NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0977

TYRONE RICHARDSON

VERSUS

PERCY MAY AND FARM BUREAU INSURANCE COMPANY

DATE OF JUDGMENT: JUN 1 1 2012

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 563,557, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE JANICE CLARK, JUDGE

* * * * * *

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Louisiana Farm Bureau Casualty
Insurance Company and Barbara
Guillory May, Donna May Hogan,
and Terri May Wilkes, as the legal
successors of Percy May

* * * * * *

BEFORE: CARTER, C.J., WHIPPLE, KUHN, GUIDRY, GAIDRY,
MCDONALD, AND HUGHES, JJ.

Whipple, J. concurs in part & dissents in part, for reasons assigned.

Disposition: JUNE 25, 2009 JUDGMENT VACATED; JUNE 17, 2009 JUDGMENT AFFIRMED.

Guidry, J. concur in part and dissents in part, for the reasons assigned by Whipple, J.
McDonald, J. concurs in part and dissents in part. I disagree as to the lost wage claim for reasons assigned by Judge Whipple.

KUHN, J.

Defendants, Barbara Guillory May, Donna May Hogan, and Terri May Wilkes, the legal successors of Percy May, and their insurer, Farm Bureau Casualty Insurance Company (Farm Bureau), appeal two judgments issued by the trial court, each of which awarded damages in favor of plaintiff-appellee, Tyrone Richardson, as a result of a car accident. We vacate the June 25, 2009 judgment and affirm the June 17, 2009 judgment.

FACTS AND PROCEDURAL HISTORY

On the morning of March 13, 2007, while Tyrone Richardson was stopped at a red light on Airline Highway in Baton Rouge, Louisiana on his way to work, his vehicle was struck twice by a vehicle driven by Percy May. As a result of the collision, Richardson's vehicle was propelled into a nearby pole, which then collapsed on top of his car. Richardson was extricated from his car by law enforcement and transported by ambulance to Our Lady of the Lake Hospital (OLOL) immediately following the accident.

On January 29, 2008, Richardson filed a petition against Percy May and his insurer, Farm Bureau,[1] for the damages he sustained as a result of the March 13, 2007 accident. After Percy May died, apparently for causes unrelated to this accident, his legal successors, Barbara Guillory May, Donna May Hogan, and Terri May Wilkes, were substituted for him as party defendants. Defendants stipulated to Percy May's liability, and the matter proceeded to trial solely on the issue of damages.

[1] In the petition, Richardson incorrectly identified Percy May's insurer as "Louisiana Farm Bureau Casualty Insurance Company."

After a trial at which documentary and testimonial evidence was adduced, the trial court issued judgments in favor of Richardson and against defendants. Notice of judgment was issued for the judgments signed on June 17, 2009 and June 25, 2009.[2] This appeal followed.[3]

MULTIPLE JUDGMENTS

According to La. C.C.P. art. 1951, "[a] final judgment may be amended by the trial court at any time, with or without notice, on its own motion or on motion of any party: (1) To alter the phraseology of the judgment, but not the substance; or (2) To correct errors of calculation." Article 1951 contemplates the correction of a "clerical error" in a final judgment, but does not authorize substantive amendments. ***Bourgeois v. Kost***, 2002-2785 (La. 5/20/03), 846 So.2d 692, 695.

The June 17, 2009 judgment, submitted by counsel for defendants,[4] provided the following:

> **IT IS ORDERED, ADJUDGED, AND DECREED** that there be judgment herein in favor of [Richardson], and against [the legal successor of Percy May] and [Farm Bureau], in the amount of twenty five thousand and 00/100 ($25,000.00) plus interest from the date of judicial demand until December 1, 2008 in the amount of $1,811.48.
>
> **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that there be judgment herein in favor of [Richardson], and against [the legal successors of Percy May] in the amount of $53,134.64 plus interest from date of judicial demand until paid.

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[2] On July 2, 2009, the trial court also signed a judgment, identical to the June 25, 2009 judgment, for which notice of judgment did not issue and from which no party has appealed.

[3] Defendants filed separate motions for appeal. Farm Bureau was granted a suspensive appeal of both the June 17th and the June 25th judgments; and the legal successors to Percy May were subsequently granted a devolutive appeal of these same judgments as well. The same attorneys represent all defendants on appeal.

[4] Although the judgment was certified in accordance with Rule 9.5 of the Uniform Rules for Louisiana District Courts and Juvenile Courts, Richardson objected to the form and content of the June 17, 2009 judgment.

> **IT IS FURTHER ORDERED, ADJUDGED, AND DECREED** that [Farm Bureau] pay [Richardson's] costs of court from date of judicial demand through March 31, 2009, subject to a credit of $493.40 which was deposited into the registry of the court on December 5, 2008, and which [Richardson] has been authorized to withdraw.

A second judgment, submitted by Richardson and signed by the trial court on June 25, 2009, provided for the same total amount of damages. But the June 25, 2009 judgment differed from the June 17, 2009 judgment in that it itemized the amounts of damages as articulated by the trial court in its oral reasons for judgment, awarding: $12,834.64 in past medical expenses, $25,000.00 in general damages, and $40,300.00 in lost wages. More importantly, the June 25, 2009 judgment decreed that all defendants were liable for the total sum of $78,134.64.[5]

As long as an amendment to a judgment takes nothing from or adds nothing to the original judgment, a final judgment may be amended by the court at any time. ***Bourgeois***, 846 So.2d at 695. However, for a trial court to substantively amend a final judgment, it must be pursuant to a motion for new trial, see ***Fagan v. Leblanc***, 05-1845 (La. App. 1st Cir. 2/10/06), 928 So.2d 576, 584, or pursuant to a timely appeal. See ***Bourgeois***, 846 So.2d at 695.

In the matter before us, the June 25, 2009 judgment substantively amended the June 17, 2009 judgment, by casting Farm Bureau along with the legal successors of Percy May liable for the entire sum of $78,130.64, resulting in an increase liability of $54,134.64 for Farm Bureau.[6] Since the June 25, 2009

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[5] In the June 25, 2009 judgment, the written sum of the amount awarded was "SEVENTY EIGHT THOUSAND ONE HUNDRED THIRTY & 64/100," but the numeric representation of that amount was incorrectly stated as "$88,134.64."

[6] Of particular note, the insurance policy issued by Farm Bureau to Percy May provided coverage of $25,000 per person and $50,000 per accident.

judgment was not rendered pursuant a motion for new trial or a timely appeal, it is an absolute nullity and of no effect. See ***Bourgeois***, 846 So.2d at 696. Accordingly, we vacate the June 25, 2009 judgment and, in this appeal, review only the June 17, 2009 judgment.

LOST WAGES

The trial court is accorded broad discretion in assessing awards for lost earnings, but there must be a factual basis in the record for the award. A plaintiff bears the burden of proving his claim for lost earnings. For purposes of determining damages, the amount of lost earnings need not be proved with mathematical certainty, but by such proof as reasonably establishes the claim, and such proof may consist only of the plaintiff's own testimony. Reasonable certainty is the standard. ***Driscoll v. Stucker***, 2004-0589 (La. 1/19/05), 893 So.2d 32, 53.

At trial, Richardson testified that as a result of the accident he had pain in his neck and back. After he was released from the emergency room at OLOL, Richardson sought medical treatment from Dr. F. Allen Johnston, who over the course of seven months undertook diagnostic tests and prescribed medication and physical therapy. Richardson stated that he underwent physical therapy for about three months and while he experienced some relief as a result of the physical therapy, it had not helped enough for him to go back to work. He explained that he had been able to obtain relief in his back, but the neck pain never fully diminished. Even as of the date of trial, he continued to have neck pain between three and four times a week.

Richardson denied that Dr. Johnston verbally apprised him that he could return to light-duty work after the first office visit. He believed Dr. Johnston

released him back to work in October 2007, but only for light duty. He later identified his medical record showing that he was released to light duty on September 17, 2007.

At trial, Richardson offered all of Dr. Johnston's records in support of his claim. The records showed that Dr. Johnston examined Richardson on six occasions over a seven-month period. A section of recommendations in Dr. Johnston's note for the March 15, 2007 visit included that Richardson "should only return to work with light duty." The doctor's recommendation stated no more than 15 pounds of lifting; alternating between sitting and standing, with a change of position every 20 minutes; and stair climbing should be one flight at a time. Dr. Johnston's records also showed that as of October 15, 2007, Richardson was released to return to work without any physical restrictions.

Richardson described himself as a laborer at VIP, International (VIP). His duties included two distinct types of jobs. One job involved cleaning troughs of acid. He explained that after donning an acid suit and safety gear, he climbed aloft between 30 and 40 feet, put on equipment, and went inside a tank where the troughs were located. The other job involved catalysts, where he and four or five other workers likewise donned safety gear, climbed aloft, went into a hole, and caught rocks with a bucket from a machine that spewed the rocks. He stated that the stream of rocks was steady and while he was not sure of the weight of a bucketful of rocks he was certain it was more than 20 pounds. According to Richardson, to do his duties at VIP as a laborer, he had to be 100% because it was an intensely physical job.

Richardson testified that VIP contacted him about returning to work, and he advised the VIP representative to whom he spoke that he could only do light duty work. After that phone call, Richardson decided to call the warehouse manager, who was the person who assigned him in-town work. The warehouse manager advised Richardson that there were no light-duty jobs. Richardson said that he was terminated in May 2007, before he had been medically released to return to work.

On cross-examination, Richardson did not deny that he had spoken with Darrell Sam, a VIP dispatcher who allocated jobs that required workers to travel. Richardson recalled that at the time he spoke with Sam, he advised the dispatcher that his doctor had not yet released him to work. He stated that he never told Sam that he could only do light duty work. Richardson testified that although VIP attempted to assign him work after his accident, no one ever offered him a light-duty assignment.

Defendants attempted to impeach Richardson's testimony with that of Sam's. Sam stated that VIP called Richardson into work after the accident and that Richardson told the dispatcher he was receiving medical treatment for his injuries, expressly advising that his neck was "still hurting." Sam testified that he was the person at VIP who would have assigned light-duty work to an injured employee. Sam believed that he offered Richardson light-duty work just after the accident when VIP called the injured laborer. Although he had no specific light-duty assignment for Richardson and admitted that he had not reviewed any medical restrictions for Richardson from a doctor, Sam believed that VIP offered

Richardson an opportunity to do light-duty work because "it's just normal procedure."

While the record contains seemingly contradictory accounts of whether VIP offered and Richardson refused light-duty work, Richardson's testimony is sufficient to establish a factual basis to support an award of lost wages. The trier of fact, who was free to believe in whole or part the testimony of any witness, see ***Scoggins v. Frederick***, 98- 814 (La. App. 1st Cir. 9/24/99), 744 So.2d 676, 687, writ denied, 99-3557 (La. 3/17/00), 756 So.2d 1141, clearly believed that of Richardson. Richardson's testimony established that his doctor first advised him he was released to light-duty work in September 2007, which was approximately four months after he had been terminated. And while Dr. Johnston's medical record seemed to suggest that Richardson should have been advised by Dr. Johnston of light duty restrictions as of March 2007, that documentary evidence did not so contradict Richardson's story, and Richardson's account of not having been apprised of light-duty work restrictions is not so rife with internal inconsistencies or facial implausibility that it should be removed from the ambit of that which a reasonable factfinder can credit, especially here, where Dr. Johnston's testimony explaining his dictated note was not offered. See ***Stobart v. State through Dep't of Transp. and Dev.***, 617 So.2d 880, 882 (La. 1993). Thus, the trial court was not manifestly erroneous in concluding a reasonable factual basis exists for an award of lost wages.

We additionally find no abuse of discretion by the trial court in awarding $40,300.00, which, the parties do not dispute, is the amount of the *in globo* award of $53,134.64 attributable to lost wages. Richardson testified that before the

accident, his weekly gross pay was $1,300.00 and that he was unable to work from the day of the March 13, 2007 accident. Dr. Johnston's record showed that Richardson was released to full duty work on October 15, 2007. In light of the reasonable factual basis for the lost wages award, the trial court did not abuse its discretion in awarding $40,300.00, which was obviously fashioned through the multiplication of Richardson's $1300.00 weekly wages by the 31 weeks between the accident and the date of Richardson's unrestricted work release. Accordingly, the trial court was neither manifestly erroneous in permitting an award of lost wages nor abusive of its discretion in the quantum of $40,300.00 it awarded.

GENERAL DAMAGES

The trier of fact is accorded much discretion in fixing general damage awards. La. C.C. art. 2324.1; ***Cheramie v. Horst***, 93-1168 (La. App. 1st Cir. 5/20/94), 637 So.2d 720, 723. The discretion vested in the trier of fact is great, even vast, so that an appellate court should rarely disturb an award of general damages. ***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). General damages are those which are inherently speculative in nature and cannot be fixed with mathematical certainty, including pain and suffering. ***Wainwright v. Fontenot***, 2000-0492 (La. 10/17/00), 774 So. 2d 70, 74. The role of an appellate court in reviewing a general damage award 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. ***Bouquet v. Wal-Mart Stores, Inc.***, 2008-0309 (La. 4/4/08), 979 So. 2d 456, 459.

Richardson's vehicle was struck twice and propelled into a pole. He had to be extricated from the vehicle. He was transported to the hospital in an ambulance and, while he was not required to stay overnight, he suffered pain in his back and neck. He estimated that his level of pain was 8 on a scale of 1-10. As a result of his injuries, Richardson sought medical treatment, for which he was administered prescriptions for pain and physical therapy. He still suffered from pain in his neck as of the date of trial, which was two years after the accident. Although an award of $25,000.00 in general damages for soft tissues injuries to the back and neck may be considered by some on the high side, it certainly was not an abuse of discretion. Accordingly, we find no abuse of discretion by the trial court.

DECREE

For these reasons, the judgment signed by the trial court on June 25, 2009 is an absolute nullity and is, therefore, vacated. The judgment signed by the trial court on June 17, 2009 is affirmed. Appeal costs are assessed against defendants, Barbara Guillory May, Donna May Hogan, and Terri May Wilkes, the legal successors of Percy May, and their insurer, Farm Bureau Casualty Insurance Company.

JUNE 25, 2009 JUDGMENT VACATED; JUNE 17, 2009 JUDGMENT AFFIRMED.

TYRONE RICHARDSON **STATE OF LOUISIANA**

COURT OF APPEAL

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WHIPPLE, J., concurring in part and dissenting in part.

While I agree with the majority's determination that the June 25, 2009 judgment is an absolute nullity and thus concur in the decision to vacate that judgment, I respectfully disagree with the majority's decision to affirm both the trial court's award for general damages and its award for lost wages.

With regard to the general damages award of $25,000.00, I find that this award for Richardson's complaints of neck and back pain is improper given that Richardson's back pain resolved within three months of the accident. Also, while he claimed to continue to suffer neck pain, he saw Dr. Johnston only six times in the seven months following the accident. Accordingly, I believe that the highest amount that the trier of fact could have awarded for this particular injury was $15,000.00.

Moreover, regarding Richardson's claim for lost wages, I would conclude that he proved his entitlement to an award of lost wages for, at most, ten weeks. Given that Richardson's weekly wage was $1,300.00, I would accordingly reduce the lost wages award to $13,000.00.

For these reasons, I respectfully dissent in part.