nevertheless the theme arising from [previous cases] is that the discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court

> should increase or reduce the award. *See also, Dixon v. Winn-Dixie Louisiana Inc*., 93-1627 (La.App. 4 Cir. 5/17/94) 638 So.2d 306. *Youn v. Maritime Overseas Corp*., 623 So.2d 1257, 1260-61 (La.1993). See also *Vaughan Contractors, Inc. v. Cahn*, 629 So.2d 1225 (La. App. 4Cir.1993), in which this court recognized that the *Youn* case is the last in a trilogy of cases in which the Louisiana Supreme Court has indicated that "error correction in factual disputes is virtually non-existent" in Louisiana, resulting in a rule that "reversal of a judgment is warranted only in those rare cases where the record contains little or no evidence to support the trial court's conclusions." *Id*. at 1228.

In the instant case, Dr. Kenneth Vogel, a Neurosurgeon, testified he performed surgery to remove a portion of the herniated disc from Gibson's right side. Dr. Vogel testified that the surgery would resolve approximately eighty (80%) to ninety (90%) percent of Gibson's pain. However, he would have residual pain of ten (10%) to twenty (20%) percent for the rest of his life. Dr. Vogel stated that the trauma to Gibson's back caused an acceleration of the normal aging of his back. He stated that Gibson had a 57 year old back rather than a 37 year old back.

He stated that after the surgery Gibson continued to experience pain and that he advised him to continue the conservative treatment including medication and physical therapy. Also, he advised Gibson to avoid the "extremes of his work" and to avoid activities that caused pain.

Dr. Vogel testified that Gibson would have problems in performing

his job as a Police Officer. He stated that Gibson would be limited to light or sedentary duty and that Gibson suffered 10% to 15% permanent partial total body impairment.

Accordingly, we find no error in the jury award of $250,000.00 in general damages. The trial court is in the best position to decide what is an appropriate award. The role of the appellate court is not to decide what is appropriate award, but rather to review the discretion of the trial court. *Youn, supra.* In the instant case, the jury was in a position to hear the description of the accident, and of the pain and suffering that Gibson experienced. Therefore, we will not disturb this award.

FUTURE MEDICAL EXPENSES

Phillips contends the jury abused its discretion in awarding Gibson future medical expenses.

Medical expenses, past and future, which are incurred by an injured plaintiff, are recoverable as an element of damages. *Thames v. Zerangue*, 411 So.2d 17 (La.1982). The record contains uncontroverted evidence of Gibson's past medical expenses in the amount of $31,000.00 in past medical expenses.

In the instant case, Dr. Vogel testified that Gibson would have continual pain, which would require medication, and physical therapy. Also.

Dr. Bradley Bartholomew, another neurosurgeon who treated Gibson testified that he reviewed the MRI, physical therapy notes, reports and notes from Dr. Vogel and Dr. Batherson from which he concluded that Gibson had some disherniation, lost of disc space, lost of water content at the bottom disc L-4, herination of second to last disc toward the right side, l-4, L-5 disc. He testified that he conduct a physical examine on Gibson as well. He recommended that Gibson have a functional capacity evaluation, which is a series of exercise, physical therapy, where a therapist would evaluate what a patient can and cannot do safely without pain. He testified he recommended this evaluation to be done because Gibson expressed a wish to do more than what had been recommended by his physicians after surgery. Also, because of Gibson's physical size and strength are above average he might be able to do more. Dr. Bartholomew opined that after reviewing the medical records, physical therapy reports, notes from Drs. Vogel and Batherson, the physical exam he conducted and the history given by Gibson, that the accident caused the need for the surgery. Dr. Bartholomew testified that conservative treatment does work but sometimes a patient can get worse and have a need for more aggressive treatment.

Based on the testimony of Gibson's physician, we find the jury amount awarded for future medical expenses to reasonable and supported by

the record and will not be disturb on appeal.

FUTURE LOSS OF EARNING/IMPAIRMENT OF EARNING CAPACITY

Phillips contends the jury abused its discretion in awarding Gibson future earnings/impairment of earning capacity.

Plaintiff has the burden to prove each and every element of damage claimed. *Borden, Inc. v. Howard Trucking Company, Inc.*, 454 So.2d 1081 (La.1983); *Woodfield v. Dugas*, 450 So.2d 1011 (La.App. 1st Cir.1984). Damages for impairment of earning capacity cannot be calculated with mathematical certainty and the trial court is accorded broad discretion. *Klein v. Himbert*, 474 So.2d 513 (La.App. 4th Cir.1985); *Johnson v. Dixon*, 457 So.2d 79 (La. App. 4th Cir.1984),). Calculations of actuarial experts merit substantial consideration. The court should consider plaintiff's physical condition before the accident, plaintiff's work record, amount earned in previous years, and the probability that except for the injury the plaintiff would have earned similar wages the rest of his life. *Garrett v. Celino*, 489 So.2d 335 (La. App. 4th Cir.1986).

In reviewing an award the appellate court must look to the facts and circumstances of the individual case. An appellate court should not disturb an award unless the record shows that the trial court abused its much

discretion. The question is whether the evidence and justifiable inferences support the award. If the appellate court finds an abuse of discretion, it may only change the award to lower it (or raise it) to the highest (or lowest) point, which is reasonably within the court's discretion. *Reck v. Stevens, supra*; *Coco v. Winston Industries, Inc., supra*); *Bitoun v. Landry*, 302 So.2d 278 (La.1974); *Perez v. State Through Dept. of Transp. and Development*, 90-1148,1149(La. App. 4 Cir. 4/23/91).

Gross rather than net income is the proper measure in formulating lost wages and loss of earning capacity. *Harris v. Tenneco Oil Co.*, 563 So.2d 317 (La. App. 4th Cir.1990) 578 So. 2d 1199.

Lost earnings need not be precisely proven, but they must be shown with reasonable certainty. *Moore v. Chrysler Corp*., 596 So.2d 225 (La.App. 2d Cir.1992); *Finley v. Bass*, 478 So.2d 608 (La.App. 2d Cir.1985). To recover, a plaintiff must show proof to reasonably establish his claim. *Weber v. Brignac*, 568 So.2d 1129 (La.App. 5th Cir.1990).

Loss of earning capacity is not the same as lost wages; earning capacity refers to a person's potential and is not necessarily determined by actual loss. *Walker v. Bankston*, 571 So.2d 690 (La.App. 2d Cir.1990); *Finnie v. Vallee*, 620 So.2d 897 (La.App. 4th Cir.1993). Damages for loss of earning capacity are based on the injured person's ability to earn.

Hobgood v. Aucoin, 574 So.2d 344 (La.1990); *Laing v. American Honda* Motor Co., 628 So.2d 196 (La.App. 2d Cir.1993.

In determining whether a plaintiff is entitled to recover for loss of earning capacity, the court should consider whether and how much plaintiff's current condition disadvantages him in the work force. The inquiry is what plaintiff might have been able to earn but for his injuries and what he may now earn given his resulting condition. *Finnie, supra.*

The burden of proof in a claim for future medical expenses is a preponderance of the evidence. *Jordan v. Travelers Insurance Co*., 257 La. 995, 245 So.2d 151 (1971); Harig *v. State Through the Board of Elementary and Secondary Education*, 25,702 (La.App. 2d Cir. 03/30/94), 635 So.2d 485. An award for future medical expenses is by nature somewhat speculative. *Odom v. Claiborne Electric Cooperative, Inc*., 623 So.2d 217 (La. App. 2d Cir.1993). Nonetheless, future medical expenses must be established with some degree of certainty. *Underwood v. Dunbar*, 628 So.2d 211 (La. App. 2d Cir.1993), *writ denied*, 94-0026 (La. 02/25/94), 632 So.2d 767. Medical testimony is needed to establish that such expenses are indicated and to set out their probable cost. *Harig, supra*; *Durkee v. City of Shreveport*, 587 So.2d 722 (La. App. 2d Cir.1991), *writ denied*, 590 So.2d 68 (La.1991).

In the instant case, there was the medical expert testimony of Dr. Vogel and Dr. Bartholomew that Gibson would have permanent disability and restriction. His co-worker testified regarding Gibson continual complaint of pain. Gibson at the time of the accident was a Narcotic Detective with the New Orleans Police Department. He testified to his inability to perform various job related duties as well as chores such as cutting grass at his home. The evidence presented showed that Gibson had a substantial drop in his earnings after the accident. Accordingly, we find the medical expert testimony, the lay testimony, and Gibson's own testimony was sufficient to support the jury award of lost of future earnings/impairment of earning capacity.

Also, Gibson presented the testimony of Carla Seyler, an expert in vocational rehabilitation counseling. She testified that Gibson could perform light or sedentary jobs such as, manager trainee, automobile rental clerk, parking lot supervisor, customer service representative, auto express processor, and a site supervisor for an unarmed security company with his law enforcement background. The rate of pay would be in the range of $8.50 per hour to a high of $12.01 per hour and the annual salary would range from $17,068.00 to $25, 000.00 dollars per year.

This assignment is without merit.

PUNITIVE DAMAGES

Phillips contends the jury abused its discretion in awarding Gibson punitive damages.

The appellate courts review the jury's determination of liability for punitive damages under the clearly wrong-manifestly erroneous standard of review. *See Dekeyser v., Automotive Cas. Ins. Co.,* 97-1251 (La.App. 4th Cir 2/4/98), 706 So.2d 676, 684 (discussing punitive damages under Article 2315.4). Thus, we may not set aside the jury's finding if it is one as to which reasonable minds could differ. *See, e.g., Stobart v. State through Dept. of Transp.and Development* 617 So.2d 880 (La.1993). The question is not whether we, as an initial matter, would make the same finding, as did the jury on the issue of liability for punitive damages but, instead, whether, in light of the record as a whole, the jury's finding was unreasonable. *Id*. This is a function of the allocation of responsibility between the finder of fact and the appellate court. *In re, New Orleans Train Car Leakage Fire Litigation* 2000-0479 (La. App. 4Cir. 6/27/01) 795 So.2d 364.

Article 2315.4 of the Louisiana Civil Code provides that exemplary damages may be awarded in addition to special and general damages "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." The trier of fact has much discretion in fixing exemplary damages. *Riser v. Acadiana Limousine Service, Inc.,* 96-1687 (La.App. 3 Cir. 4/30/97); 693 So.2d 330.

In the instant case, the evidence presented at trial showed that Phillips was intoxicated at the time of the accident. The record contains an affidavit of Gibson, who at the time of the accident was a New Orleans Police department detective. He attested that at the time of the accident Phillips threw down an open container (an unmarked, white Styrofoam cup) as he exited the car. He further attests that Phillips had a strong smell of alcohol, was rattling on and on incoherently, sweating profusely, acting strangely, and appeared to be on drugs. This affidavit supports the trial court's conclusion that Gibson established that intoxication was a cause in fact of the accident. Also, that there was testimony of his long history of drug usage. Accordingly, in punitive damage awards, the emphasis is not on the plaintiff and his hurt but on the defendant and his conduct. It is not so much the particular tort committed as the defendant's motives and conduct in committing it, which will be important as the basis of the award. Thus, punitive damages have more to do with the tortfeasor than with the victim and are regarded as a fine or a penalty for the protection of the public

interest. *Mosing v. Domas*, 2001-0265 (La. App. 3 Cir. 10/3/01) 798 So.2d 1105.

After reviewing the evidence presented to the jury, we cannot say that it abused its much discretion in awarding the Gibson's $50,000.00 in punitive damages for the harm suffered by them as a result of Phillip's intoxication. Considering his past history and continued use of alcohol while operating a motor vehicle, we feel that the award should adequately punish and deter Phillips, as well as others, from not only drinking and driving, but in failing to obey the rules of civilized society and for their wanton disregard of the rights and safety of others. Accordingly, the jury's award of $50,000.00 in punitive damages is affirmed.

STATE FARM APPEAL

On appeal, State Farm contends the trial court erred in awarding judicial interest against State Farm on the entire amount of the judgment from the date of judicial demand. State Farm argues that the policy it issued to Walker specifically provided rules regarding recovery of interest on damages owed by the insured due to a judgment and accruing **after** judgment or **before** judgment, whichever was applicable. State Farm argues that the trial court erred by awarding interest on both the amount of the policy limits and the amount of excess judgment from the date of judicial

demand.

State Farm cites *Dekeyser v. Automotive Cas. Ins. Co*., 971251 (La. App. 4Cor 2/9/1998) 706 So. 2d 676, in support of its contention. Further, State Farm contends the language in the policy in *Dekeyser, supra* is similar to the language in Walker's State Farm policy.

Reviewing a trial court's determinations of the legal interest obligation, the appellate court must determine whether the trial court abused its discretion in granting or denying the motion for new trial. *Zatarain v. WDSU-Television, Inc.*, 95-2600 (La.App. 4 Cir. 4/24/96), 673 So.2d 1181, 1183. We are unable to determine from the record the trial judge's reasons for amending the amount, on which State Farm owes interest, from $1,187,937,52 (the entire judgment), to $25,000.00 (State Farm's policy limits). To disturb a trial court's factual findings on motion for new trial, an appellate court must determine from the record that the findings are clearly erroneous. *Turner v. Dameron-Pierson Company, Ltd.*, 95-0143 (La. App. 4 Cir. 11/16/95), 664 So.2d 739, 741.

Generally, judgments in *ex delicto* cases bear legal interest from the date of judicial demand until paid. La.R.S.13: 4203. Liability and UM/UIM insurers owe interest on their policy limits from the date of judicial demand. *Martin v. Champion Ins. Co*., 95-0030 (La.6/30/95); 656 So.2d 991, 995;

(*citing Ainsworth v. Government Employees Insurance Company*, 433 So.2d 709 (La.1983). Therefore, State Farm's statutory obligation requires it to pay legal interest **on its policy limits**, from the date of judicial demand, until paid.

Interpretation of all of the provisions, including the provisions relating to the obligations of a liability insurer, of the insurance policy determine the uninsured/underinsured motorist insurer's interest obligation on judgments exceeding policy limits. *Martin, supra*, 656 So.2d at 998. Any provision of an insurance policy enhancing liability coverage and benefiting the insured must enhance the UM/UIM coverage and benefit the insured. *Martin, supra* at 994. La.R.S. 13:4203 does not prohibit insurers, including UM/UIM insurers, from lowering, excluding or extending their interest liability on amounts in excess of their policy limits, with their policy. *Martin, supra* at 995.

In *Dekeyser v. Automotive Cas. Ins. Co*., 97-1251 (La. App. 4 Cir. 2/04/98), 706 So.2d 676, this court construed an endorsement to a State Farm policy that differentiated between State Farm's liability for pre-judgment interest and its liability for post-judgment interests. Further, this Court reasoned that State Farm by providing in the endorsement that it was obligated to pay pre-judgment interest only on the "that part of the judgment

we pay" obligated itself "to pay pre-judgment interest on the amount paid by the insurance company up to the policy limits." *Dekeyer at 682.* This Court further held that as to post-judgment interest, the policy required State farm to pay interest on the entire judgment.

In the instant case, the trial court rendered the following in pertinent part;

> **IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor intervenor, the City of New Orleans, and Warren Gibson, against State Farm Mutual Automobile Insurance Company, who is liable, in solido with its insured Russell Walker and David Phillips, for the amount of the policy limits, $100,000.00, plus judicial interest on the entire amount of the judgment from the date of judicial demand and all court costs incurred by intervenor and plaintiff. (EMPHASIS OURS)**

The State Farm policy issued to Russell Walker and active on the date of the accident contained the following provision;

> **In addition to the limits of liability, we will pay for any costs listed below resulting from such accident.**
>
> **(1) Court costs of any suit for damages that we defend**.
>
> (2) Interest **on damages owed by the insured due to a judgment and accruing:**
>
> **a. After the judgment, and until we pay, offer or deposit in court, the amount due under this**

coverage, or

b. Before the judgment, where owed by law, and until we pay, offer or deposit in court the amount due under this coverage, <u>but only on part of the judgment we pay</u>. (EMPHASIS OURS)

The State Farm policy itself includes virtually identical language to that in the endorsemnt in *Dekeyser, supra*. The State Farm's policy at issue in this case differentiated between pre-judgment and post-judgment interest and includes an express limitation on State Farm's obigation to pre-judgment interest, providing for liability for such "only on the part of the judgment we [State Farm] pay{s}. Translated, State farm confines the amount on which it owes legal interest to the policy limits and thereby contractually relieves itself of an obligation to pay interest on an excess judgment.

After reviewing the State Farm policy issued and the record in its entirety, we conclude it was legal error to cast State Farm for judicial interest on " the entire' amount of the judgment from the date of judicial demand," Accordingly, the trial court's judgment is reversed and amended to reflect that State Farm owes legal interest to the limits of the policy.

<u>AFFIRMED IN PART, REVERSED AND AMENDED IN PART</u>