NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2012 CA 1218

ALEX FOSTER

VERSUS

FERMIN MOLINA ROSAS, PRESTIGE ONE LANDSCAPE AND FARMERS INSURANCE EXCHANGE

Judgment Rendered: March 22, 2013

* * * * * * * * * *

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 2010-002824

The Honorable Zorraine M. Waguespack, Judge Presiding

* * * * * * * * * *

Michael J. Remondet, Jr.
Lafayette, LA

Counsel for Plaintiff/Appellant,
Alex Foster

Erik M. Tadda
Baton Rouge, LA

Jack E. Truitt
Covington, LA

Counsel for Defendants/Appellees,
Fermin Molina Rosas, Prestige One Landscape and Farmers Insurance Exchange

BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McClendon, J. concurs and assigns reasons.

WHIPPLE, C.J.

Plaintiff, Alex Foster, appeals from a judgment of the trial court rendered in conformity with a jury's verdict in favor of the defendants, Fermin Molina Rosas, Prestige One Landscape, and Farmers Insurance Exchange, dismissing plaintiff's claims with prejudice, and taxing plaintiff with expert fees and costs. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 21, 2010, plaintiff was involved in an automobile accident with Fermin Molina Rosas while traveling north on U.S. Hwy. 51 in Tangipahoa Parish. Rosas, an employee of Prestige One Landscape ("Prestige"), was operating a company vehicle at the time of the accident. After the accident, plaintiff was transported to North Oaks Hospital by ambulance for treatment of injuries allegedly sustained in the accident. Plaintiff was treated by an emergency room physician at North Oaks and sent home that night. Plaintiff eventually underwent spinal surgery, which he claims was necessitated by the injuries sustained in this accident.

On July 13, 2010, plaintiff filed a petition for damages, contending that the accident was caused solely by the negligence of Rosas. The defendants answered plaintiff's petition, contending that any damages sustained by plaintiff were the result of plaintiff's comparative fault and/or negligence. The defendants further asserted the affirmative defense of "no pay, no play" pursuant to LSA-R.S. 32:866.

The matter proceeded to trial before a jury on August 16, 2011 through August 19, 2011. At the conclusion of trial, the jury entered a verdict finding that the negligence of the defendants was not the proximate cause of plaintiff's

damages.[1] A judgment conforming to the jury's verdict was signed by the trial court on September 19, 2011.

From this judgment, plaintiff appeals, contending that the trial court erred: in accepting Charles Bain, M.D. and Dan Cliffe, Ph.D. as expert witnesses without applying the proper *Daubert/Foret/Kuhmo* analysis pursuant to LSA-C.C.P. art. 1425(F) and LSA-C.E. art. 702; in allowing the introduction of evidence and testimony of charges of misdemeanor crimes to attack the credibility of plaintiff and his brother, Clarzeal Foster; and in denying the introduction of evidence of future medical expenses.

DISCUSSION

STANDARD OF REVIEW

The decision to admit or exclude expert testimony is within the sound discretion of the trial court, and its judgment will not be disturbed by an appellate court unless it is clearly erroneous. Devall v. Baton Rouge Fire Department, 2007-0156 (La. App. 1st Cir. 11/2/07), 979 So. 2d 500, 503. Because a finding of an evidentiary error may affect the applicable standard of review, in that the appellate court must conduct a *de novo* review if the error is deemed to have interdicted the fact-finder's conclusions, alleged evidentiary errors are addressed first on appeal. Devall v. Baton Rouge Fire Department, 979 So. 2d at 502. If the trial court has abused its discretion in its evidentiary rulings, such that the jury verdict is tainted by the errors, the appellate court then conducts a *de novo* review. See McLean v. Hunter, 495 So. 2d 1298, 1304 (La. 1986). However, absent a prejudicial error of law, this Court is not

---

[1] The jury verdict form completed by the jury does not appear in the appellate record. Nonetheless, the parties do not dispute the jury's verdict, which, according to the minute entry and as shown in the trial transcript, was read aloud in open court, confirmed by the jury foreperson, and made the judgment of the court by the September 19, 2011 judgment of the trial court.

required to review the appellate record *de novo*. Rosell v. ESCO, 549 So. 2d 840, 844 n.2 (La. 1989).

With reference to the evidentiary challenges set forth on appeal by plaintiff, this Court must consider whether the particular rulings complained of were erroneous and whether the error prejudiced the defendant's cause, for unless it does, reversal is not warranted. Brumfield v. Guilmino, 93-0366 (La. App. 1st Cir. 3/11/94), 633 So. 2d 903, 911, writ denied, 94-0806 (La. 5/6/94), 637 So. 2d 1056. Moreover, the party alleging error has the burden of showing the error was prejudicial to his case. The determination to be made on appeal is whether the error, when compared to the record in its entirety, had a substantial effect on the outcome of the case. Brumfield v. Guilmino, 633 So. 2d at 911.

DAUBERT CHALLENGES
(Assignment of Errors Numbers One and Two)

In these assignments, plaintiff challenges the trial court's acceptance of Charles Bain, M.D. and Dan Cliffe, Ph.D. as expert witnesses herein, contending that the trial court failed to conduct the proper Daubert[2] analysis and pronounce the reasons for its ruling as required by LSA-C.C.P. art. 1425(F)[3].

---

[2] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

[3]With regard to plaintiff's first contention that the trial court failed to conduct the necessary Daubert analysis and failed to properly articulate its findings, LSA-C.C.P. art. 1425(F) is relevant and provides, as follows:

> F. (1) Any party may file a motion for a pretrial hearing to determine whether a witness qualifies as an expert or whether the methodologies employed by such witness are reliable under Articles 702 through 705 of the Louisiana Code of Evidence. The motion shall be filed not later than sixty days prior to trial and shall set forth sufficient allegations showing the necessity for these determinations by the court.
> (2) The court shall hold a contradictory hearing and shall rule on the motion not later than thirty days prior to the trial. At the hearing, the court shall consider the qualifications and methodologies of the proposed witness based upon the provisions of Articles 104(A) and 702 through 705 of the Louisiana Code of Evidence. For good cause shown, the court may allow live testimony at the contradictory hearing.
> (3) If the ruling of the court is made at the conclusion of the hearing, the court shall recite orally its findings of fact, conclusions of law, and reasons for judgment. If the matter is taken under advisement, the court shall render its

ruling and provide written findings of fact, conclusions of law, and reasons for judgment not later than five days after the hearing.
(4) The findings of facts, conclusions of law, and reasons for judgment shall be made part of the record of the proceedings. The findings of facts, conclusions of law, and reasons for judgment shall specifically include and address:
(a) The elements required to be satisfied for a person to testify under Articles 702 through 705 of the Louisiana Code of Evidence.
(b) The evidence presented at the hearing to satisfy the requirements of Articles 702 through 705 of the Louisiana Code of Evidence at trial.
(c) A decision by the judge as to whether or not a person shall be allowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence at trial.
(d) The reasons of the judge detailing in law and fact why a person shall be allowed or disallowed to testify under Articles 702 through 705 of the Louisiana Code of Evidence.
(5) A ruling of the court pursuant to a hearing held in accordance with the provisions of this Paragraph shall be subject to appellate review as provided by law.
(6) Notwithstanding the time limitations in Subparagraphs (1), (2), and (3) of this Paragraph, by unanimous consent of the parties, and with approval by the court, a motion under this Paragraph may be filed, heard, and ruled upon by the court at any time prior to trial. The ruling by the court on such motion shall include findings of fact, conclusions of law, and reasons for judgment complying with the provisions of Subparagraph (4) of this Paragraph.
(7) The provisions of this Paragraph shall not apply to testimony in an action for divorce or annulment of marriage, or to a separation in a covenant marriage, to a property partition, or to an administration of a succession, or to testimony in any incidental or ancillary proceedings or matters arising from such actions.
(8) All or a portion of the court costs, including reasonable expert witness fees and costs, incurred when a motion is filed in accordance with this Paragraph may, in the discretion of the court, be assessed to the non-prevailing party as taxable costs at the conclusion of the hearing on the motion.

As plaintiff correctly notes, the factual basis for an expert's opinion determines the reliability of the testimony. An unsupported opinion can offer no assistance to the fact finder, and should not be admitted as expert testimony. Carrier v. City of Amite, 2008-1092 (La. App. 1st Cir. 2/13/09), 6 So. 3d 893, 897, writ denied, 2009-0919 (La. 6/5/09), 9 So. 3d 874. The trial court's inquiry must be tied to the specific facts of the particular case. As stated above, the abuse of discretion standard applies to the trial court's ultimate conclusion as to whether to exclude expert witness testimony and to the court's decisions as to how to determine reliability. Brown v. City of Madisonville, 2007-2104 (La. App. 1st Cir. 11/24/08), 5 So. 3d 874, 881, writ denied, 2008-2987 (La. 2/20/09), 1 So. 3d 498. As the jurisprudence recognizes, there is a crucial difference between questioning the methodology employed by an expert witness and questioning the application of that methodology or the ultimate conclusions derived from that application. Only a question of the validity of the methodology employed brings Daubert into play. MSOF Corporation v. Exxon Corporation, 2004-0988 (La. App. 1st Cir. 12/22/05), 934 So. 2d 708, 718, writ denied, 2006-1669 (La. 10/6/06), 938 So. 2d 78. However, if a trial court conducts no Daubert analysis of any kind, the exclusion of the expert's evidence without an evaluation of the relevant reliability factors is legal error. Arceneaux v. Shaw Group, Inc., 2012-0135 (La. App. 1st Cir. 9/24/12), 103 So. 3d 1086, 1091. Nonetheless, the analysis does not end there, as the reviewing court still must determine, on the entirety of the record, whether or not such error was harmless, i.e., whether the testimony was so inherently prejudicial as to interdict the ultimate verdict rendered. See generally Clement v. Griffin, 92-1664 (La. App. 4th Cir), 634 So. 2d 412, 427-428, writs denied, 94-0717, 94-0777, 94-0789, 94-0791, 94-0799, 94-0800 (La. 1994), 637 So. 2d 478, 479.

In the instant case, a hearing was held on August 15, 2011, in response to pre-trial motions in limine and for a Daubert hearing, challenging Dr. Bain's qualification and testimony as an expert in the field of biomechanics, vehicle impact, and injury causation analysis with a medical specialty, and Dr. Cliffe's testimony as an expert in the field of forensic economic evaluation. At the conclusion of the hearing, the trial court determined that it would accept Drs. Bain and Cliffe as experts in the fields offered and allow their testimony to be presented at trial.[4]

With reference to Dr. Bain, plaintiff complains on appeal that although Dr. Bain has had some training in accident reconstruction, his medical training and experience consists primarily of emergency medicine with some amount of family practice, he has no active practice or patients, and, other than assisting, has never performed spinal surgery or been qualified in the treatment of spinal disorders. As such, plaintiff contends that it was error for the trial court to allow Dr. Bain to testify as an expert regarding the injury-causation of plaintiff's medical injuries and condition, where he has no experience or certification in orthopedic or neurologic medicine or spinal disorders other than his residency training, which therefore renders his opinion improper, as beyond his medical experience and certification.[5]

---

[4]To the extent that defendants contend on appeal that counsel for plaintiff failed to object to Dr. Bain's qualification as an expert, we note that the trial transcript shows that plaintiff's counsel did object to Dr. Bain's testimony when Dr. Bain was tendered by the defendants as an expert at trial. The trial court overruled plaintiff's objection and accepted Dr. Bain as an expert "subject to [plaintiff's] objection."

[5]Dr. Bain testified that he is employed by Biodynamic Research Corporation (BDR), a corporation of physicians and engineers who contract with clients to determine whether and how injuries are caused in a particular event. Dr. Bain explained that there are four basic components of the principles and methodology applied in their analyses of cases: (1) accident reconstruction; (2) kinematics (how bodies move); (3) bio-mechanical (determining what type of forces applied to the person's body, through bio-mechanical knowledge, to determine the effects of those forces and the type of injury patterns customarily seen as a result of those forces); and (4) injury causation analysis (reviewing medical records and

Instead, in the instant matter, on review, we note that even if we agreed with plaintiff both that the trial court erred in failing to conduct the Daubert analysis required by LSA-C.C.P. art. 1425(F) and in allowing Dr. Bain's testimony as an expert on the causation of plaintiff's spinal injuries, we would not disturb the jury's verdict by conducting a *de novo* review, given the extensive and consistent testimony and evidence of record on the issue of causation from the IME, Dr. Paul Van Deventer, as well as from plaintiff's own treating physician and orthopedic surgeon, Dr. David Wyatt, all of which support the jury's verdict on causation.[6] The testimony provided by Dr. Bain was merely cumulative and corroborative of the evidence presented by other medical experts regarding causation and plaintiff's medical condition, all of which support the jury's findings and verdict. To the extent that there was

---

diagnosed or alleged injuries, then comparing them to the "potential of that event," by applying the science of physics to determine whether the injuries were caused by such forces.

Dr. Bain conceded that he had never examined plaintiff, but claimed that the research and methodology in the biomechanics field is "widely accepted" to understand how people react to the application of forces and accelerations not only in the scientific community, but within government, academia, and industry. Dr. Bain testified that he has conducted bio-mechanic research over the past ten years and has published research in peer review venues. One of the articles published by Dr. Bain in a peer review journal was entitled, Analytical Model for Investigating Sideswipe Collisions. Dr. Bain opined that the instant case was basically a sideswipe case with some peculiarities to it.

Plaintiff alleges that Dr. Bain's testimony was improper in that other Louisiana Courts "have excluded so-called physician 'injury causation" specifically excluding at least three . . . other BRC 'consultants'," including Dr. Bain himself. We note that some courts have allowed testimony in the field of biomechanics previously and other courts have refused to allow such testimony.

While we agree with plaintiff that Dr. Bain's "expertise" under the broad category of "biomechanics" in predicting and opining whether spinal injuries will occur in particular collisions comes perilously close to usurping the province of the fact-finder, we save for another day the broader question of whether such testimony should be allowed at all, absent some legislative determination regarding same is improper and should be excluded on this basis alone.

[6]Although Dr. Wyatt initially testified that plaintiff may have re-aggravated his disc in the instant accident, he conceded on cross examination that it was not until his deposition that he found out that another physician had previously recommended that plaintiff undergo an L4-5 lumbar surgery as a result of prior accidents in 2008. Dr. Wyatt was further unaware that plaintiff had been involved in another automobile accident on June 18, 2010, only three days prior to the instant accident, after which he presented at a hospital emergency room with complaints of neck and back pain. Given these significant omissions by plaintiff in his medical history, Dr. Wyatt acknowledged that it was difficult to tell the jury exactly which accident caused plaintiff's back pain.

discrepancy in the plaintiff's testimony and that of the medical experts, it was the job of the jury as the trier of fact to decide the question of causation based upon its credibility evaluations. Thus, on the record before us, we cannot conclude that the verdict rendered by the jury was so tainted by the testimony of Dr. Bain as to warrant *de novo* review by this Court. See Menard v. Audubon Insurance Group, 2006-1192 (La. App. 3rd Cir. 3/14/07), 953 So. 2d 187, 191-192.

Moreover, with reference to Dr. Cliffe's testimony, although plaintiff argues that in addition to the trial court's failure to conduct the Daubert analysis, there is no factual basis for the amounts used by Dr. Cliffe in calculating plaintiff's loss of earning capacity, we note that even if we were to conclude the trial court erred in failing to conduct the proper Daubert analysis, or that Dr. Cliffe's testimony was flawed because not based on facts in evidence, we would likewise be constrained to find the admission of same to be harmless error herein, given the jury's conclusion that the accident did not cause the injuries at issue, which precluded the jury from reaching the issue of damages.

Thus, considering the record as a whole and all of the evidence presented to the jury, we find no showing of prejudicial error from any abuse of the trial court's discretion in allowing these experts to testify.

Accordingly, we find no merit to these assignments of error.

EVIDENCE OF MISDEMEANOR CHARGES TO ATTACK CREDIBILITY[7]
(Assignment of Errors Numbers Three and Four)

Plaintiff contends that the trial court erred in allowing the defendants to introduce evidence of two pleas of "no contest" by Clarzeal Foster to certain misdemeanor charges to impeach his testimony.

At trial, plaintiff called his brother, Clarzeal Foster, as a witness to testify as to the damage sustained by plaintiff's vehicle as a result of the instant accident, specifically to contradict the testimony of Dr. Bain, concerning his appraisal of the condition of the car and areas of damage in rendering his ultimate opinion on causation. Clarzeal testified that he had driven plaintiff's car and that it had been repaired since the subject accident herein. On cross-examination, the defendants attacked Clarzeal's credibility by attempting to impeach his trial testimony with his prior deposition testimony, wherein he denied having any criminal convictions. Although he denied in the deposition that he had ever pled guilty or no contest to a crime, Clarzeal admitted on cross examination at trial that he had, in fact, previously pled "no contest" to the charges of "theft of goods" and "simple battery." When questioned about the conflicting answers, Clarzeal explained that he thought he was only required to reveal prior felonies at the time of his deposition testimony.."

At the outset, we note that deposition testimony is generally allowed to impeach a witness with a prior inconsistent statement. LSA-C.C.P. art. 1450(A)(1). Moreover, other extrinsic evidence, including prior inconsistent statements and evidence contradicting the witness' testimony, is admissible when offered solely to attack the credibility of a witness unless the court determines that the probative value of the evidence on the issue of credibility is

[7]To the extent plaintiff's brief states that the trial court erred in granting the defendants' alleged reverse-Batson/Edmonson challenge to plaintiff's peremptory challenge of a prospective juror, we note that plaintiff failed to assign error to same in this appeal. Nonetheless, we find no record support for these statements.

substantially outweighed by the risks of undue consumption of time, confusion of the issues, or unfair prejudice. LSA-C.E. art. 607(D)(2).

To the extent that plaintiff contends that evidence of these crimes was inadmissible under LSA-C.E. art. 609,[8] in that neither of the two crimes pled to by Clarzeal are crimes of "dishonesty or false statement," we note that article 609 is not applicable in the present case, given the purpose for which the evidence of Clarzeal's pleas was offered. Clarzeal was not questioned about his prior convictions for the purpose of using the convictions, but, instead, to demonstrate that he had, in fact, given a prior inconsistent statement when he previously denied having pled guilty or no contest to a crime. Cf. Busby v. St. Paul Insurance Company, 95-2128 (La. App. 1st Cir. 5/10/96), 673 So. 2d 320, 327, writ denied, 96-1519 (La. 9/20/96), 679 So. 2d 443.

Plaintiff next argues that Clarzeal's subsequent admission of the prior inconsistent statement rendered the evidence inadmissible under LSA-C.E. art. 613.[9] We disagree. In Williams v. United Fire and Casualty Company, 594 So. 2d 455, 462 (La. App. 1st Cir. 1991), the plaintiff denied any prior criminal

---

[8]Louisiana Code of Evidence article 609, entitled, "[a]ttacking credibility by evidence of conviction of crime in civil cases," provides, in part, as follows:

> **A. General civil rule.** For the purpose of attacking the credibility of a witness in civil cases, no evidence of the details of the crime of which he was convicted is admissible. However, evidence of the name of the crime of which he was convicted and the date of conviction is admissible if the crime:
> (1) Was punishable by death or imprisonment in excess of six months under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to a party; or
> (2) Involved dishonesty or false statement, regardless of the punishment.

[9]Louisiana Code of Evidence art. 613 provides that:

> Except as the interests of justice otherwise require, extrinsic evidence of bias, interest, or corruption, prior inconsistent statements, conviction of crime, or defects of capacity is admissible after the proponent has first fairly directed the witness' attention to the statement, act, or matter alleged, and the witness has been given the opportunity to admit the fact and has failed distinctly to do so.

convictions at his deposition, when plaintiff had actually been convicted of a misdemeanor marijuana possession charge and a misdemeanor improper telephone communications charge. The trial court ruled that evidence of plaintiff's false deposition statements was admissible as evidence of character and credibility. Williams v. United Fire and Casualty Company, 594 So. 2d at 462-463. On review, this Court affirmed, noting "plaintiff's denial of the two misdemeanor convictions under oath at his deposition and his conflicting statement at trial clearly reflect the plaintiff's credibility." Williams v. United Fire and Casualty Company, 594 So. 2d at 462. As this Court noted therein:

> Although at trial the plaintiff truthfully admitted his misdemeanor convictions, "[t]he theory of attack by prior inconsistent statements is not based on the assumption that the present testimony is false and the former statement true but rather upon the notion that talking one way on the stand and another way previously is blowing hot and cold, and raises a doubt as to the truthfulness of both statements." C. McCormick, McCormick on Evidence § 34 at 74 (3rd ed. 1984). The evidence of plaintiff's statements concerning possession of marijuana and improper telephone communications convictions was used to show that the plaintiff made prior inconsistent statements and that the statement made at the deposition was false. Therefore, evidence of the plaintiff's statements concerning the misdemeanor convictions that occurred prior to the deposition and were denied by plaintiff in the deposition were clearly admissible under LSA-C.E. art. 607 D(2).

Williams v. United Fire and Casualty Company, 594 So. 2d at 462-463.

Accordingly, we agree with defendants that pursuant to the above statutes and jurisprudence, the eliciting of evidence of Clarzeal's plea agreements was properly allowed by the trial court to impeach Clarzeal's testimony with his inconsistent statement.

Plaintiff next contends that he was prejudiced when testimony of plaintiff's prior pleas of "no contest" to marijuana possession charges was discussed in the testimony of vocational rehabilitation counselor, Nancy Favoloro, despite the trial court's prior ruling on a motion in limine that such evidence would not be allowed.

During the examination of Ms. Favaloro by defense counsel, the following exchange occurred:

> Q. You reviewed Ms. Chalfin's[[10]] report in this case I think you said?
>
> A. Yes, sir.
>
> Q. Did you see where she commented that Mr. Foster had been terminated from some jobs for illegal drug use?
>
> A. Yes.
>
> Q. Can that affect future employability?
>
> A. It can.
>
> Q. What was the specific drug that she commented on in her report?
>
> A. I don't know if she named the drug in that report.
>
> Q. I think it was marijuana, if you remember?
>
> A. Yeah. Well, he pled guilty to possession. But, yes. People - - she just said positive drug screen in 2007, that he was let go to noncompliance with that policy.
>
> Q. And do employers go back and look at that kind of stuff in terms of whether or not they're going to employ someone in the future?
>
> A. Some do.
>
> Q. Okay. And are employers free to refuse to employ someone if they have that on their record?
>
> A. They are.
>
> Q. There's no disability act or anything that precludes someone from not hiring someone if they tested positive for drugs; is that correct?
>
> A. For that or other reasons.

We first note that counsel for plaintiff failed to timely object to this line of questioning during defense counsel's direct examination. However, upon the

[10]Stephanie Chalfin was plaintiff's vocational rehabilitation expert.

tender of the witness by the defense at the conclusion of direct examination, a sidebar conference was held by the trial court, wherein the plaintiff requested that a mistrial be granted. The defense argued that the trial court's order on the motion in limine was that the conviction itself was not admissible and that Ms. Favaloro's admission was not solicited, in that she was merely commenting on information that was provided in the plaintiff's expert's report. The trial court denied plaintiff's motion for mistrial, and admonished the jury, as follows: "I will caution the jury and advise the jury to disregard any evidence that was presented relative to marijuana."

Considering the cautionary instructions issued by the trial court herein, we find any error that occurred as a result of the comments of Ms. Favaloro to be harmless.

These assignments lack merit.

EVIDENCE OF FUTURE MEDICAL EXPENSES
(Assignment of Error Number Five)

Plaintiff contends that the trial court erred in refusing to allow the introduction of evidence of plaintiff's future medical expenses through the testimony of plaintiff's orthopedic surgeon, Dr. David Wyatt.

Defendants counter that they were only presented with estimates of future surgical expenses from plaintiff at the "eleventh hour," on Sunday, the day before trial commenced on Monday. As such, defendants contend that the admission of such evidence would have been extremely prejudicial and would deprive them the opportunity to respond to or explore this evidence through discovery. Defendants note that in his deposition, Dr. Wyatt had testified that the only way he would perform a second surgery on plaintiff was if plaintiff went to physical therapy, and that there was absolutely no evidence that plaintiff had attended physical therapy in the interim. Thus, defendants

contend, the exclusion of evidence was proper as there was no certainty that a future surgery would even be recommended.

A trial court has great discretion in conducting a trial and in determining the admissibility of testimony and evidence. Palace Properties, L.L.C. v. Sizeler Hammond Square Limited Partnership, 2001-2812 (La. App. 1st Cir. 12/30/02), 839 So. 2d 82, 91, writ denied, 2003-0306 (La. 4/4/03), 840 So. 2d 1219. Moreover, an award of future medical expenses is justified where there is medical testimony that such are indicated and where the medical evidence establishes that plaintiff, more probable than not, will be required to incur such expenses. Muller v. Colony Insurance Company, 2010-0688 (La. App. 1st Cir. 12/9/10), 57 So. 3d 341, 353, writ denied, 2011-0092 (La. 2/25/11), 58 So. 3d 459.

Considering the tardiness of plaintiff's production of this evidence alone, we find no abuse of the trial court's great discretion in excluding the introduction of plaintiff's future surgery estimates at trial.

We likewise find no merit to this assignment of error.

CONCLUSION

For the above and foregoing reasons, the September 19, 2011 judgment of the trial court, rendered in conformity with the jury's verdict, is hereby affirmed. Costs of this appeal are assessed to the plaintiff/appellant, Alex Foster.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 1218

ALEX FOSTER

VERSUS

FERMIN MOLINA ROSAS, PRESTIGE ONE LANDSCAPE AND FARMERS INSURANCE EXCHANGE

****

McCLENDON, J., concurs and assigns reasons.

Even if I were to find that legal error interdicted the fact finding process thus applying a *de novo* standard of review, I would reach the same result as that reached by the majority. Accordingly, I concur with the majority's opinion.