NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1330

BRUCE DAVID LAGRONE, II

VERSUS

CHRISTOPHER T. NEELY, LUTHER NEELY,
SHARON NEELY AND TACO BELL OF AMERICA, INC.

Judgment Rendered: February 11, 2011

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 524,442

Honorable R. Michael Caldwell, Judge

* * * * * * *

Harry L. Shoemaker, III
Edwin A. Smith, III
Baton Rouge, LA

Attorneys for
Plaintiff – Appellee
Bruce David Lagrone, II

Randall E. Estes
Baton Rouge, LA

Attorney for
Defendants – Appellants
Christopher T. Neely,
et al.

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

WELCH, J.

This matter is before us on appeal by the defendants, Christopher T. Neely, Luther Neely, and Sharon Neely, from a judgment rendered on a confirmation of default in favor of the plaintiff, Bruce David LaGrone, II ("David LaGrone"). For the following reasons, we amend the judgment, and as amended, the judgment is affirmed.

FACTUAL AND PROCEDURAL HISTORY

On September 20, 2003, David LaGrone and Justin Caston were in the parking lot of a Taco Bell restaurant on George O'Neil Road in Baton Rouge, Louisiana. As they were walking into the restaurant, Christopher Neely approached them from behind and struck David LaGrone in the head with a full half-gallon glass liquor bottle, which broke upon impact and injured David LaGrone. Christopher Neely left the scene, but was subsequently arrested and charged with aggravated battery in proceedings entitled "State of Louisiana v. Christopher Neely, Number: 01-04-49, Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, Criminal Section V" ("the criminal proceedings").

Thereafter, on September 14, 2004, David LaGrone filed a petition for damages, naming as defendants Christopher Neely and his parents, Luther and Sharon Neely.[1] According to the allegations in the petition, at the time of the September 20, 2003 Taco Bell incident, Christopher Neely was a minor child, residing with his parents, Luther and Sharon Neely. Therefore, David LaGrone asserted that they were liable for the damage caused by their son's intentional tort (battery) pursuant to La. C.C. art. 2318.

David LaGrone also asserted that as a result of the September 20, 2003 Taco

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[1] Taco Bell of America, Inc. was also named as a defendant. However, by judgment signed on September 19, 2007, David LaGrone's claims against Taco Bell of America, Inc. were dismissed.

Bell incident, he sustained serious and painful personal injuries to his body and mind, including, but not limited to, serious head and brain injuries, eye injuries, and injuries to his neck and other parts of his body, along with serious psychological injuries. He further alleged that his injuries have necessitated considerable medical treatment since the incident, and will necessitate further medical treatment in the future. Accordingly, David LaGrone requested that he be awarded all special and general damages for the injuries he has sustained.

Thereafter, on October 6, 2004, in the criminal proceedings, Christopher Neely pleaded guilty to simple battery. He was sentenced to six-months in the custody of the Sheriff of East Baton Rouge, which was suspended, and he was placed on two years probation. As a special condition of probation, he was ordered, among other things, to pay $5,000.00 in restitution to David LaGrone. By June 17, 2005, Christopher Neely had fully paid the $5,000.00 in restitution owed to David LaGrone.

On March 23, 2005, David LaGrone filed a motion for preliminary default. In his motion, he asserted that service had been made upon the defendants, Christopher Neely, Luther Neely, and Sharon Neely, on September 23, 2004, that no answer or other pleading had been filed by the defendants since the date of service, and accordingly, requested a preliminary default be entered against the defendants Christopher Neely, Luther Neely, and Sharon Neely. On March 28, 2005, the trial court signed an order that a preliminary default be entered against defendants, Christopher Neely, Luther Neely, and Sharon Neely pursuant to La. C.C.P. art 1701.

A hearing to confirm the default was held on April 15, 2009.[2] After the

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[2] Although the sheriff's return of service of process is not contained in the record before us in accordance with Uniform Rules, Courts of Appeal, Rule 2-1.11, we note that at the confirmation of default hearing, a deputy clerk of court examined the record and testified under oath that Christopher Neely, Luther Neely, and Sharon Neely were served on September 23, 2004, and had not filed an answer or other responsive pleading.

introduction of documentary and testimonial evidence, the trial court took the matter under advisement. On April 23, 2009, the trial court rendered and signed judgment in favor of David LaGrone and against Christopher Neely, Luther Neely, and Sharon Neely, *in solido*, in the amount of $107,578.84, together with legal interest from the date of judicial demand, plus costs of the proceedings in the amount of $1,904.06. The total award for damages was broken down as follows: medical expenses—$5,898.84; lost wages—$1,680.00; future medical expenses—$25,000.00; and general damages—$75,000.00.

Additionally, in accordance with La. C.C.P. art. 1917, the trial court made written findings of fact as follows: (1) on September 20, 2003, Christopher Neely committed multiple assaults and batteries upon David LaGrone; (2) that Christopher Neely was 100% at fault for the multiple assaults and batteries committed on David LaGrone on September 20, 2003; (3) that the multiple assaults and batteries committed by Christopher Neely were the legal cause of the damages sustained by David LaGrone; (4) that Christopher Neely was not of the age of majority when he committed the multiple assaults and batteries upon Christopher Neely on September 20, 2003; (5) that Christopher Neely was the child of Luther Neely and Sharon Neely; and (6) that Luther Neely and Sharon Neely were liable *in solido* with Christopher Neely for the damages sustained by David LaGrone on September 20, 2003.

Christopher Neely, Luther Neely, and Sharon Neely filed a motion for new trial, which the trial court denied by judgment signed on March 12, 2010. Specifically, in denying the motion for new trial, the trial court found that David LaGrone presented sufficient evidence through depositions, certified medical records and bills, as well as testimonial evidence, to support the award of general damages and future medical expenses, and that the judgment confirming the default was not contrary to the law and evidence. From the March 12, 2010

judgment denying the motion for new trial, Christopher Neely, Luther Neely, and Sharon Neely have appealed.

On appeal, Christopher Neely, Luther Neely, and Sharon Neely contend that the trial court "committed legal and factual error when denying" the motion for new trial. Specifically, they contend that the trial court erred in: ruling that the evidence supported the award of future medical expenses; finding that there was sufficient evidence to show that Christopher Neely was the unemancipated minor child of Luther and Sharon Neely and that he resided with them; failing to give credit to the defendants for the $5,000.00 already paid in restitution (in the criminal proceedings) toward the past medical expenses; failing to "rule on Dr. [Ashwin] Sura's qualifications as an expert;" and awarding excessive general damages in the amount of $75,000.00.

LAW AND DISCUSSION

At the outset, we note that the defendants/appellants have appealed the denial of the motion for a new trial. However, in the issues presented for review, it appears that they are challenging the underlying judgment confirming the default. Generally, we consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits when it is clear from the appellant's brief that he intended to appeal the merits of the case. See **Shultz v. Shultz**, 2002-2534, p. 3 (La. App. 1st Cir. 11/7/03), 867 So.2d 745, 746-747; **Carpenter v. Hannan**, 2001-0467, p. 4 (La. App. 1st Cir. 3/28/02), 818 So.2d 226, 228-229, writ denied, 2002-1707 (La. 10/25/02), 827 So.2d 1153. Thus, in this appeal, we will review the underlying judgment confirming the default, *i.e.*, the April 23, 2009 judgment.

"If a defendant in the principal ... demand fails to answer within the time prescribed by law, judgment by default may be entered against him." La. C.C.P.

art. 1701.[3] A judgment of default is sometimes referred to as a "preliminary default." **Arias v. Stolthaven New Orleans, L.L.C.**, 2008-1111, p. 6 (La. 5/5/09), 9 So.3d 815, 819. Thereafter, the judgment of default may be confirmed after two days, exclusive of holidays, from the entry of the judgment of default, that is, on the third "judicial day" after the lapse of two days, which are not judicial holidays, from the entry of the preliminary default. *Id.*; La. C.C.P. art. 1702(A).

A judgment of default must be confirmed by proof of the demand sufficient to establish a *prima facie* case. La. C.C.P. art. 1702(A). In order to confirm a default judgment when a demand is based upon a delictual obligation, the testimony of the plaintiff with corroborating evidence, which may be by affidavits and exhibits annexed thereto which contain facts sufficient to establish a *prima facie* case, shall be admissible, self-authenticating, and sufficient proof of such demand. However, the court may, under the circumstances of the case, require additional evidence in the form of oral testimony before entering judgment. La. C.C.P. art. 1702(B)(2). Furthermore, when the demand is based upon a claim for a personal injury, the plaintiff may offer either a sworn narrative report of a treating physician or his testimony. La. C.C.P. art. 1702(D).

The elements of a *prima facie* case must be established with competent evidence, as fully as though each of the allegations in the petition were denied by the defendant. **Arias**, 2008-1111 at p. 7, 9 So.3d at 820. A plaintiff seeking to confirm a default must prove both the existence and validity of his claim. Moreover, a default judgment cannot be different in kind from what is demanded in the petition and the amount of damages must be proven to be properly due. *Id.*; La. C.C.P. art. 1703. Finally, a defendant against whom a default judgment is confirmed may not assert an affirmative defense on appeal. **Arias**, 2008-1111 at p. 8, 9 So.3d at 820.

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[3] See also La. C.C.P. arts. 1001 and 1002.

When reviewing a default judgment, an appellate court is restricted to a determination of the sufficiency of the evidence offered in support of a default judgment. **Arias**, 2008-1111 at p. 5, 9 So.3d at 818. This determination is a factual one governed by the manifest error standard of review. *Id.*

Thus, in this case, the issue before this court is whether the judgment confirming the default was based on evidence that was sufficient and competent. As previously noted, in this appeal, the defendants are challenging the sufficiency of the evidence with regard to: whether Christopher Neely was the unemancipated minor child of Luther and Sharon Neely and resided with them; Dr. Sura's qualifications as an expert; the award of future medical expenses; the award of past medical expenses (*i.e.*, whether the defendants were entitled to credit for the $5,000.00 paid in restitution in the criminal proceedings); and the general damage award of $75,000.00.

Unemancipated Minor

On appeal, the defendants contend that it was the plaintiff's burden, at the hearing to confirm the default, to prove that Christopher Neely was an unemancipated minor residing with his parents, Luther and Sharon Neely, at the time of the September 20, 2003 incident in order for them to be liable for the tortious acts of Christopher Neely and that the plaintiff failed to offer sufficient and competent evidence. We disagree.

Louisiana Civil Code article 2318 provides:

> The father and the mother are responsible for the damage occasioned by their minor child, who resides with them or who has been placed by them under the care of other persons, reserving to them recourse against those persons. However, the father and mother are not responsible for the damage occasioned by their minor child who has been emancipated by marriage, by judgment of full emancipation, or by judgment of limited emancipation that expressly relieves the parents of liability for damages occasioned by their minor child.
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> The same responsibility attaches to the tutors of minors.

Under this article, parents are liable for the torts committed by their minor child who resides with them or who has been placed by them in the care of another person; however, parents may be relieved from tort liability for the acts of their minor child if that child has been emancipated by marriage, judgment of full emancipation, or by judgment of limited emancipation that expressly relieves the parents of liability for damages. As such, emancipation of a minor child would be an affirmative defense,[4] which must be specifically pleaded (and thereafter proven) *by the defendants*. See **Boudreaux v. Entrekin**, 94-272, p. 5 (La. App. 5th Cir. 9/27/94), 643 So.2d 1309, 1312.[5] Thus, with regard David LaGrone's claims against Luther and Sharon Neely, his burden was to sufficiently establish that at the time of the September 21, 2003 Taco Bell incident, Christopher Neely was the minor child of Luther and Sharon Neely and either that he resided with them or that he had been placed in the care of another by them.

The evidence offered by the plaintiff in this regard consisted of certified true copies of the transcripts in the criminal proceedings and the testimony of Justin Caston.

According to the transcripts in the criminal proceedings, at the arraignment on February 5, 2004, wherein Christopher Neely pleaded not guilty to the felony charge of aggravated battery, Christopher Neely stated on the record that his date of birth was "6-8-86" and that his address was "5521 North Allegheny." On October 6, 2004, when Christopher Neely pleaded guilty to the lesser charge of simple battery, Christopher Neely stated on the record that his date of birth was "6/8/86" and that his address was "5520 North Allegheny." Subsequently, at a

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[4] By definition, an affirmative defense raises a new matter or issue that will defeat the plaintiff's claim on the merits, even assuming that claim is valid and that the allegations of the petition are true. **Jalou II, Inc. v. Liner**, 2010-0048, p. 16 (La. App. 1st Cir. 6/16/10), 43 So.3d 1023, 1034.

[5] We further note, since a default judgment has been confirmed against the defendants, they may not assert an affirmative defense on appeal. See **Arias**, 2008-1111 at p. 8, 9 So.3d at 820.

review hearing on February 2, 2005, Christopher Neely stated on the record that he was living with his parents.

Justin Caston, who was with David LaGrone in the parking lot of Taco Bell when David LaGrone was attacked, testified that he knew Christopher Neely because they were both students at Woodlawn High School, he had previously been friends with Christopher Neely, and knew that Christopher Neely was living with his parents, Luther and Sharon Neely, in the Shenandoah area at the time of the incident. His testimony later confirmed that the name of the street where Christopher Neely was living with his parents was "North Allegheny."

Therefore, based on our review of the record, we find a reasonable basis for the trial court's conclusion that David LaGrone established with sufficient and competent evidence that at the time of the September 20, 2003 Taco Bell incident, Christopher Neely was a minor child (17 years of age) of Luther and Sharon Neely and that he resided with them.

Dr. Sura's Qualifications as an Expert

The defendants further contend that while David LaGrone offered the deposition testimony of Dr. Sura into evidence at the confirmation of default hearing and offered Dr. Sura as an expert in the field of child, adolescent, and adult psychiatry during the deposition, because the trial court did not specifically "rule on Dr. Sura's qualifications" as an expert at the hearing, any and all opinions given by him were improper and should not be considered. Furthermore, the defendants contend that once Dr. Sura's opinions are excluded, David LaGrone failed to offer any medical testimony in support of his need for future medical expenses or with regard to his past, current, and future medical condition.

We disagree. The proof offered at the confirmation of default only has to be "sufficient to establish a prima facie case." La. C.C.P. art. 1702. When the demand is based upon a claim for a personal injury, the plaintiff may offer either a

sworn narrative report of a treating physician or his testimony. La. C.C.P. art. 1702(D). At the confirmation of default hearing, David LaGrone chose to offer into evidence the deposition testimony of Dr. Sura in lieu of his live testimony. See La. C.C.P. art. 1450(A)(5). In response to this offer of evidence, the trial court stated "Yes, sir. All right. The court will admit it into evidence." Thus, once the trial court admitted the deposition testimony into evidence, there was no need to specifically "rule" on Dr. Sura's qualifications, because the trial court accepted the deposition testimony as offered—*i.e.,* as that of an expert witness in the field of child, adolescent, and adult psychiatry. Otherwise, the trial court could not have reached some of the conclusions that it did in regard to damages.

The deposition testimony of Dr. Sura establishes that he has been practicing psychiatry in Baton Rouge since 1987. He is board certified in child, adolescent, and adult psychiatry. He currently maintains an outpatient psychiatry practice, performs contract work for a mental health clinic, and performs consultations with United Way Parker House and O'Riley program for children. He stated that he has qualified as an expert in the field of psychiatry in the courts of Louisiana on multiple occasions and had never been rejected as an expert witness by any court.

Therefore, based on our review of the record, we find a reasonable basis for the trial court's implicit decision to accept Dr. Sura as an expert witness.

Future Medical Expenses

The trial court awarded David LaGrone the sum of $25,000.00 for future medical expenses. The defendants contend that the evidence at the confirmation of default hearing was insufficient to support this award.

Future medical expenses must be established with some degree of certainty. **Hymel v. HMO of Louisiana, Inc.**, 2006-0042, p. 26 (La. App. 1st Cir. 11/15/06), 951 So.2d 187, 206, writ denied, 2006-2938 (La. 2/16/07), 949 So.2d 425. However, an award for future medical expenses is by nature somewhat speculative.

An award for future medical expenses is justified if there is medical testimony that they are indicated and setting out their probable cost. *Id.* In such cases, the court should award all future medical expenses which the medical evidence establishes that the plaintiff, more probable than not, will be required to incur. **Hymel**, 2006-0046 at pp. 26-27, 949 So.2d at 206.

According to the certified medical records offered into evidence and the deposition testimony of Dr. Sura, as a result of the September 20, 2003 attack, David LaGrone suffered from subarachnoid hemorrhage and was diagnosed with a concussion. The testimony of Dr. Sura established that after the attack, David LaGrone experienced a return and a worsening of his Attention Deficit and Hyperactivity Disorder ("ADHD") symptoms. Dr. Sura explained that head injuries, particularly those with subarachnoid bleeding, may cause cognitive deficits and ADHD. It was Dr. Sura's opinion that the return and worsening of David LaGrone's ADHD symptoms were more likely than not attributable to the September 20, 2003 attack. According to Dr. Sura, due to David LaGrone's ADHD symptoms and to help David LaGrone with attention span, concentration, focusing, and organization, he was placed on the prescription drug Concerta. Dr. Sura testified that David LaGrone must take 54 milligrams of Concerta every day and will probably be on this medication for the remainder of his life.

David LaGrone, who was approximately 24-years-old at the time of the confirmation of default hearing, testified that the cost of his medication is approximately $90.00 per month. Thus, the approximate cost of his medication is approximately $1,080.00 per year.

Based on our review of the record, we find a reasonable basis for the trial court's conclusion that David LaGrone established that he was entitled to damages for future medical expenses in the amount of $25,000.00. This sum would cover cost of his prescription medication for approximately twenty-three years. Given

David LaGrone's age at the time of the hearing, we conclude that the evidence offered was sufficient and competent to support the trial court's award for future medical expenses.

Past Medical Expenses and Credit for Restitution

The defendants contend that Christopher Neely had previously paid $5,000.00 in restitution to David LaGrone for the medical bills that he had incurred and were entitled to a credit for such sum against the past medical expenses for which they were cast in judgment. We agree.

According to the medical bills offered into evidence at the hearing to confirm the default, David LaGrone's past medical expenses totaled $5,898.84. These expenses were itemized as follows: Our Lady of the Lake Regional Medical Center—$3,745.59; The Neuromedical Center (Dr. John R. Clifford)—$1,835.25; and Dr. Sura—$320.00. As previously noted, the transcript of the criminal proceedings discloses that after Christopher Neely pleaded guilty to simple battery, he was sentenced to six-months in parish prison, which was suspended, and was placed on two years probation. As a special condition of probation, he was ordered, among other things, to pay $5,000.00 in restitution to David LaGrone. At the probation review hearing on June 17, 2005, it was noted that Christopher Neely had fully paid the restitution owed to David LaGrone.

Louisiana Code of Criminal Procedure article 895.1 provides, in pertinent part as follows:

> A. (1) When a court places the defendant on probation, it shall, as a condition of probation, order the payment of restitution in cases where the victim or his family has suffered any direct loss of actual cash, any monetary loss pursuant to damage to or loss of property, or medical expense. The court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain. However, any additional or other damages sought by the victim and available under the law shall be pursued in an action separate from the establishment of the restitution order as a civil money judgment provided for in Subparagraph (2) of this Paragraph. The restitution payment shall be made, in discretion of the court,

> either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant.
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> (5) The amount of any judgment by the court hereunder, shall be credited against the amount of any subsequent civil judgment against the defendant and in favor of the victim or victims, which arises out of the same act or acts which are the subject of the criminal offense contemplated hereunder.

Under this article, when a court places a defendant on probation, it shall, as a condition of probation order the payment of restitution for direct or monetary loss or expense. Further the amount of restitution shall be credited against the amount of any subsequent civil judgment against the defendant which arises out of the same act that is the subject of the criminal offense.

The record reflects that the September 20, 2003 Taco Bell incident forming the basis of this civil suit for damages was the subject of the criminal proceedings.[6] Thus, the amount of restitution paid by Christopher Neely to David LaGrone ($5,000.00) for his direct losses or medical expenses, should have been credited against the amount of the subsequent civil judgment in this case. Because the trial court failed to give Christopher Neely credit for the $5,000.00 in restitution that he paid to David LaGrone, we find no reasonable basis to support the trial court decision that David LaGrone established that he was entitled to past medical expenses in the amount of $5,898.84 and its finding in this regard is clearly wrong. Accordingly, we amend the trial court's judgment to award David LaGrone past medical expenses in the amount of $898.84, which reflects a credit for restitution paid in the amount of $5,000.00 in the criminal proceedings.

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[6] During the October 6, 2004 hearing wherein Christopher Neely pleaded guilty to simple battery and was ordered to pay $5,000 in restitution to David LaGrone, the factual basis for the guilty plea offered by the state was as follows: "If the matter went to trial, the state would show that upon September 20, 2003, this defendant armed himself with a bottle of liquor and committed a battery using that dangerous weapon upon Mr. Bruce David LaGrone."

General Damages

Lastly, the defendants contend that the general damage award of $75,000.00 is clearly excessive. With regard to general damage awards,

> [T]he 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.

Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1261 (La.1993); cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d. 379 (1994).

David LaGrone was 18 years old at the time of the September 20, 2003 Taco Bell incident. According to his testimony and the testimony of Justin Caston, David LaGrone was in the parking lot of and about to walk into Taco Bell when Christopher Neely hit him in the head from behind with a full half-gallon glass liquor bottle. The glass bottle broke upon impact with his head, leaving him completely blindsided. David LaGrone testified that everything in his body went numb and the alcohol from the bottle began to burn his eyes. As he turned around, Christopher Neely "was swinging" at him, and he fell to the ground. Justin Caston helped him off of the ground and picked the broken glass particles out of his head. While at the police substation filling out the police report, he got dizzy and his body went numb again, so he went to the emergency room at Our Lady of the Lake Regional Medical Center. He was admitted into the hospital and stayed a few days.

According to the certified copies of David LaGrone's medical records, he presented the emergency room with a severe headache and dizziness. It was noted that he had multiple small lacerations on his face, arms, and hands. In the emergency room, he underwent a "trauma workup" that showed evidence of a small traumatic subarachnoid hemorrhage and was diagnosed with a concussion.

He was admitted into the hospital for overnight observation and was eventually discharged. He had follow-up appointments with the neurosurgeon that treated him in the hospital on October 13, 2003, January 14, 2004, February 6, 2004, and August 9, 2004.

David LaGrone further testified that for a few months after the attack, he had numbness in his right arm and hand and that his neck was sore. He also said that he had (and still has) severe headaches that last several hours, and would see "black dots, black floaters" in his eyes that would come and go sporadically. David LaGrone testified that he had ADHD in middle school, but had been off of medication for five or six years prior to attack; however, after the September 20, 2003 Taco Bell incident, he had to seek treatment for it again. As previously noted, Dr. Sura opined that it was more probable than not that the return and worsening of David LaGrone's ADHD symptoms resulted from the injury he suffered during the attack. David LaGrone testified that he planned to go to college, and he enrolled in Baton Rouge Community College, but his ADHD symptoms made it difficult and he dropped out. He is currently working as a mechanic. David LaGrone stated that he has suffered some depression and has had some anxiety because of the attack. Dr. Sura noted that David LaGrone does have a higher risk of developing problems like depression due to his active ADHD.

Based on this evidence, we do not find that the trial court abused its vast discretion in concluding that David LaGrone established that he was entitled to an award of general damages in the amount of $75,000.00.

CONCLUSION

For all of the above and foregoing reasons, we find that David LaGrone sufficiently established a *prima facie* case with regard to all of his claims against the defendants, Christopher Neely, Luther Neely, and Sharon Neely. However, for reasons set forth above, we find that Christopher Neely was entitled to a credit in

the amount of $5,000.00 for the restitution that he already paid to David LaGrone. Therefore, we amend the judgment to reflect this credit, to provide for an award of past medical expenses in the amount of $898.84, and to provide for a total judgment in favor of Bruce David LaGrone, II against Christopher Neely, Luther Neely, and Sharon Neely in the amount of $102,578.84. As amended, the April 23, 2009 judgment is affirmed.

All costs of this appeal are assessed to the defendants/appellants Christopher Neely, Luther Neely, and Sharon Neely.

AMENDED AND AS AMENDED, AFFIRMED.