NOT DESIGNATED FOR PUBLICATION

DANIEL E. BECNEL, III	*	**NO. 2014-CA-0962**
VERSUS	*	
		COURT OF APPEAL
TIMOTHY DESMOND, DESCO AUTO BODY & PAINT, L.L.C. AND THEIR LIABILITY INSURANCE CARRIER, WESTERN HERITAGE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2011-05917, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge
* * * * * *

Judge Roland L. Belsome
* * * * * *

(Court composed of Judge Terri F. Love, Judge Roland L. Belsome, Judge Joy Cossich Lobrano)

Kevin P. Klibert
Daniel E. Becnel, Jr.
Daniel E. Becnel, III
THE LAW OFFICES OF DANIEL E. BECNEL, JR.
425 West Airline Highway, Suite B
LaPlace, LA 70068

COUNSEL FOR PLAINTIFF/APPELLANT

Mark E. Seamster
GALLOWAY JOHNSON TOMPKINS BURR & SMITH
Three Sanctuary Boulevard, Suite 301
Mandeville, LA 70471

COUNSEL FOR DEFENDANTS/APPELLEES

AMENDED IN PART; AND AFFIRMED AS AMENDED

APRIL 1, 2015

Daniel Becnel, III appeals the jury's award of $50,375.03 in damages for injuries resulting from an automobile accident. For the reasons that follow, the judgment is amended in part and affirmed as amended.

On June 4, 2010, Mr. Becnel was involved in an automobile accident while traveling on U.S. Highway 61. Mr. Becnel was stopped when an automobile driven by Tim Desmond hit the right rear bumper of his automobile. Mr. Desmond is the owner of Desco Auto Body & Paint, LLC (Desco) and was driving a client's automobile at the time of the accident.[1] As a result of the accident, suit was filed against Mr. Desmond, Desco and Western Heritage Insurance Company for damages sustained in the accident.

After a jury trial, Mr. Becnel was awarded:

Past Medical Expenses	$27,375.03
Future Medical Expenses	$3,000.00

[1] The record indicates that the car driven by Mr. Desmond did not require repairs after the accident, and Mr. Becnel's repairs cost approximately $1,200.00.

General Damages $20,000.00

Assignments of Error

Mr. Becnel is appealing the jury's award of damages, as well as the trial court's assessment of expert's fees. On appeal he argues that: 1) the award of general damages was abusively low; 2) the jury's failure to award loss of enjoyment of life and lost wages was error; 3) the award for future medicals was erroneous; and 4) the trial court's award for expert's fees was abusively low.

Standard of Review

Appellate courts review factual findings under the "manifest error" or "clearly wrong" standard. *Rosell v. ESCO*, 549 So.2d 840, 844 (La.1989). The Louisiana Supreme Court has developed a two-part test for reviewing a factfinder's determinations. *Mart v. Hill*, 505 So.2d 1120, 1127 (La.1987). The test states that, to disturb the findings of a trial court: 1) the reviewing court must conclude that the trial court's findings have no reasonable factual basis, and 2) the reviewing court must determine that the record evidences that the findings are clearly wrong or manifestly erroneous. *Mart*, 505 So.2d at 1127. Thus, the reviewing court considers the totality of the record to determine whether the factfinder was clearly wrong. *Stobart v. State, Through Dept. of Transp. and Dev*., 617 So.2d 880, 882 (La.1993). This rationale stems from the fact that the factfinder has a "better capacity to evaluate live witnesses." *Canter v. Koehring Co*., 283 So.2d 716, 724 (La.1973). Therefore, an appellate court may not substitute its judgment for that of the factfinder, because "where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." *Stobart*, 617 So.2d at 883.

Additionally, appellate courts review errors of law de novo. *Norfleet v. Lifeguard Transp. Service, Inc*., 2005-0501 (La.App. 4 Cir. 5/17/06); 934 So.2d 846.

Trial Testimony

At trial, Mr. Desmond gave testimony on how the accident occurred. He claimed that it was raining and he was driving in heavy traffic on Airline Highway in Kenner, Louisiana. Mr. Desmond stated that in the process of changing lanes he grazed the right rear corner of Mr. Becnel's bumper while traveling at less than 10 miles per hour. Mr. Desmond was driving a client's car, which did not require repair.

Mr. Becnel claims that shortly after the accident he began to experience pain in his neck and back. Although he had been in several previous automobile accidents, the most recent in 2006, he said that he had not sought treatment for his neck and back issues since 2007. After this accident, he treated with a chiropractor for nearly 3 ½ years, consulted with a neurosurgeon and also treated with a pain management physician. At the time of trial his medical bills totaled $27,375.03.

At trial, Mr. Becnel conceded that he had been injured in previous automobile accidents and had sought treatment. In 2007, chiropractor, Dr. Gary Provance and neurosurgeon, Dr. Bradley Bartholomew determined that Mr. Becnel's neck and back pain were chronic in nature and would continue to flare up for the remainder of his life. Mr. Becnel claimed that with this accident, his lower back pain was resolved after approximately two years of treatment, but his neck pain remained.

Mr. Becnel testified that the discomfort from his back and neck pain placed occasional minor limitations on his lifestyle, but did not disrupt his frequent

commute between his homes in Colorado and Louisiana; he was able to ski frequently, play golf, and attend sporting events. [2]

At trial, the jury heard the live testimony of Mr. Becnel's past treating chiropractor, Dr. Robert Dale, his current treating chiropractor Dr. Provance and the insurance company' s medical examiner Dr. Alexis Waguespack.

Dr. Dale's treatment of Mr. Becnel dated back to the 1990's. The doctor's records indicated that he treated Mr. Becnel for neck and back injuries related to automobile accidents in 2001 and 2003. He testified that with treatment Mr. Becnel's injuries from each of the accidents were resolved.

Dr. Provance also appeared at trial to testify regarding Mr. Becnel's current and past chiropractic treatment. He stated that for the 2010 automobile accident Mr. Becnel had received chiropractic treatment at his office approximately twice a month for about 3 ½ years. Dr. Provance asserted that the impact of the 2010 automobile accident caused trauma and injury to Mr. Becnel's lower back, mid-upper back, as well as his neck. Dr. Provance was also Mr. Becnel's treating physician for a 2006 automobile accident; for that incident he treated approximately two years. Dr. Provance was asked to discuss what an MRI taken in 2011 revealed about the condition of Mr. Becnel's spine. He explained that the MRI indicated that Mr. Becnel had multiple levels of herniated/bulging discs. He claimed that these findings were consistent with someone who had been in a traumatic accident. [3] Additionally, he admitted that in 2007 he described Mr. Becnel's back and neck pain and spasms as chronic and a continuing problem.

---

[2] Testimony established that Mr. Becnel only lives in New Orleans part-time. He testified that he spent approximately 60% of his time in Colorado.

[3] Mr. Becnel had represented to Dr. Provance that he was rear-ended by a vehicle that was traveling approximately 25 miles per hour. That statement was contradicted by Mr. Desmond,

The defendant insurance company sent Mr. Becnel to orthopedic surgeon Dr. Alexis Waguespack for an independent medical exam. Dr. Waguespack was given the medical records related to Mr. Becnel's chiropractic treatment dating back to 2001 together with other physician reports and films for a CT Scan, SPECT Scan, and MRI relating to treatment for the subject automobile accident. She testified that the films she reviewed show that Mr. Becnel suffers from a chronic degenerative disc disease that affects his cervical spine and will continue to worsen with age.

Dr. Waguespack testified that in addition to the information she received, she discussed Mr. Becnel's medical history with him prior to his physical exam. Her notes reflected that he was not seeking chiropractic treatment for any symptoms since 2008, but he would self-medicate with Naproxen and sometimes the muscle relaxer Soma. That would indicate that he continued to experience some level of discomfort prior to this automobile accident. Additionally, she testified that in reviewing Dr. Bartholomew's records from 2007, he had indicated that Mr. Becnel would suffer from neck pain forever and should continue to take Mobic and use a muscle stimulator. Dr. Waguespack also stated that she was aware Mr. Becnel had received facet injections after the 2010 accident, which she explained was a treatment used to relieve arthritic pain.

The jury also viewed recorded deposition testimony from Dr. Najeeb Thomas, an expert in neurological surgery and Dr. Patrick Waring, an expert in pain management. Mr. Becnel sought treatment from Dr. Thomas for his neck pain. He informed Dr. Thomas that he began experiencing pain in his neck in June

---

who stated that they were in traffic and moving slowly at the time of impact. The limited damage to Mr. Becnel's car and lack of damage to the second vehicle would be more consistent

2010 after an automobile accident. Dr. Thomas was not given history on prior automobile accidents or neck injuries and pain. He stated that based on Mr. Becnel's representation that he was pain free until the date of this most current accident, Dr. Thomas related his neck pain to the accident. Dr. Thomas referred Mr. Becnel to Dr. Waring. Dr. Waring treated him with facet injections. Dr. Waring had no opinion as to causation.

Damages

The evaluation of the appropriate amount of damages by a jury is a determination of fact which is entitled to great deference on review. *Wainwright v. Fontenot*, 00-0492, p. 6 (La.10/17/00), 774 So.2d 70, 74. Thus, "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." *Id*. (quoting *Youn v. Maritime Overseas Corp*., 623 So.2d 1257, 1260 (La.1993)). Therefore, before disturbing an award made by the jury, an appellate court must first find that the jury abused its great discretion. *Wainwright*, 774 So.2d at 74 (citing *Coco v. Winston Indus., Inc*. 341 So.2d 332, 334 (La.1977)). The jury has the latitude to choose between witnesses, including expert witnesses, and to use such expert testimony together with common sense and experience to arrive at its conclusions of fact. La. C.E. art. 704; *Burns v. CLK Investments V, L.L.C*., 10–0277, p. 10 (La.App. 4 Cir. 9/1/10), 45 So.3d 1152. The jury's acceptance of part or all of each expert's testimony is within its discretion in fact finding. *Joseph v. Archdiocese of New Orleans*, 10–0659, p. 3 (La.App. 4 Cir. 11/10/10), 52 So.3d 203.

---

with a low-speed impact.

In this case, the jury awarded Mr. Becnel 100% of his past medical expenses, while assessing $20,000.00 for past pain and suffering. Pain and suffering, both physical and mental, refers to the pain, discomfort, inconvenience, anguish, and emotional trauma that accompanies an injury. *McGee v. A C and S, Inc.*, 05-1036, p. 5 (La. 7/10/06), 933 So.2d 770, 775. In reviewing the totality of the record including Mr. Becnel's testimony together with medical testimony regarding past and present injuries and treatment, this Court cannot find that the jury was manifestly erroneous in concluding that $20,000.00 adequately compensated Mr. Becnel for his pain and suffering.

Additionally, he was awarded $3,000 in future medicals with no award for future pain and suffering. Taking into account all of the testimony and evidence, the jury could have reasonably viewed any injury Mr. Becnel sustained as an exacerbation of a pre-existing condition. In the same light, it would be just as reasonable to find that his future medical care related more to his degenerative arthritic condition than injuries related to this accident. Given this record, we do not find that the jury abused its discretion in only awarding a portion of the requested future medical expenses.

Next, we must determine if it was inconsistent and thus an error for the jury to not award future pain and suffering. The Supreme Court in *Wainwright*, held that a jury can reasonably reach the conclusion that a plaintiff has proven his claim to recover certain medical costs, yet has failed to prove that he endured compensable pain and suffering as the result of defendant's fault. *Wainwrigh*t, 774 So.2d at 76. The Court further recognized that there is no bright line rule that an award of medical expenses mandates an award for pain and suffering, but rather such inconsistencies must be evaluated on the evidence in the record. *Id.* In these

circumstances, the Supreme Court has consistently applied an abuse of discretion standard of review. *Id.*; *see also Green v. K-Mart Corp*., 03-2495 (La. 5/25/04), 874 So.2d 838. Accordingly, if correction of the verdict is based upon finding an abuse of discretion, we are limited to raising the inadequate general damages award to the lowest amount reasonably within the jury's discretion. *Coco v. Winston Industries*, *Inc.,* 341 So.2d 332, 335 (La.1977).

Even though it is not readily apparent what future treatment the jury determined was necessary, it only awarded $3,000.00 for future medical treatment. On this record, we know from Dr. Waring's testimony and closing arguments that the facet injections Mr. Becnel underwent, referred to as a rhizotomy, cost approximately $3,000.00. The jury also heard testimony from both the plaintiff and Dr. Waring regarding the procedure requiring anesthesia and taking several hours from start to finish, while leaving the patient unable to drive or work for the remainder of the day. The fact that the jury likely considered this a treatment that Mr. Becnel would have to undergo in the future, it was inconsistent to not attach some monetary award for future pain and suffering, which includes pain, discomfort and inconvenience. Therefore, the jury abused its discretion in failing to award any future pain and suffering.

"General damages cannot be fixed with exactitude and that no mechanical rule exists for calculating general damages; rather, such damages are based on the particular facts and circumstances of each case." *Jones v. Capitol Ent., Inc.* 11-956, p. 44 (La.App. 4 Cir. 5/9/12) 89 So.3d 474, 505. In assessing quantum of damages for pain and suffering, the considerations are severity and duration. *Id.* For this specific circumstance, we find that the lowest amount a jury could have awarded in future pain and suffering for this procedure is $1,500.00. Accordingly, we amend

the judgment to reflect an award of future pain and suffering in the amount of $1,500.00.

Mr. Becnel further complains that the jury erred in not awarding the $50,000.00 he sought for loss of enjoyment of life. Loss of enjoyment of life is conceptually distinct from pain and suffering. *McGee, supra.* Loss of enjoyment of life, refers to detrimental alterations of the person's life or lifestyle or the person's inability to participate in the activities or pleasures of life that were formerly enjoyed prior to the injury. *Id.* In contrast to pain and suffering, whether or not a plaintiff experiences a detrimental lifestyle change depends on both the nature and severity of the injury and the lifestyle of the plaintiff prior to the injury. *Id.* Based on the testimony presented to the jury, we find the jury was well within its discretion to determine that this accident did not result in detrimental lifestyle changes for Mr. Becnel.

Mr. Becnel also maintains that the jury erred in rejecting his claim for lost wages. At trial, Mr. Becnel sought $31,050.00 in lost wages. As with each and every aspect of his damages, he had the burden of proving this loss. Mr. Becnel's accountant, John McMahon testified that he reviewed 2010, 2011, and 2012 tax returns and using "quick math" he divided the annual earnings by a 2,000 hour work year. His conclusion was that Mr. Becnel earned $300.00 per hour. Mr. Becnel testified that he spent more than 100 hours attending doctors' appointments due to this accident. He also testified that his base salary did not fluctuate during that time period and that his annual earnings depended on contingency fees from settlements not hourly work. Given the evidence provided to the jury in this case,

it was well within its discretion to find that Mr. Becnel did not establish that he lost wages due to injuries he sustained from this accident.

Expert Fees

Lastly, Mr. Becnel argues that the trial court abused its discretion in its assessment of expert fees. Mr. Becnel's experts included Dr. Provance, Dr. Thomas, Dr. Waring, and CPA, Mr. McMahon. As the prevailing party, Mr. Becnel motioned the trial court to set each expert's fee at $2,500.00. Instead, the trial court awarded $500.00 each for Dr. Thomas and Dr. Waring, $750.00 for Dr. Provance, and nothing for Mr. McMahon.

The expert fees to be awarded in a case are largely within the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. La. R.S. 13:3666; *Board of Sup'rs of La. State University v. Boudreaux's Tire & Auto Repair, L.L.C.*, 13-0444, p. 16-17 (La.App. 4 Cir. 3/5/14), 133 So.3d 1262, 1273 *rehearing denied, writ denied* 14-0942 (La. 8/25/14), 147 So.3d 1118. When setting expert fees the trial court may consider the time spent testifying and the helpfulness of the expert's testimony to the trial court. *See, Samuel v. Baton Rouge General Medical Center,* 99–1148, p. 8 (La.App. 1 Cir. 10/2/00), 798 So.2d 126, 132. Moreover, a trial court judge may fix an expert witness fee solely on the basis of what the court has observed or experienced concerning the expert's time and testimony in the courtroom or in deposition. *Wampold v. Fisher*, 01-0808 (La.App. 1 Cir. 6/26/02), 837 So.2d 638. Considering these parameters, there is nothing in this record that would indicate an abuse of discretion on the trial court's part in setting the expert fees.

Conclusion

For the reasons discussed, we amend the judgment to reflect a $1,500.00 award for future pain and suffering and in all other respects the judgment is affirmed.

AMENDED IN PART; AND AFFIRMED AS AMENDED