NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0607

FRED BANKS

VERSUS

FIRST GUARANTY BANK OF HAMMOND AND FIRST GUARANTY BANCSHARE, INC.

Judgment Rendered: FEB 25 2014

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Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Case No. 2006-2700

The Honorable Elizabeth P. Wolfe, Judge Presiding

* * * * * * * *

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* * * * * * * *

BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

THERIOT, J.

The defendant-appellant, First Guaranty Bank of Hammond,[1] (FGB), seeks reversal of the judgment based on a jury verdict and rulings by the trial court rendered in the Twenty-First Judicial District Court (21st JDC) in favor of the plaintiff-appellee, Fred Banks. For the following reasons, we affirm in part, reverse in part, remand, and render.

FACTS AND PROCEDURAL HISTORY

Mr. Banks was employed as a courier by Downtown Delivery, L.L.C., which had contracted with FGB to provide courier services. While on duty on September 1, 2005, he was involved in a car accident on I-55 and sustained physical injuries. On the morning of the accident, Mr. Banks was present at FGB's Kentwood, Louisiana branch to make a pickup. At that time, the city of Kentwood was without power due to the recent passing of Hurricane Katrina, and a generator was running inside the branch so that FGB could conduct business.

Hours later, while driving north on I-55, Mr. Banks alleges to have lost consciousness, causing him to lose control of his vehicle and collide with another vehicle, causing injury to his back, neck, and extremities. Mr. Banks claims his loss of consciousness is due to carbon monoxide poisoning that he sustained at FGB's Kentwood branch, where he inhaled exhaust fumes from the generator.

In addition to Mr. Banks's complaining of loss of consciousness on that day, several of the branch's employees made similar claims of headaches, nausea, and passing out. As a result of employee complaints, 911 was called and the fire department had the building evacuated. It is not

[1] In a consent judgment on exceptions, correction to party name and discovery, the name of First Guaranty Bank of Hammond was corrected to "First Guaranty Bank."

disputed that Mr. Banks entered the branch office on the day of the accident; however, the parties do dispute the amount of time he was in the branch office.

Mr. Banks sued FGB for creating an unreasonably hazardous condition at the Kentwood branch which caused him to lose consciousness and get into a car accident. Prior to the trial, the parties identified expert witnesses who would be called to testify on whether Mr. Banks's loss of consciousness was directly related to carbon monoxide poisoning from FGB's branch office. On December 30, 2010, FGB filed a motion to disqualify Mr. Banks's expert, toxicologist Dr. Patricia Williams. FGB's motion was denied by the court on January 18, 2011.

Trial by jury commenced on August 7, 2012. During voir dire, Mr. Banks raised a *Batson* challenge[2] against one of FGB's peremptory challenges, where FGB sought to exclude an African American juror after previously using peremptory challenges on the only two other African American jurors on the panel.[3] The court sustained the *Batson* challenge, and the juror was accepted.

Later, during the presentation of evidence, Juror No. 12 submitted a note to the court that he felt the need to disclose that he had specialized knowledge in the field of industrial hygiene. Counsel declined to question the juror further, and the presentation of evidence resumed. Then, at the close of the presentation of evidence and prior to closing argument, Juror No. 12 sent another note to the court, in which he stated he no longer felt he could be impartial in this case due to his specialized knowledge. After being directly examined by the court, Juror No. 12 was excused over FGB's

[2] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986).
[3] Mr. Banks is also African American.

objection. An alternate juror, who had also heard the entire presentation of evidence, replaced Juror No. 12.

Following deliberation, the jury rendered a verdict in favor of Mr. Banks in the amount of $375,072.47, itemized as follows:

Past medical expenses	$ 97,072.47
Future medical expenses	$ 7,000.00
Scarring and disfigurement	$ 1,000.00
Past and future loss of earnings	$ 70,000.00
Past physical pain and suffering	$ 75,000.00
Future pain and suffering	$ 75,000.00
Past mental anguish	$ 15,000.00
Future mental anguish	$ 10,000.00
Past loss of enjoyment	$ 10,000.00
Future loss of enjoyment	$ 10,000.00
Disability	$ 5,000.00

Costs were fixed at $8,825.00 and awarded to Mr. Banks. FGB timely filed a motion for new trial and in the alternative judgment notwithstanding the verdict, which the court denied. FGB timely filed this suspensive appeal.

ASSIGNMENTS OF ERROR

FGB cites twelve assignments of error by the trial court:

1. The trial court erroneously upheld Mr. Banks's *Batson* challenge of FGB's peremptory challenge.
2. The trial court erred in striking Juror No. 12.
3. The trial court erred in permitting the testimony of Dr. Patricia Williams.
4. The trial court erred in allowing testimony from Dr. Alan Manning concerning Mr. Banks's exposure to carbon monoxide.
5. The trial court erred in permitting testimony from Dr. Charles Genevose about back degeneration.
6. The trial court erred in preventing FGB from introducing evidence to contradict and impeach Mr. Banks's testimony.

7. The jury erred in finding causation.
8. The jury erred in its award of past physical pain and suffering and future physical pain and suffering.
9. The jury erred in its award of past and future loss of earnings.
10. The jury erred in awarding future medical expenses and disability.
11. The trial court's award of costs on the Motion to Disqualify was erroneous.
12. The trial court's award of costs following trial was erroneous.

DISCUSSION

Constitution of Jury

The issue of the *Batson* challenge is most often met in criminal cases, and *Batson* itself arises from the use of a peremptory challenge in a criminal voir dire to deny the defendant equal protection by purposefully excluding members of his race from the jury. *Batson,* 476 U.S. at 84-5. The protections afforded the criminally accused in *Batson* are equally applicable to parties in civil suits. See *Alex v. Rayne Concrete Service,* 2005-1457, 2005-2344, 2005-2520 p. 8 (La. 1/26/07), 951 So.2d 138, 146; *Lee v. Magnolia Garden Apartments,* 96-1328, p. 5 (La. App. 1 Cir. 5/9/97), 694 So.2d 1142, 1146, writ denied, 97-1544 (La. 9/26/97), 701 So.2d 990.

Alex adopts *Batson's* three-step inquiry in analyzing whether a prospective juror has been excluded due to race. First, the trial court must determine whether the party raising the challenge has made a prima facie showing that the opposing party is utilizing a peremptory challenge to exclude potential jurors on the basis of race. Second, if the showing is made, the burden shifts to the opposing party to present a race-neutral explanation for striking the juror in question. Although the opposing party

must present a comprehensive reason, the second step of this process does not demand an explanation that is persuasive, or even plausible, so long as the reason is not inherently discriminatory. Third, the court must then determine whether the party raising the challenge has carried his burden of proving purposeful discrimination. *Alex,* 951 So.2d at 150-51. The ultimate burden of persuasion regarding racial motivation lies with the party raising the challenge. *Id.,* at 151.

Alex presents a very similar pattern of facts to the instant case. In *Alex,* the plaintiff brought suit against the defendant, alleging he suffered injuries due to negligence. *Id.,* at 142. During the jury selection, four African American jurors were selected as part of the initial voir dire panel. *Id.,* at 147. After successfully challenging one of these potential black jurors for cause, the defendant used three of its peremptory challenges to exclude all the other black jurors. *Id.* The plaintiff raised a *Batson* challenge after the attempted exclusion of the last black juror, but the trial court accepted the defendant's race-neutral explanation that counsel had a "gut feeling" about the juror, asserting that the juror in question didn't give "good vibes." *Id.,* at 147-48. On appeal, the Louisiana Supreme Court determined that counsel's "gut feeling" about a juror was insufficient to meet the standards set by *Batson,* noting such instinctive generalizations could actually be thinly-veiled racial prejudice. *Id.,* at 152-53.

In the instant case, the initial voir dire panel included three African American potential jurors. FGB exercised two peremptory challenges on the first two black potential jurors and sought to use its third peremptory challenge to exclude the final African American on the panel. In explaining its peremptory challenge, FGB stated it sought to exclude the potential juror because he "[s]eemed reluctant to talk and generally not communicate [sic]."

Mr. Banks raised a *Batson* challenge, to which FGB countered that it was not systematically or purposefully excluding jurors based upon race. FGB explained it was concerned with the juror's attitude, specifically noting that he was "generally not engaged" and was "reluctant to be here," expressing concern that the juror would therefore not fairly and adequately listen to the evidence and weigh the opinions of the experts.

The trial court determined there was a prima facie showing of systematic, purposeful racial exclusion, noting it appeared facially discriminatory for the only three black jurors to be peremptorily excluded. The court then considered FGB's race-neutral explanation in light of the circumstances.[4] The court then assessed the weight and credibility of that explanation in order to determine whether Mr. Banks had carried his burden of proving purposeful discrimination. See *Lee v. Magnolia Garden Apartments,* 694 So.2d at 1147. The record indicates the court questioned whether "just because [the juror] didn't talk very much" was a "good enough reason" to have him excluded, and although the court explained it "didn't agree or disagree" whether the potential juror wasn't engaged, it ultimately upheld the plaintiff's *Batson* challenge and accepted the juror in question, concluding FGB's race-neutral explanation was insufficient to meet the standards set out in *Batson* to overcome the inference of systematic, purposeful racial exclusion.

We agree with the trial court's conclusion. Although the court did not communicate exactly why it rejected FGB's proffered race-neutral explanation, the record provides sufficient support. The juror in question was twenty-one years old, not married, and without children. The court

[4] The United States Supreme Court has held that all circumstances relevant to racial animosity must be considered in a *Batson* challenge and/or when reviewing a *Batson* decision allegedly made in error. *Snyder v. Louisiana,* 552 U.S. 472, 478, 128 S.Ct. 1203, 1208 (2008).

supposed the juror had limited life experience, which could be a reason for his unwillingness to talk about the case's complicated topic. Another reason from the record as to why the juror remained generally silent is that FGB did not ask him any questions. We find that to say the juror is "not engaged," when not a single question is asked of him amounts to the same "gut feeling" that is insufficient to overcome a *Batson* challenge. We cannot overturn a ruling on a *Batson* challenge unless it is manifestly erroneous, and we do not find any manifest error in the trial court's decision. See *Snyder v. Louisiana,* 552 U.S. 472, 477, 128 S.Ct. 1203, 1208 (2008). This assignment of error is without merit.

In its next assignment of error, FGB alleges that the trial court improperly excused Juror No. 12 after all of the evidence had been submitted, thereby depriving FGB of a fair and impartial jury. Mr. Banks argues that FGB did not have an absolute right to a jury of the twelve originally selected jurors and contends the trial court acted appropriately in excusing Juror No. 12.

The record reflects that prior to the introduction of evidence, Juror No. 12, in an effort to disclose his specialized knowledge of subject matter involved in the case, first notified the court of his experience in industrial hygiene. Following this initial notification, the parties waived questioning the juror. Following the introduction of evidence but before closing arguments were made, Juror No. 12 again sent notice to the trial judge expressing concern as to his impartiality. The juror stated to the court, "Judge, my problem is that I am trying to be impartial. But in my line of work, I deal with these issues every day. With my education, I feel I may know a little more than the others, and this may sway my decision more to one side." The trial court then asked the juror, outside the presence of the

jury, whether he would "be able to put all that [expertise] aside and be impartial and give each side a fair verdict[.]" The juror responded, "I can't say that I could because, like I said, it's just hard knowing the facts that I know and my education... [I]t's hard for me to look past certain facts." FGB objected to Juror No. 12's removal, noting he was not asked whether he would follow the instructions of the court, and that each individual juror should consider his experiences, backgrounds, and common sense, and in the later stages of the trial, jurors are in fact supposed to have opinions formed. The trial court excused Juror No. 12, and an alternate juror took his place.

Although the entire jury may have been accepted and sworn, *up to the beginning of the taking of evidence,* a juror may be challenged for cause by either side or be excused by the court for cause or by the consent of both sides, and the panel completed in the ordinary course. La. C. C. P. art 1767 (emphasis added). Juror No. 12 had been accepted and sworn and was not excused by the court until after the presentation of evidence was concluded. The reason the court gave for excusing the juror was that he believed he could not be impartial in rendering a verdict. He did not state, and the court did not determine, that he was not qualified or competent to sit as a juror in the case.[5] Based on La. C. C. P. art. 1767, it was inappropriate for the trial court to excuse the juror after the taking of evidence had begun.

Despite the trial court's error in excusing Juror No. 12, we find it to be harmless error since an alternate juror was immediately put in his place. The record reflects that the alternate was present for the entirety of the presentation of evidence and therefore would have had knowledge of the case sufficient enough to aid in rendering a verdict. This Court has

[5] See *State v. Davis,* 637 So.2d 1012, unpublished appendix (La. 1994), cert. denied, 513 U.S. 975, 115 S.Ct. 450, 130 L.Ed.2d 359 (1994), which defines juror incompetency as "death, illness, or any other cause which renders a juror unfit to perform her duty as prescribed."

previously considered a trial court's broad discretionary power to control trial proceedings. See *Cavalier v. State, ex rel. Dept. of Transp. and Development,* 2008-0561, 2008-0562, p. 12 (La. App. 1 Cir. 9/12/08), 994 So.2d 635, 643-44. In *Cavalier,* this Court held that a trial court did not abuse its discretion by excusing two jurors during the course of a trial, replacing the first with the sole alternate, and continuing with only eleven jurors after dismissing the second. *Id.,* at 643. If we find that proceeding with eleven jurors in a trial is permissible, we also find that proceeding with twelve, where one of the jurors was an alternate, is permissible. There is also no merit in the contention that the dismissed juror might have "possibly persuaded other jurors to reach a different verdict." *Id.*

Expert Testimony

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. 1 Cir. 11/2/07), 979 So.2d 500, 503. 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. *McLean v. Hunter,* 495 So.2d 1298, 1304 (La. 1986).

In assignments of error 3 through 5, FGB avers that the trial court erred in allowing the expert testimony of Dr. Patricia Williams, Dr. Alan Manning, and Dr. Charles Genevose, respectively, concerning various issues of the case. Each of these witnesses would be qualified to testify in their respective fields if they passed the analysis found in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). Trial judges have great discretion in determining the qualifications of experts and the effect and weight to be given expert testimony.

Moreover, trial judges are generally given wide discretion in determining whether a question or subject falls within the scope of an expert witness's field of expertise. Absent a clear abuse of the trial court's discretion in accepting a witness as an expert, appellate courts will not reject the testimony of an expert or find reversible error. *Belle Pass Terminal, Inc. v. Jolin, Inc.,* 634 So.2d 466, 477 (La. App. 1 Cir. 1994), writ denied, 638 So.2d 1094 (La. 1994).

FGB contends, that since Dr. Williams is a toxicologist and not a medical doctor, she is not qualified to make a diagnosis of Mr. Banks as to whether carbon monoxide poisoning caused his loss of consciousness. While this is true, if Dr. Williams was properly qualified in the field of toxicology, the trial court was within its discretion to allow Dr. Williams to give testimony concerning the effects of carbon monoxide inhalation on the human body. With that established, the jury could then reasonably draw a causal connection between the effects of carbon monoxide poisoning and Mr. Banks's loss of consciousness.

Under *Daubert,* a trial court must determine whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. *Daubert,* at 592. Dr. Williams provided to the court a 30-page curriculum vitae, regarding her education and training, professional experience, teaching experience, numerous publications, and other professional contributions, all related to toxicology and its subfields. Based on her extensive knowledge in toxicology, she compared the causes and symptoms of carbon monoxide poisoning to Mr. Banks's loss of consciousness and the events that preceded it. Her conclusion was that Mr. Banks suffered from acute carbon monoxide poisoning. We find that her testimony assisted the jury in understanding

carbon monoxide poisoning and its application to Mr. Banks's circumstances, and that she did not go beyond her field of expertise and make a diagnosis of Mr. Banks, as would a medical doctor.

FGB also contends that its expert witness, a medical doctor, was qualified to make a diagnosis and therefore more qualified and credible as an expert in this case. Regardless of FGB's evaluation or this court's own evaluation of the expert testimony admitted in this case, the jury's finding of fact may not be set aside simply because there is a conflict in testimony and the jury made a reasonable evaluation of credibility between the two witnesses. See *Rosell v. ESCO,* 549 So.2d 840, 845 (La. 1989). We find that Dr. Williams's testimony was properly admitted by the court, and that the jury's determination on its credibility cannot be disturbed on appeal. This assignment of error is without merit.

In its next assignment of error, FGB contends that the portion of Dr. Manning's testimony regarding carbon monoxide poisoning should have been excluded since he was not qualified to testify on the issue. Dr. Manning, a medical doctor, had physically examined Mr. Banks following the automobile accident. Dr. Manning testified that Mr. Banks brought to his attention the possibility of carbon monoxide inhalation playing a role in his loss of consciousness. Dr. Manning then admitted that he didn't have "a lot of experience" with carbon monoxide poisoning, and could not say with certainty that carbon monoxide poisoning resulted in Mr. Banks's loss of consciousness.

FGB claims Dr. Manning gave opinions for which he was not qualified, but the record shows that Dr. Manning made clear that he had neither knowledge nor experience with carbon monoxide poisoning, and he did not diagnose Mr. Banks with carbon monoxide poisoning or state that it

was the direct cause of Mr. Banks's loss of consciousness. Rather, Dr. Manning explored other possibilities for Mr. Banks's loss of consciousness, such as Mr. Banks's history of having a stroke and administering a CT scan.

Dr. Manning's testimony on carbon monoxide poisoning is brief and without detail, and we do not find that it goes beyond the scope of his medical expertise such that it should have been excluded. This assignment of error is without merit.

FGB's fifth assignment of error concerns the expert testimony of Dr. Genevose and the causal relationship between Mr. Banks's car accident and his degenerative disk disease. Similar to the assignment of error concerning Dr. Manning, FGB claims that the court erred when it did not exclude a certain portion of the testimony.

Dr. Genevose testified he had an MRI taken of Mr. Banks approximately two years after the car accident. While he testified that he located degenerative disk disease in several places on Mr. Banks's spine, he also testified that he could not conclude whether the disease resulted from trauma received from the accident or whether the disease existed prior to the accident. He stated that he was never given any history of Mr. Banks having degenerative disk disease prior to the car accident, but he did not make the assumption that the lack of history meant that Mr. Banks was asymptomatic prior to the accident.

Counsel for Mr. Banks asked Dr. Genevose to briefly assume that Mr. Banks never had any complaint of back or neck pain prior to the accident:

> Q. For the purpose of this next question, I'd ask you to hypothetically assume that there wasn't any significant pre-existing complaints of back or neck pain of any kind of remotely close to the accident that happened in 2007 [sic], and if after this accident he reports having back and neck complaints really up to the present date, would that be consistent with an aggravation of his spine?

> A. Absolutely. And one other thing, without having MRIs before this accident... the changes that he has in this MRI that is two years later, these are chronic changes; but that could have developed in that two-year period.
>
> In other words, if we had had one [MRI] the day before the wreck, they might not have been nearly as severe as they are here; although, this is not that unusual for his age.
>
> I can't say what it would have been like, but it might have been much, much less than is visible here. I'm only speculating, but it could very well be that.

FGB pinpoints this part of Dr. Genevose's testimony as the reason why the section concerning degenerative disk disease should be excluded. However, Dr. Genevose was answering a question that called for speculation, to which counsel for FGB did not raise any objection as to its form. The question has no bearing on the rest of Dr. Genevose's testimony, which clearly shows that he could not make a direct link between the car accident and Mr. Banks's degenerative disk disease due to other intervening factors. We find the trial court was correct in denying FGB's motion to strike this portion of Dr. Genevose's testimony. This assignment of error has no merit.

Causation

At the core of this controversy is Mr. Banks's allegation that he entered FGB's Kentwood branch, where carbon monoxide was present in the air, and after leaving the branch, passed out while driving due to carbon monoxide poisoning. At trial, Mr. Banks testified he entered the branch at approximately 11:40 a.m. and waited in the "middle" of the building for his pickup, which was not ready because, as a Bank employee informed him, FGB employees were "sick." Since the door locked behind him, he was unable to leave the building until a Bank employee let him out. Mr. Banks testified that he remained at the branch office until about 2:30 p.m. He was

not let out of the building until the fire department arrived and had the building evacuated. The car accident occurred in Hammond at 5:25 p.m.

In FGB's sixth assignment of error, it contends that the trial court erred by not allowing FGB to introduce Mr. Banks's deposition to impeach his testimony. FGB claims that Mr. Banks testified differently in his deposition by stating he was at the Kentwood branch for a much shorter period of time. FGB proffered one page from that deposition to demonstrate the difference in Mr. Banks's account of his visit to the Kentwood branch:

> Q. So after [the FGB employee] opened the door and you saw her faint, what did you do after that?
> A. I stood right where I was, and I kept looking out the bank. And then that is when the fire—I didn't know what was going on, sir.
> Q. You stood outside after that?
> A. I stood right in the bank all of that time. I never went outside.
> Q. Did you go into the door that she had opened up when you initially got there?
> A. The front door, that is the only door she opened.
> Q. You got—
> A. That is when I went in.
> Q. You went inside the bank?
> A. Yes, sir.
> Q. Did you see a generator when you got to the bank?
> A. Yes, sir, all the way to the back of the bank.

This proffered excerpt of the deposition gives no indication of the length of time Mr. Banks stayed inside the branch office. It merely indicates that Mr. Banks entered the building and waited inside for an undisclosed period of time. On re-direct examination, Mr. Banks testified that later in his deposition, he explained that he had been inside the Kentwood branch for at least an hour or an hour and a half. We find the proffer to be consistent with Mr. Banks's live testimony insomuch as his actions are the same in both accounts. The live testimony is a more detailed account of the deposition testimony.

Any or all of a witness's deposition may be used to contradict or impeach his live testimony. La. C. C. P. art. 1450 (A)(1). The credibility of a witness may be attacked with extrinsic evidence unless the court determines that the probative value of the evidence on the issue of credibility is substantially outweighed by the risks of undue consumption of time, confusion of issues, or unfair prejudice. La. C. E. art. 607(D)(2). A party is entitled to introduce evidence which tends to show that a witness's testimony has changed over time. See *Olivier v. LeJeune,* 95-0053 (La. 2/28/96), 668 So.2d 347, 350.

Since the proffered deposition testimony of Mr. Banks is not contradictive or substantively different from his live testimony, the trial court did not abuse its discretion in refusing to admit it as impeachment evidence. This assignment of error is without merit.

As to FGB's seventh assignment of error, we find that the jury was reasonable in finding a causative link between FGB's actions and Mr. Banks's injuries. It is established in the record that a generator was running inside the Kentwood branch when Mr. Banks entered the building. Several Bank employees were already getting sick and passing out when Mr. Banks arrived, and the fire department had to be called to evacuate the building. Later, while driving, Mr. Banks lost consciousness and was injured in a car accident. Expert testimony introduced by Mr. Banks showed that exposure to carbon monoxide can result in a loss of consciousness. Mr. Banks's injuries were caused by his loss of consciousness.

In a negligence case such as this, the plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant and the risk of harm was within the scope of protection afforded

by the duty breached. *Daye v. General Motors Corp.*, 97-1653 (La. 9/9/98), 720 So.2d 654, 659. We are responsible for the damage occasioned by the things we have in our own custody. La. C. C. art. 2317. FGB therefore had a duty not to make ill those people who were invited upon its premises, such as Mr. Banks. That duty was breached when Mr. Banks contracted carbon monoxide poisoning, and it was reasonable for the jury to conclude that Mr. Banks's injuries were a result of FGB's negligence. This assignment of error is without merit.

Award of Damages

Much discretion is left to the fact finder in awarding damages in tort cases. See La. C.C. art. 2324.1. In determining whether a trial court has abused its discretion and made an excessive award of general damages, emphasis is on an analysis of the individual facts and circumstances of the present case. *McCarroll v. Asplundh Tree Expert Co.*, 427 So.2d 881, 883 (La. App. 1 Cir. 1982), writ denied, 432 So.2d 268 (La. 1983). Upon appellate review, damage awards will be disturbed only when there has been a clear abuse of discretion. *Scott v. Pyles,* 99-1775, p. 13 (La. App. 1 Cir. 10/25/00), 770 So.2d 492, 501-02, writ denied, 2000-3222 (La. 1/26/01), 782 So.2d 633. Reasonable persons frequently disagree about the measure of general damages in a particular case. *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. *King v. State Farm Ins. Co.*, 47,368, p. 9 (La. App. 2 Cir. 8/8/12), 104 So.3d 33, 40.

In its eighth assignment of error, FGB challenges the jury's award of $75,000.00 for past and future pain and suffering as unreasonable and an

abuse of discretion. Evidence of the severity of Mr. Banks's injuries from the car accident was introduced at trial. He underwent emergency surgery and was hospitalized for several days, then had to walk with a cane. Mr. Banks was approximately seventy-three years old at the time of the accident and had several health issues. He testified that he had never been "a hundred percent" since the accident. He testified he has trouble walking and can do no heavy lifting. He claimed the accident "messed [his] life up." This Court has previously upheld such awards for past and future physical pain and suffering when the plaintiff has sustained severe physical injuries. See *Bergeron v. Blake Drilling & Workover Co., Inc.*, 599 So.2d 827, 846 (La. App. 1 Cir. 1992), writs denied, 605 So.2d 1117, 1119; See also *Franklin v. AIG Cas. Co.*, ___ So.3d ___, 2012-1698, 2012-1699 (La. App. 1 Cir. 6/7/13) (unpublished opinion). We find this award for past and future pain and suffering to be within the discretion of the jury, and this assignment of error is without merit.

The jury awarded Mr. Banks $70,000.00 in past and future lost earnings, and FGB challenges this award in its ninth assignment of error. By his own testimony, Mr. Banks was out of work for two or three months due to the injury, and while out of work received $200.00 a week from his employer, which was a portion of his salary. He continued to work for Downtown Delivery until 2007, when he was no longer able to lift the bags he had to deliver. He then was hired by C.A.R.E., Inc. as a sitter for the sick and the elderly. He eventually resigned from C.A.R.E. when the job required the lifting of patients, which he could not do. His payroll history report shows he worked for C.A.R.E. until November of 2008. Mr. Banks was unemployed at the time of the trial.

Mr. Banks earned minimum wage of $7.50 an hour at both Downtown Delivery and C.A.R.E., and he continued to work for approximately three years following the accident. He claims to have missed only about three months of work following the accident, for which he received $200.00 per week. For an average forty-hour work week, Mr. Banks would have earned $300.00 per week. For three months of missed work, minus $200.00 per week for what Mr. Banks earned during that time, Mr. Banks had $1,200.00 in lost wages. Although his injuries in the accident may have contributed to his current unemployment, Mr. Banks is an elderly man and has health problems unrelated to the car accident.

As for special damages such as lost wages that have a "ready market value," the amount of damages theoretically may be determined with relative certainty. *Guillory v. Lee*, 2009-0075, p. 16 (La. 6/26/09), 16 So.3d 1104, 1117-18. The trial court has broad discretion in assessing awards for lost wages, but there must be a factual basis in the record for the award. See *Brown v. City of Madisonville*, 2007-2104, p. 17 (La. App. 1 Cir. 11/24/08), 5 So.3d 874, 887, writ denied, 2008-2987 (La. 2/20/09), 1 So.3d 498. An appellate court, in reviewing a jury's factual conclusions with regard to special damages, must satisfy a two-step process based on the record as a whole: there must be no reasonable factual basis for the trial court's conclusions, and the finding must be clearly wrong. *Guillory,* at 1118. We find the jury's award of $70,000.00 for Mr. Banks's past and future lost earnings to be grossly disproportionate to what the record shows as his earning capacity. Mr. Banks earned minimum wage at both Downtown Delivery and C.A.R.E., which totaled approximately $15,600.00 per year ($7.50/hour x 40 hours a week x 52 weeks). Since Mr. Banks continued to work for approximately three years after the accident, and since Mr. Banks

is currently eighty-one years old and has poor health for reasons unrelated to the accident, the record does not support that his current unemployment and future capacity for employment is completely due to his injuries from the accident. We find no reasonable factual basis existed for the jury's conclusion, which we find to be clearly wrong. However, we do find it reasonable to conclude that Mr. Banks's injuries from his accident may have shortened the remaining length of time for which he is employable in his earning capacity at the time he was employed with Downtown Delivery. We therefore reduce this award to a more reasonable sum of $16,800.00, which represents his past lost wages ($1,200.00) and one year of additional employment in which Mr. Banks could have worked at minimum wage following his employment at C.A.R.E. ($15,600.00).

As to FGB's tenth assignment of error, we find the court and the jury were reasonable in their awards and will not disturb them. The occurrence of future medical expenses is a speculative possibility. *Holliday v. United Services Auto. Ass'n,* 569 So.2d 143, 147 (La. 1990). Dr. Manning testified he would have future problems with his back and diaphragm, and predicted Mr. Banks would have future disability from those complications. In surgery, Dr. Manning discovered that Mr. Banks's spleen was severely damaged and removed it. Dr. Manning also testified the loss of his spleen would result in an impaired immune system, for which Mr. Banks would require medication. As the jury found the past medical expenses of Mr. Banks to total $97,072.47, we find the award of future medical expenses of $7,000.00 and the award for disability of $5,000.00 to be reasonably based on evidence and facts presented before the court and the jury. See *Holliday* at 147. An appellate court does not have the authority to impose another reasonable conclusion when the trier of fact had reached its own reasonable

conclusion based on the same facts. See *Johnson v. Morehouse General Hosp.,* 2010-0387, 2010-0387, pp. 11-12 (La. 5/10/11), 63 So.3d 87, 96. This assignment of error is without merit.

As to the final two assignments of error, we find the court's award of costs to Mr. Banks to be reasonable, except for expert witness fees awarded with respect to Dr. Williams. A reviewing court should not set aside an award of special damages unless an analysis of the facts and circumstances reveals an abuse of discretion in setting the award. *Rochel v. Terrebonne Parish School Bd.,* 93-0383 (La. App. 1 Cir. 5/20/94), 637 So.2d 753, 757-58, writ denied, 94-1613 (La. 10/7/94), 644 So.2d 633. Experts are only entitled to reasonable fees and related costs. Neither the agreement between the hiring party and the expert, nor the bill submitted to the court, binds the court's decision. *Wingfield v. State ex rel. Dept. of Transp. and Development,* 2003-1740, 2003-1741, p. 6 (La. App. 1 Cir. 5/14/04), 879 So.2d 766. In *Wingfield,* this Court remanded the matter for the trial court to allow stipulations or have an evidentiary hearing to determine expert witness fees for pretrial preparation. *Id.,* at 771-72. An itemized invoice was submitted as an exhibit to the trial court to set expert witness fees for Dr. Williams. That invoice totaled $6,870.00, and that is the exact amount the court awarded to Mr. Banks. No transcript of the hearing to set expert witness fees is included in the record. Therefore, it appears that the trial court awarded fees based on the invoice and nothing else. It is impossible to determine from the record if the submitted invoice is correct or accurate without any corroborating testimony from Dr. Williams or questioning of Dr. Williams to explain and verify her preparation for the trial.

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. However, for work done or expenses incurred outside the courtroom, such as time spent gathering facts in preparation for trial testimony and time spent away from regular duties, the plaintiff in rule must submit competent and admissible evidence. Unless the parties stipulate to the specifics and costs of the out-of-court work, the expert must testify at the trial, or a subsequent hearing on the rule to tax costs, and be subject to cross-examination. *Wampold v. Fisher,* 2001-0808, pp. 2-3 (La. App. 1 Cir. 6/26/02), 837 So.2d 638, 640. In *Wampold,* this Court remanded the matter for the trial court to set expert witness fees without taking of courtroom testimony based on the court's personal observation of the witness and other criteria. We do the same in the instant case, since it appears from the record that the trial court simply set Dr. Williams's fees according to the invoice submitted without any further investigation. The trial court must make its own determination of what it believes to be a reasonable fee based on its own knowledge and understanding of Dr. William's pretrial preparation and in-court appearance.

CONCLUSION

We find that the trial court was within its discretion to sustain the *Batson* challenge raised by Mr. Banks. While the court improperly excluded Juror No. 12 after the introduction of evidence, we find the exclusion to be harmless error. The court was not erroneous to admit the testimony of Drs. Williams, Manning, and Genevose into the record, and neither was it erroneous to exclude a portion of Mr. Banks's deposition for the purpose of impeaching his credibility. The jury's award for past and future lost wages was unreasonable and in need of modification, and the trial court must make a determination from its own observations rather than a single invoice to set

expert witness fees with respect to Dr. Williams. In all other respects, the award of damages and costs was reasonable.

DECREE

The jury's verdict and the court's rulings on motions and costs are affirmed, except for the jury's award for past and future lost wages and the court's award for expert witness fees with respect to Dr. Patricia Williams. Past and future lost wages is hereby modified from $70,000.00 to $16,800.00, changing the total award to Mr. Banks to $321,872.47. The award of expert witness fees with respect to Dr. Patricia Williams in the amount of $6,870.00 is vacated and remanded to the trial court pursuant to the above instructions. All costs of this appeal are assessed to the appellant, First Guaranty Bank of Hammond.

AFFIRMED IN PART, REVERSED IN PART, REMANDED, AND RENDERED.