NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 0430

DIANE JOHNSON

VERSUS

NEILL CORPORATION, PARIS PARKER SALONS AND/OR NEILL CORPORATION D/B/A PARIS PARKER SALONS; LARRY DONNIE ASHTON, JR.; AND ABC INSURANCE COMPANY

VGW by EJW

Judgment Rendered: DEC 23 2015

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C571267

Honorable Robert Downing, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND DRAKE, JJ.

JEW - dissents in part to written reasons assigned

WHIPPLE, C.J.

This matter is before us on appeal by both plaintiff, Diane Johnson a/k/a Maureen Jones,[1] and defendants, Neill Corporation and Larry Ashton, Jr., from a judgment on liability and damages rendered by the trial court in favor of plaintiff. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 11, 2007, Dr. Maureen Jones[2] received a Swedish massage at Paris Parker Salon in Baton Rouge. Larry Ashton, Jr., a massage therapist employed by Paris Parker Salon, performed Dr. Jones's massage. According to Dr. Jones, during the massage, Mr. Ashton was "rough and aggressive" and applied a significant amount of pressure and force during certain maneuvers, which initially caused her pain and discomfort. However by the following day, she experienced back pain that was sharp and "burning" into her back and radiating into her buttocks, right leg pain and numbness, and she noticed bruises on her thighs. Dr. Jones immediately sought medical treatment. An MRI revealed that she had sustained a rupture of her L4-L5 disc, resulting in Dr. Jones having to undergo a left L4-L5 discectomy for relief, after a course of attempted conservative treatment failed.

On October 2, 2008, Dr. Jones filed a petition for damages against Neill Corporation d/b/a Paris Parker Salons, Larry Donnie Ashton, Jr., and ABC

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[1]The caption of the instant case was filed under a fictitious name purportedly to protect the privacy of plaintiff, Maureen Jones, who is a practicing physician. Plaintiff's petition for damages, however, clearly sets forth that "Diane Johnson is actually Maureen Jones." The defendants' challenge to the use of this pseudonym in the case caption was specifically rejected by the trial court, and the trial court's ruling on the issue was not assigned as error in this appeal. Thus, we have used the case caption, as styled by the plaintiff and as captioned by the clerk of the trial court in preparing the appellate record. See Uniform Rules – Courts of Appeal, Rule 2-1.3(4).

[2]Dr. Jones specializes in internal medicine and practices at the Baton Rouge Clinic.

Insurance Company,[3] contending that the massage was negligently performed by Mr. Ashton and that he breached the reasonable standard of care causing Dr. Jones serious, permanent, and disabling injuries.

The matter proceeded to a bench trial on October 6, 7, 8, 9, and 16, 2014. At the conclusion of trial, the trial court rendered judgment in favor of Dr. Jones and against Neill Corporation, Paris Parker Salons, and/or Neill Corporation D/B/A Paris Parker Salons, and Larry Donnie Ashton, Jr., finding that Mr. Ashton had breached the applicable standard of care owed Dr. Jones, which resulted in her disc herniation. By written judgment signed December 15, 2014, Dr. Jones was awarded the following damages, in conformity with the trial court's rulings:

$250,000.00	Pain and suffering, mental anguish and distress (past, present and future)
$250,000.00	Loss of enjoyment of life (past, present and future)
$200,000.00	Permanent disability (past, present and future)
$27,550.00	Past lost wages
$107,811.00	Past medical expenses

The judgment further provided that Dr. Jones's claims for loss of earning capacity, past, present and future, and for future lost wages were denied. Finally, the trial court awarded Dr. Jones future medical expenses in the amount of $3,650.00 to cover the future cost of Aleve. Dr. Jones then filed the instant appeal from the judgment of the trial court, challenging the trial court's awards of damages. Specifically, she contends that the trial court abused its discretion and erred in: failing to award damages for loss of earning capacity, future loss of income, and future medical expenses, and in awarding general damages, which were excessively low.

The defendants also appealed, assigning the following as error:

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[3]Paris Parker Salon ultimately discovered it did not have insurance coverage for this event.

(1) The trial court erred by "presuming negligence" and applying the doctrine of *res ipsa loquitur*, albeit without expressly providing so;

(2) The trial court erred in finding that Dr. Jones met her burden of proving that Mr. Ashton breached or deviated from the standard of care as required in a negligence action;

(3) The trial court erred in awarding Dr. Jones past lost wages when she presented no evidence to support her claim other than her testimony, which they contend conflicted with the income information shown on her tax returns;

(4) The trial court erred by awarding Dr. Jones a sum for past medical expenses that included expenses for medical services rendered to her free of charge;

(5) The trial court abused its discretion in awarding Dr. Jones $700,000.00 in general damages for a mild disc herniation allegedly resulting from a Swedish massage; i.e., in awarding $250,000.00 for pain and suffering and $250,000.00 for loss of enjoyment of life where she only takes Aleve for pain; and awarding $200,000.00 for permanent disability after finding that the injury did not render Dr. Jones disabled.

DISCUSSION

Defendants' Assignment of Error Number One: *Res Ipsa Loquitur*

The defendants contend that the trial court erred in presuming negligence under the doctrine of *res ipsa loquitur*. The doctrine of *res ipsa loquitur* involves the simple matter of a plaintiff's using circumstantial evidence to meet the burden of proof by a preponderance of the evidence and merely assists the plaintiff in presenting a prima facie case. The doctrine only applies when direct evidence is not available. Linnear v. CenterPoint Energy Entex/Reliant Energy, 2006-3030

(La. 9/5/07), 966 So. 2d 36, 41-42, quoting Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So. 2d 654, 665 (La. 1989).

According to the defendants, the trial court made a statement in chambers referencing the doctrine, and thus, "presumed negligence" in rendering its ruling herein. However, "[s]tatements [made] in chambers form no part of a case, unless formally introduced into or made a part of the record." Mancuso v. Union Carbide Corporation, 99-1273 (La. App. 5th Cir. 4/25/00), 762 So. 2d 79, 82. Thus, any error founded on what allegedly was said by the parties or trial judge in chambers is not properly before this court and presents nothing for review. See Mancuso v. Union Carbide Corporation, 762 So. 2d at 82. In any event, we note that the record does not support the conclusion that this doctrine was applied by the trial court. The trial court's oral reasons for judgment make no mention of the doctrine. Instead, in its oral reasons for judgment, the trial court specifically referenced the duty-risk analysis applicable in negligence cases by explicitly finding that Mr. Ashton's conduct fell "below the standard of care."

Thus, we find no merit to this assignment of error.

Defendants' Assignment of Error Number Two:
Duty and Breach

In their second assignment of error, the defendants contend that the trial court erred in imposing liability where Dr. Jones failed to: (a) identify or define the specific standard of care to which massage therapists have a duty to conform their conduct to; or (b) explain how Mr. Ashton's conduct deviated from that standard.

Dr. Jones's claims in this case are based upon Mr. Ashton's alleged negligence. Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under general negligence principles. Lemann v. Essen Lane Daiquiris, Inc., 2005-1095 (La. 3/10/06), 923 So. 2d 627, 632-633. For

liability to attach under a duty-risk analysis, a plaintiff must prove: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant failed to conform his conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) actual damages (the damages element). Roberts v. Rudzis, 2013-0538 (La. App. 1st Cir. 5/28/14), 146 So. 3d 602, 608-609, writ denied, 2014-1369 (La. 10/3/14), 149 So. 3d 797. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. Bellanger v. Webre, 2010-0720 (La. App. 1st Cir. 5/6/11), 65 So. 3d 201, 207, writ denied, 2011-1171 (La. 9/16/11), 69 So. 3d 1149. Whether a duty is owed is a question of law; whether a defendant has breached a duty is a question of fact. Brewer v. J.B. Hunt Transport, Inc., 2009-1408 (La. 3/16/10), 35 So. 3d 230, 240.

Dr. Jones, who had only had one massage prior to the instant massage, testified that she recalled the events of the October 11, 2007 massage vividly. She testified in detail, noting that Mr. Ashton started to pinch, grip, and isolate the length of her sternocleidomastoid muscle in her neck, then took the side of his hand and applied a significant amount of pressure in a continuous downward stroking motion to the anterolateral part of her neck, and thereby caused the onset of pain. Dr. Jones testified that she told Mr. Ashton that his application of force was "too hard," and to be careful because she had a thyroid nodule in her neck. She testified that he then took his fingertip and placed it directly midline over the lower cervical spine in the soft tissue region, then with his fingertip, raised her head and cervical spine and suspended them, which caused her pain because there was a pinpoint pressure in the back of her neck at that time. She specifically

remembered that his application of such force was in the soft tissue between the bones, which was concerning to her. Dr. Jones testified that he then massaged her arms and legs with a significant amount of force, to the point where she noticed there was not really a release of pressure as he neared the muscle groups that were near the tendons, which caused her to have more pain. She further testified that as a result of the amount of force that was applied to her thighs, she had observable bruising the next day. Dr. Jones described this part of the massage as "painful and uncomfortable," even though not necessarily "excruciating" at this point.

Dr. Jones recalled that Mr. Ashton then took his hand and "drug it down" the front of her calf, across her ankle and over her foot. According to Dr. Jones, the closer he got to her toes, the more downward pressure he applied, which caused her to have ankle pain and to experience foot cramping from the way the ankle was being extended. At that point, she withdrew her leg from the painful position and told him his force was "too hard." Dr. Jones testified that next, while on her back, he pushed her leg to the side, causing it to fall at a nearly 45-degree angle, then took his elbow and forearm and placed it over the bottom of her foot and medial calf, which pinned the top and lateral part of her foot and lateral calf to the table. When pinned, the movement forced her hip to go down on one side, while causing the hip on the opposite side to come off the table. She testified that he then took his opposite hand and pushed her opposite leg away, which caused twisting in her spine and immediate pain in her back, leg, and hip. Dr. Jones testified that she did not say anything more to Mr. Ashton at that point because she had already told him twice during the massage that it was "too hard" and there was a problem, yet he did not respond to her requests. She stated he then massaged the upper part of her back and took his fingers and "dug them kind of deep and beneath" the medial border of her scapular, causing her pain.

Dr. Jones testified that Mr. Ashton, who she believed to weigh more than 240 pounds, leaned his body weight onto her back, applying a significant amount of force to her back with his forearm in a kind of continuous downward stroking motion and then also again with his elbows on her lower back. She stated that he then took his hand and placed it on her hip or iliac crest region on the side of her body and took the opposite hand and put it in the small of her back. Dr. Jones testified that with one hand, Mr. Ashton then pulled up on her body and with the other hand, he pushed down, causing her back pain. Next, he took his hand and placed it over her buttock region and pushed towards her feet firmly, which caused her back pain as well. Then, to each leg at separate times, he grabbed her ankle with one hand and raised it up high in the air, taking his other hand and applying a significant amount of continuous pressure down her leg, which caused back and leg pain. Dr. Jones testified that during the massage she felt a deep, aching pain in her neck, a sharp burning pain in her back, and a burning type of pain in her leg. The next day, Dr. Jones's condition had evolved into a sharp burning pain in her back radiating into her buttocks, along with right leg pain and numbness and bruising on her thighs. As a result, she immediately sought medical treatment.[4]

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[4] Dr. Jones initially sought medical treatment from her endocrinologist, Dr. Gary Field, reporting that she had had a "rough and aggressive" massage resulting in pain in her thyroid region and severe pain in her back.

On October 15, 2007, she saw neurologist, Dr. Brian Murphy. Dr. Jones reported to him that she had been subjected to a "very rough" massage, which she described as "[p]ulling, twisting, bending-type maneuvers performed on lower extremities" and which she felt strained her back. Dr. Jones reported that prior to the October 11, 2007 massage, she had had no history of low back pain. Dr. Jones described her pain as pain in her right lateral foot followed by numbness extending up her lateral shin area and stated that her low back pain had worsened with burning and spasms in her low back. Dr. Murphy recommended that she have an MRI, which she had that day. The MRI revealed a focal disc protrusion at L4-L5 with minimal contact of the L-5 nerve roots, which could be consistent with a lumbar radiculopathy. Dr. Murphy also recommended medication, physical therapy, epidural steroid injections, restricted activity, and that she stay off of work for two weeks. Dr. Murphy testified that an October 26, 2007 MRI of the sacrum and coccyx revealed soft tissue contusion or bruising and edema, which is swelling of the tissue underneath the skin. Dr. Murphy testified that this would have been caused by some sort of preceding event that resulted in trauma and that the only event he was aware of was her massage. Dr. Murphy testified that considering Dr. Jones was an otherwise healthy woman with no prior significant history of low back or lower extremity pain prior to the massage she received

Mr. Ashton's account of the massage differed significantly from Dr. Jones's account. Mr. Ashton denied using a significant amount of force and stated a massage therapist should never intend to cause pain. He further denied performing the maneuvers in the manner described by Dr. Jones, but acknowledged that if that had happened, it was not something he intended to happen, and it would have been improper. Mr. Ashton claimed that the pressure strokes he applied to Dr. Jones were only light to medium pressure. Mr. Ashton testified that Dr. Jones never told him that she was in pain, nor did he remember her ever asking him to reduce the pressure during the massage. However, Mr. Ashton conceded that if he did something in the massage that resulted in bruising to Dr. Jones, then the technique he had used was improper.

Dr. Jones also offered the testimony of massage therapy expert, Zoe Putnam. After reviewing the deposition testimony of Mr. Ashton and Dr. Jones, Ms. Putnam testified that if the massage were conducted in the particular manner described by Dr. Jones, it would have been below the standard of care. Ms. Putnam testified that if Mr. Ashton "gripped, isolated, and pinched" the length of Dr. Jones's sternocleidomastoid muscles in her neck as described by Dr. Jones, such a maneuver fell below the applicable standard of care. She explained that a massage therapist can legitimately work on that muscle, but it is one of the endangerment zones where an excess of caution must be exercised. Ms. Putnam further testified that if properly conducted, a Swedish massage should never cause the client pain or bruising. She testified that it is the responsibility of the massage therapist to ensure that the client is not injured and that the therapist should be communicating with the client during the massage, particularly if it is a new client.

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on October 11, 2007, it was his opinion that Dr. Jones's back pain, lower extremity pain, and ongoing pain issues were a direct result of the massage.

Dr. Jones then began treatment with orthopedic surgeon, Dr. Henry Louis Eiserloh, III, and ultimately, after conservative treatment, underwent an endoscopic discectomy surgery performed by Dr. Hae-Dong Jho.

The defendants offered the expert testimony of massage therapist, Jan Debenedetto. Ms. Debenedetto reviewed the deposition testimony of Dr. Jones and Mr. Ashton along with related teaching materials and applicable ethical standards. Ultimately, Ms. Debenedetto opined that all of the techniques and strokes that Mr. Ashton performed on Dr. Jones on October 11, 2007, were proper Swedish massage techniques. Based on the testimony she had reviewed, she did not believe Mr. Ashton did anything that was improper or breached any standard of care during Dr. Jones's massage. Ms. Debenedetto felt that the descriptions of the massage by both Dr. Jones and Mr. Ashton were consistent with the technique, strokes, and compression used in a proper Swedish massage. She stated that Mr. Ashton adjusted and moved on after Dr. Jones indicated that he was too rough, which is what a massage therapist should do. Ms. Debenedetto claimed that, even accepting Dr. Jones's version of what occurred during the massage, Mr. Ashton's conduct would not fall below the standard of care. She explained that Dr. Jones's perception that Mr. Ashton applied an excessive use of force is merely subjective. Ms. Debenedetto concluded that even the use of excessive force in a Swedish massage is not below the standard of care.

After considering all of the testimony herein, the trial court specifically found that "something that [Mr. Ashton] did was below the standard of care which resulted in this disc herniation. It is more likely than not, more probable than not[,] that the herniation resulted from something he did rather than [something that] just occurred, because she went to the doctor the next day."

Although the defendants contend that Dr. Jones failed to identify and specify the "specific standard of care" that applied to Mr. Ashton, the trial court clearly accepted the standard of care was the standard set forth by Dr. Jones's expert

witness, Ms. Putnam.[5] Ms. Putnam testified that there is not one standard protocol used in executing a Swedish massage. She explained that the techniques can vary and have changed since they were developed, and "can be done correctly one way and done correctly another way." She further testified that there are numerous technical moves within a Swedish massage and that in any given Swedish massage, a therapist may or may not use a given technique. Notably, when specifically questioned about each particular maneuver and technique used by Mr. Ashton, as described by Dr. Jones, Ms. Putnam opined that the massage was not properly conducted. Moreover, Ms. Putnam specifically noted that if properly conducted, a Swedish massage should "never" cause the client pain or bruising, as was shown to have occurred in the instant case.

On review of Ms. Putnam's testimony and the remainder of the record, we find no merit to the defendants' contention that Dr. Jones failed to identify the standard of care applicable herein. Further, as to the defendants' contention that the trial court erred in finding that Mr. Ashton breached the applicable standard of care, we note that in order to reverse a factfinder's determination, an appellate court must undertake a two-part inquiry: (1) the court must find from the record that a reasonable factual basis does not exist for the finding of the trier of fact; and (2) the court must further determine the record establishes the finding is clearly wrong. Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Ultimately, the issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Stobart v. State, Department of Transportation and Development, 617 So. 2d at 882. If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse even

[5]Ms. Putnam has a bachelor's and master's degree in psychology, is licensed by the State of New Jersey in massage therapy, is certified in fourteen massage techniques, and has an advanced certification in Swedish massage.

though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Stobart v. State, Department of Transportation and Development, 617 So. 2d at 882-883. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. Stobart v. State, Department of Transportation and Development, 617 So. 2d at 883.

However, where documents or objective evidence so contradict a witness's story, or the story itself is so internally inconsistent or implausible on its face that a reasonable factfinder would not credit the witness's story, a reviewing court may well find manifest error. Rosell v. ESCO, 549 So. 2d 840, 844-845 (La. 1989). Where such factors are not present, however, and a factfinder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So. 2d at 844-845. Moreover, where there are two permissible views of the evidence, the fact-finder's choice between them cannot be manifestly erroneous. Adams v. Rhodia, Inc., 2007-2110 (La. 5/21/08), 983 So. 2d 798, 806.

In the instant case, the trial court was presented with two versions of how this massage occurred, as well as the differing opinions of each party's expert witness. Dr. Jones testified that Mr. Ashton's application of force and his heavy-handed technique caused her "deep," "aching," and "burning" pain during the massage and caused visible bruising on her thighs, all of which required that she immediately seek medical attention. The trial court obviously accepted Dr. Jones's version of the events that occurred during the massage, as well as the testimony of her expert, Ms. Putnam, who testified that if the massage were conducted in the particular manner described by Dr. Jones, it was improper and fell below the standard of care. On review of the testimony and evidence presented herein, we find that a reasonable basis exists for the trial court's determination that Mr.

Ashton breached the standard of care, which resulted in Dr. Jones's injuries. As such, we find no merit to this assignment of error.

The remaining assignments of error challenge particular portions of the trial court's award for various damages. For ease, we will consider these out of order.

Defendants' Assignment of Error Number Three:
Past Lost Wages

In this assignment of error, the defendants challenge the trial court's award of past lost wages. The defendants contend herein that Dr. Jones failed to meet her burden of proof to establish her claim for lost wages where the only support she presented was her own self-serving testimony, without corroboration from any other source, which, alone, they contend, cannot serve as the basis for such an award.

A plaintiff seeking damages for past lost wages bears the burden of proving lost earnings, as well as the duration of time missed from work due to the accident. Boyette v. United Services Automobile Association, 2000-1918 (La. 4/3/01), 783 So. 2d 1276, 1279. The trier of fact has broad discretion in assessing awards for lost wages, but there must be a factual basis in the record for the award. Driscoll v. Stucker, 2004-0589 (La. 1/19/05), 893 So. 2d 32, 53. Past lost earnings are susceptible of mathematical calculation from proof offered at trial and requires such proof as reasonably establishes the claim. This proof may consist of the plaintiff's own testimony. Rhodes v. State, Department of Transportation and Development, 94-1758 (La. App. 1st Cir. 12/20/96), 684 So. 2d 1134, 1147, writ not considered, 97-0242 (La. 2/7/97), 688 So. 2d 487. Where there is no basis for a precise mathematical calculation of a past lost wage claim, the trier of fact can award a reasonable amount of damages without abusing his discretion. Brown v. City of Madisonville, 2007-2104 (La. App. 1st Cir. 11/24/08), 5 So. 3d 874, 887, writ denied, 2008-2987 (La. 2/20/2009), 1 So. 3d 498.

In support of her claim for past lost wages, Dr. Jones testified that Dr. Brain Murphy, a neurologist who examined her shortly after the massage, recommended that she not go to work. Dr. Jones further testified that she was off of work October 16, 2007, through October 29, 2007. Dr. Jones stated that she was scheduled to work half-days commencing October 29, 2007, but that by October 31, 2007, she was in so much pain that she only worked a fourth of a day. Dr. Jones testified that thereafter, she was not able to return to work until January 1, 2008, at which time she worked half-days for a month, returning to full-time status, which was four-and-a-half days per week, on February 1, 2008.

Dr. Jones testified that she is paid pursuant to the Baton Rouge Clinic physician pay formula, and when she does not work, she has to take a combination of vacation and sick pay. She explained that the first day is a vacation day, and every tenth day after that is a vacation day. She testified that she has to give up the vacation day, for which she is paid $950.00 per day. Dr. Jones testified that she did not know the "ins and outs" of the physician pay formula and has been unable to actually see the formula.[6]

Dr. Jones's economic expert, Harold Asher, calculated Dr. Jones's past lost wages, assuming that Dr. Jones used twenty-nine days of vacation and sick leave valued at $950.00 per day, at $27,550.00. Mr. Asher testified that Dr. Jones had provided him with the dates that represented those twenty-nine days. Mr. Asher further explained that no past losses related to lost productivity were included in his calculations of the past lost wages amount. Mr. Asher testified that in this case, where the physician pay formula was not available, he utilized the historical information and sworn testimony of the parties, which was the best other evidence.

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[6]The Baton Rouge Clinic, a non-party herein, filed a motion for protective order, attempting to avoid production of its pay formula in these proceedings, which was granted by the trial court. In response, the defendants filed applications for supervisory writs and requests for a stay of proceedings with this court and the Louisiana Supreme Court, which were denied by both courts.

The defendants contend that the award is unsupported where the parties were not able to access the Baton Rouge Clinic physician pay formula to confirm Dr. Jones's claim that she was paid $950.00 for each vacation day. At the trial of this matter, counsel for Dr. Jones candidly acknowledged to the court and defendants' counsel that he, too, would have loved to have seen the physician pay formula; however, such evidence could not be produced.

Herein, the trial court awarded $27,550.00 for past lost wages as calculated by Mr. Asher based on Dr. Jones's testimony that she used twenty-nine days of vacation and sick leave valued at $950.00 per day, and without accounting for Dr. Jones's loss productivity. In making its award, the trial court clearly found the testimony of Dr. Jones and Mr. Asher to be credible. On review, we will not disturb this credibility finding. We recognize that the nature of a loss of income claim can be speculative for physicians where there are many factors which could affect a physician's medical practice. See Birdsall v. Regional Electric & Construction, Inc., 97-0712 (La. App. 1st Cir. 4/8/98), 710 So. 2d 1164, 1169-1170.

Thus, on review, we find no error in the trial court's decision to award past lost wages, nor any abuse of discretion in the amount awarded.

These arguments also lack merit.

Defendants' Assignment of Error Number Four:
Collateral Source Rule

In this assignment of error, the defendants contend that the trial court erred in awarding Dr. Jones $107,811.00 for past medical expenses, which included expenses for medical services that were purportedly rendered to her free of charge as a professional courtesy. The defendants argue that because Dr. Jones provided no compensation for this collateral source benefit and did not suffer any reduction of patrimony in exchange for the professional courtesy of free medical services, the trial court committed legal error in awarding her the cost of such free services.

Generally, when claims for accrued medical expenses are supported by medical bills, such expenses should be awarded unless there is contradictory evidence or reasonable suspicion that the bills are unrelated to the accident or injuries at issue. Mack v. Wiley, 2007-2344 (La. App. 1st Cir. 5/2/08), 991 So. 2d 479, 489, writ denied, 2008-1181 (La. 9/19/08), 992 So. 2d 932.

Moreover, under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procuration or contribution. Bozeman v. State, 2003-1016 (La. 7/2/04), 879 So. 2d 692, 698. As a result, the tortfeasor is not allowed to benefit from the victim's foresight in purchasing insurance and other benefits. Bozeman v. State, 879 So. 2d at 698. The major policy reason for applying the collateral source rule to damages has been, and continues to be, tort deterrence, with the underlying concept being that tort damages can help to deter unreasonably dangerous conduct. Indeed, "tort deterrence has been an inherent, inseparable, aspect of the collateral source rule since its inception over one hundred years ago." Bozeman v. State, 879 So. 2d at 700.[7]

Cautioning about the aspect of a "double recovery" or "windfall" that might arise as a consequence of the victim's receipt of an outside payment, the Louisiana

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[7]In Bozeman, the Louisiana Supreme Court addressed the application of the collateral source rule where medical expenses were "written off" or contractually adjusted by healthcare providers pursuant to the federal Medicaid program. While holding that the Medicaid recipient can not collect a Medicaid "write-off" as damages, the Supreme Court recognized that in those instances where the plaintiff's patrimony has been diminished in some way in order to obtain the collateral source benefits, then plaintiff is entitled to the full "benefit of the bargain" and may recover the full value of his medical services, including the "write-off" amount. "However, where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source benefits he receives, ... the plaintiff is unable to recover the 'write off' amount." Bozeman v. State, 879 So. 2d at 705-706. In so holding, the Court emphasized that Medicaid is a free medical service and noted that its position that plaintiff is unable to recover the Medicaid "write-off" amount was consistent with the "often-cited statement" in Gordon v. Forsyth County Hospital Authority, Inc., 409 F. Supp. 708, 719 (M.D.N.C. 1975), affirmed in part and vacated in part, 544 F.2d 748 (4th Cir. 1976), that "[i]t would be unconscionable to permit the taxpayers to bear the expense of providing **free medical care** to a person and then allow that person to recover damages for medical [services] from a tort-feasor and pocket the windfall." Bozeman v. State, 879 So. 2d at 705 (emphasis added by the Bozeman court).

Supreme Court has held that the purpose of awarding tort damages is to deter wrongful conduct and to make the victim whole, but this goal is thwarted, and the law is violated, when the victim is allowed to recover the same element of damages twice. Bellard v. American Central Insurance Co., 2007-1335 (La. 4/18/08), 980 So. 2d 654, 668.

Nonetheless, the Supreme Court in Bellard specifically noted that often, the so-called "windfall" of the collateral source rule never in fact occurs because the injured party's patrimony has been diminished to the extent that the party was forced to recover against outside sources, and the diminution of his patrimony constituted *additional* damages he suffered. Bellard v. American Central Insurance Co., 980 So. 2d at 668; see also Cutsinger v. Redfern, 2008-2607 (La. 5/22/09), 12 So. 3d 945, 953. This scenario occurs, for instance, when the tort victim has procured insurance for which he has paid a premium, and pursuant to a contractual arrangement with the provider, the victim's insurer obtains a contractual adjustment to the cost of medical services rendered. In allowing the tort victim to recover the "write off" or "contractual adjustment" amount in such a situation, this court has reasoned that the tort victim's patrimony "was continually diminished" to the extent that the tort victim had to pay premiums in order to secure the benefits of the insurance. Thus, this court has concluded that to the extent that write-offs were procured through the payment of premiums, they could not properly be considered a prohibited "windfall" to the plaintiff. Griffin v. Louisiana Sheriff's Auto Risk Association, 99-2944 (La. App. 1st Cir. 6/22/01), 802 So. 2d 691, 714, writ denied, 2001-2117 (La. 11/9/01), 801 So. 2d 376.

In later analyzing its holding in Bozeman, the Court in Bellard explained that the question of whether the collateral source rule applies depends, to a certain extent, upon whether the victim has procured the collateral benefits for himself or has, in some manner, sustained a diminution in his or her patrimony in order to

secure the particular collateral benefits such that he or she is not merely reaping a windfall or double recovery. Bellard v. American Central Insurance Co., 980 So. 2d at 669. As set forth by the Supreme Court, after Bozeman, two primary considerations guide the determination with respect to the collateral source rule: (1) whether the application of the rule will further the major policy goal of tort deterrence; and (2) whether the victim, having a collateral source available as a source of recovery, either paid for such benefit or suffered some diminution in his patrimony because of the availability of the benefit, such that no actual windfall or double recovery would result from application of the rule. Bellard v. American Central Insurance Co., 980 So. 2d at 669.

In Cutsinger, rendered subsequent to Bozeman and Bellard, the Louisiana Supreme Court stated that "the **primary policy reason** for the application of the collateral source rule is tort deterrence" and that "[w]hile it is important to consider whether plaintiff paid for the collateral source or suffered some diminution in her patrimony due to the availability of the benefit to determine whether a double recovery would result from application of the rule, this consideration alone is not the determinative factor in deciding whether the collateral source rule applies." Cutsinger v. Redfern, 2008-2607 (La. 5/22/09), 12 So. 3d 945, 952, 954. (Emphasis added). Thus, Cutsinger reflects that a careful analysis of the facts of each particular case in light of each Bozeman factor individually, with emphasis placed on the first factor, i.e., whether application of the collateral source rule to the facts of a particular case will further the major policy goal of tort deterrence, is the appropriate approach. See Cutsinger v.Redfern , 12 So. 3d at 952, 954-955.

In the instant case, in determining whether the collateral source rule was correctly applied to prevent defendants from obtaining a credit against their liability to Dr. Jones for medical services rendered at no cost to her, the particular facts of this case must be analyzed in light of the Bozeman factors. Clearly, the

first Bozeman factor is satisfied, in that application of the collateral source rule herein will further the major policy of tort deterrence. Here, Mr. Ashton and his employer are seeking a credit for the professional courtesy discounts provided to or obtained by Dr. Jones, with no contribution by the defendant tortfeasors for such benefits she obtained. Thus, absent the application of the collateral source rule herein, the major policy goal of tort deterrence would be rendered meaningless.

As to the second Bozeman factor, i.e., whether the collateral source rule applies because Dr. Jones suffered some diminution of her patrimony due to the availability of these professional courtesy discounts, we note that Dr. Jones is an internal medicine physician who works for the Baton Rouge Clinic, where she is a partner and shareholder. As part of her medical care following the incident in question, Dr. Jones received treatment at the Baton Rouge Clinic, and she acknowledged she was not actually charged for those services, which were rendered at no direct cost to her as a professional courtesy.[8] As Dr. Jones explained:

> In Baton Rouge at the Baton Rouge Clinic, for example, the Baton Rouge Clinic, when we see a doctor or a doctor's family, actually there is no charge for that person, so professional courtesy is very prevalent in the community. So, I have received some professional courtesy as a physician, which is pretty typical.

With regard to the charges for services rendered at the Baton Rouge Clinic, we are unable to say that Dr. Jones suffered no diminution in her patrimony due to the availability of the benefit. While it is unclear whether, as a partner and shareholder in the Baton Rouge Clinic, Dr. Jones paid for her ownership interest (either through a cash payment or services rendered) and/or has some obligation for expenses or losses incurred by the clinic, Dr. Jones testified that "we" (meaning

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[8]Dr. Jones explained that she understood that her insurance company was billed for these medical services, but that in those instances where she was extended a professional courtesy discount, she was not responsible for paying the patient's portion of the charge. To the extent that her private insurance paid portions of these bills, the collateral source rule clearly applies to preclude any credit to the defendants for the portions of the bills paid by her health insurer.

herself and other physicians at the Baton Rouge Clinic) render gratuitous medical treatment to other physicians and their families in the Baton Rouge community and that, in turn, she has received such gratuitous services. Thus, we find that to the extent that Dr. Jones has rendered such services or has obligated herself to provide such without payment as part of the prevalent practice in her clinic and within the medical community in the Baton Rouge area, she has suffered a diminution of her patrimony through her obligations such that the defendants are not entitled to take advantage of any discounts she received.[9]

In the instant case, the trial court weighed the evidence before it and had a reasonable basis to conclude that there was, in fact, a diminution in Dr. Jones's patrimony. Moreover, to the extent that there was conflicting evidence as to whether Dr. Jones suffered a diminution of her patrimony in obtaining gratuitous medical services, the trial court's choice between two permissible views of the evidence cannot be manifestly erroneous. See and compare Hoffman v. 21st Century North America Insurance Company, 2013-0054 (La. App. 1st Cir. 10/1/14) (unpublished), writ affirmed, 2014-2279 (La. 10/2/15), ___ So. 3d ___.[10]

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[9]Additionally, we note that the professional courtesy discounts were offered to Dr. Jones by virtue of her status as a doctor. To become a medical doctor, Dr. Jones was obviously required to attend (and presumably pay for) medical school, which also involved some personal cost and resulted in a diminution of her patrimony, both for the cost of the education and through wages foregone during her years of additional schooling.

[10]In Hoffman v. 21st Century North America Insurance Company, 2013-0054, p. 8 (La. App. 1st Cir. 9/13/13), 2013 WL 5176914, *3 (unpublished), writ granted, 2014-2279 (La. 2/27/15), 159 So. 3d 160, this court concluded, on original hearing, that the plaintiff therein was not entitled to recover the full billed amount of medical services, where the fee had been discounted, allegedly because the health care provider had negotiated an arrangement with the plaintiff's attorney. In reaching this conclusion, this court stated that Bozeman instructs that where the plaintiff pays no enrollment fee, has no wages deducted, and otherwise provides no consideration for the collateral source, the collateral source rule does not apply. This court then noted that there was no evidence of record to demonstrate that the plaintiff had provided any consideration whatsoever for the reduced bill. Thus, this court concluded that it could not say that the trial court had erred in finding that the collateral source rule did not apply. A rehearing was granted in Hoffman, and while still affirming the trial court's judgment that limited the plaintiff's recovery to the amount of the discounted bill, the majority of a five-judge panel of this court reasoned that the plaintiff "neither objected to the evidence introduced by defendants nor offered any evidence to establish the collateral source rule's application." Hoffman v. 21st Century North America Insurance Company, 2013-0054 at p. 2 (on rehearing). This court in Hoffman thus concluded that when confronted with two medical bills showing differing amounts owed, the trial court was faced with two permissible views of the evidence such that its choice

Finally, even if we were to find that Dr. Jones did not pay for the collateral source and suffered no diminution of her patrimony for its availability because she made no "out of pocket" payments for such, according to Cutsinger, this consideration alone is not the determinative factor in deciding whether the collateral source rule should apply. See Cutsinger v. Redfern, 12 So. 3d at 954. The question then becomes, "who should gain the benefit of the collateral source, the injured victim or the tortfeasor?" Given the Supreme Court's instruction that the primary policy reason for the application of the collateral source rule is tort deterrence, Cutsinger v. Redfern, 12 So. 3d at 952, the plaintiff/injured victim, and not the tortfeasor defendant, should benefit from the collateral source where it was obtained neither by the tortfeasor's procuration nor by a diminution of the injured victim's patrimony. Thus, allowing a credit against Dr. Jones's recovery herein would directly benefit Mr. Ashton and his employer by allowing them to receive an undeserved windfall, thereby undermining the deterrent effect of tort law. Cf. Cutsinger v. Redfern, 12 So. 3d at 952 & Bellard v. American Central Insurance Co., 980 So. 2d at 670 n.6. Also, under the facts herein, where medical services were provided by private benefactors at a free or reduced rate for Dr. Jones's benefit, allowing Dr. Jones to recover these written-off sums from defendants would not be "unconscionable," as opposed to the situation in Bozeman where the taxpayers paid for the benefit of free medical care under the Medicaid program. Bozeman v. State, 879 So. 2d at 705. Thus, applying this rationale to the particular

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between them was not manifestly erroneous. Hoffman v. 21st Century North America Insurance Company, 2013-0054 at p. 2 (on rehearing).

On February 27, 2015, the Louisiana Supreme Court granted writs in Hoffman, see Hoffman v. 21st Century North America Ins. Co., 2014-2279 (La. 2/27/15), 159 So. 3d 160, and on October 2, 2015, the Supreme Court rendered a decision affirming the opinion of this court. See Hoffman v. 21st Century North America Ins. Co., 2014-2279, p. 4 (La. 10/2/15), ___ So. 3d ___, where the Supreme Court held that "an attorney-negotiated medical discount" or write-off "is not a payment or benefit that falls within the ambit of the collateral source rule," where (unlike the instant case), the "[plaintiff] did not incur any additional expense in order to receive the attorney-negotiated 'write-off,' nor has he suffered any diminution in his patrimony." Hoffman v. 21st Century North America Ins. Co., ___ So. 3d at ___.

facts herein, we find the trial court correctly applied the collateral source rule, and that the defendants were not entitled to a reduction of the amounts actually owed by them, for any such discounts or reductions provided to Dr. Jones in the form of professional courtesy discounts.

We find no merit to this assignment of error.

Defendants' Assignment of Error Number Five and Dr. Jones's Assignment of Error Number Three: General Damages

Both the defendants and Dr. Jones challenge the trial court's award of damages on appeal. The defendants contend that the trial court's award of $700,000.00 in general damages is excessive, where Dr. Jones admitted she manages her pain with over-the-counter medication (Aleve). Contrariwise, Dr. Jones contends that the general damages awarded by the trial court are excessively low, considering that the injuries she sustained during the massage on October 11, 2007, have significantly impacted her lifestyle and quality of life.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money. Boudreaux v. Farmer, 604 So. 2d 641, 654 (La. App. 1st Cir.), writs denied, 605 So. 2d 1373 and 1374 (La. 1992). The factors to be considered in assessing the proper quantum of damages for pain and suffering are severity and duration. Jenkins v. State, Department of Transportation and Development, 2006-1804 (La. App. 1st Cir. 8/19/08), 993 So. 2d 749, 767, writ denied, 2008-2471 (La. 12/19/08), 996 So. 2d 1133. Much discretion is left to the judge or jury in the assessment of general damages. LSA-C.C. art. 2324.1; Guillory v. Lee, 2009-0075 (La. 6/26/09), 16 So. 3d 1104, 1116. In reviewing a general damage award, a court does not review a particular item in isolation; rather, the entire damage award is reviewed for an abuse of discretion. Smith v. Goetzman, 97-0968 (La. App. 1st Cir.

9/25/98), 720 So. 2d 39, 48. Furthermore, the assessment of quantum, or the appropriate amount of damages, by a trial judge or jury is a determination of fact that is entitled to great deference on review. Wainwright v. Fontenot, 2000-0492 (La. 10/17/00), 774 So. 2d 70, 74.

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 Corporation, 623 So. 2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. Coco v. Winston Industries, Inc., 341 So. 2d 332, 335 (La. 1976); Graham v. Offshore Specialty Fabricators, Inc., 2009-0117 (La. App. 1st Cir. 1/8/10), 37 So. 3d 1002, 1018.

In the instant case, the trial court awarded: $250,000.00 for pain and suffering and mental anguish and distress; $250,000.00 for loss of enjoyment of life; and $200,000.00 for permanent disability,[11] for a total general damage award of $700,000.00.

Dr. Jones testified that prior to the October 11, 2007 massage she led a very active lifestyle. She testified that in high school, she had played varsity sports since ninth grade, including volleyball, basketball, and softball, and was voted most athletic of her high school class. She stated was also very active in the band program, participating in the jazz band, concert band, and marching band, and serving as the drum major for three years. Dr. Jones explained that she maintained her active lifestyle after high school by competing in triathlons, walking, jogging, swimming, biking, working out on elliptical machines, and lifting light weights.

[11]These awards included past, present, and future damages.

Before the massage, she worked very long, hard hours, often working through lunch, on weekends, and on her half-day off, and exercised six days a week.

After the massage, Dr. Jones was unable to work from October 2007 until January 1, 2008, when she returned to work half days. During that time, she experienced so much pain and inflammation that she had difficulty performing even basic tasks. Dr. Jones testified that she also experienced muscle spasms that were so intense that the act of reaching over and turning on a faucet caused significant back pain. She was unable to get dressed without assistance, unable to get in and out of the bathtub, and unable to wash dishes or clothes, or to empty the trash. She also had difficulty brushing her teeth, washing her feet, cutting her toenails, and shaving her legs. Dr. Jones was forced to make alterations to her home to accommodate her limitations, which included buying a new toilet with a raised seat, a new bed, and a new chair. She experienced difficulty riding in a car, and she was unable to work in her yard or wash her car, which were things that she had been able to do before the massage. Dr. Jones was unable to go to the grocery store or church and missed Thanksgiving with her family for the first time in her life. She testified that initially, she could not tolerate sitting down and spent most of her days standing because of the pain. Dr. Jones was only able to lie on her right side because she was unable to lie in any other position. She eventually developed complications from not being able to move and sleep normally, including shoulder pain, significant neck pain and spasms, hip pain, and knee pain. Dr. Jones stated that sleep was a big problem and getting through the basic day-to-day things that are taken for granted was very hard. In particular, she testified that living alone with the limitations imposed by her condition was very, very difficult.

Dr. Jones testified that, as of the time of trial, she still suffers from back pain and has symptoms such as burning, decreased sensation, numbness and weakness that radiates into her buttocks, legs and feet, with her symptoms being worse on the

right side. She has not been able to go to a movie since the massage, has not gone to dinner in years, and has been unable to date, which has significantly affected her social life. Dr. Jones is no longer able to wear heels but instead, has to wear "clunky" shoes, and she has to have her clothes altered. Dr. Jones testified about how these injuries have changed her life, as follows:

> Well, from a personal standpoint, I do not feel like my old self. I do not feel like myself.
>
> Before all this happened, I was very healthy and active and athletic. I was kind of someone who was always on the go. I was very motivated and driven, passionate about what I did, and I had a strong work ethic, and then when all this happened, I started having trouble with the day-to-day, just kind of getting through the day, and then all of a sudden, I went from feeling well to not feeling well, and I have had trouble with things like not being able to sit without pain, or stand without pain, or walk without pain, or sleep through the night. I am really not able to do whatever I want whenever I want where in the past I could do those things. Now I feel restrained and limited.

Dr. Jones's mother, friends, colleague, and secretary likewise testified regarding how active Dr. Jones was in her personal life and professional life before the massage and how her life has significantly changed. Her mother testified that Dr. Jones is no longer cheerful, she doesn't have the same color in her face, has muscular atrophy, is very tired, has disruptive sleep, and has a hard time sitting down. Her mother testified that although Dr. Jones tries to ignore her symptoms and work through the pain, she ends up paying for it when she gets home at night.

Dr. Peterman Prosser, an endocrinologist who worked with Dr. Jones at the Baton Rouge Clinic and who, along with his mother and sister, are patients of Dr. Jones, testified that Dr. Jones was almost "too devoted" to her patients, working "long hard hours," and many times doing things for which there was no compensation. Dr. Prosser testified that since the massage, Dr. Jones is not able to work the same long hours, she stopped attending committee meetings, and is not as positive and upbeat. Dr. Jones's former phone nurse, Sharla Lange, testified that before the massage, Dr. Jones had a growing practice and was in demand, coming

in early, working through lunch, and working late into the evening beyond the scheduled template. Ms. Lange testified that after the massage, Dr. Jones was not as "spunky" and energetic. Ms. Lange testified that Dr. Jones had to cancel patient appointments and did not "work patients in" to her schedule as much as she did before. Ms. Lange testified that every time she talks to Dr. Jones now, she usually complains of pain.

Dr. Jones's treating orthopedic surgeon, Dr. Henry Louis Eiserloh, III, testified that his initial evaluation with Dr. Jones was in December of 2007. At that time, she reported the history of the massage and the resulting pain in her back and buttocks, as well as pain and numbness in her legs. She presented with an MRI scan that revealed a disc herniation of L4-5, with an L5 nerve root impingement. He recommended conservative treatment and testified that Dr. Jones's complaints remained fairly consistent. Her symptoms, however, worsened over time and based on their progression, she was ultimately required to undergo a percutaneous endoscopic discectomy at L4-5 in May of 2009, which was performed by Dr. Hae-Dong Jho. Dr. Eiserloh testified that after the surgery, Dr. Jones initially had diminution of symptoms on the left side, but experienced an increase in right-sided symptoms. He further testified that since the surgery, Dr. Jones has had a progression of symptoms including buttock pain, pain in both legs, and atrophy in the right leg from ongoing neurologic symptoms that she experiences on the right side. Dr. Eiserloh testified that Dr. Jones's quality of life was poor, considering that she was only able to go to work, which was a daily struggle for her. He testified that because her job requires her to mostly sit, stand, engage patients, and bend over to examine them, due to the mere stress on her back from working, she is not able to do much more once she gets home from work, other than to eat, sleep, and try to get ready for the next day.

Considering the record herein, and mindful of the trial court's discretion in awarding general damages, we are unable to conclude that the award made by the trial court for Dr. Jones's back injury constitutes an abuse of discretion. Dr. Jones was thirty-five years old at the time of the injury. She continues to suffer with pain, and will continue to suffer from these injuries over the course of her life. While the discectomy at L4-5 surgery relieved her pain to some extent, she unfortunately has developed more pain on the right side, which Dr. Eiserloh contends will require additional surgery. In awarding her damages, the trial court obviously found her testimony and that of the lay and expert witnesses to be credible. As noted by the trial court, Dr. Jones "has lost the ability to do all the things that made her life worth living, rid[ing] her bike, working out, doing anything in the evening, going anywhere, meeting anybody. ... We work to live; now Dr. Jones lives to work, and that looks like all she is doing now."

On review, we find no abuse of the trial court's discretion in its award of general damages.

Dr. Jones's First Assignment of Error:
Damages for Loss of Earning Capacity and Future Loss of Income

In this assignment of error, Dr. Jones contends that the trial court abused its discretion and erred in failing to award her damages for loss of earning capacity and future loss income.

Awards for lost future income are intrinsically insusceptible of mathematical exactitude, and as such, the trier of fact must exhibit sound discretion in rendering awards that are consistent with the record and do not impose a hardship on either party. American Century Insurance Company v. Terex Crane, 2003-0279 (La. App. 1st Cir. 11/7/03), 861 So. 2d 228, 234, writ denied, 2004-0327 (La. 4/2/04), 869 So. 2d 881. Factors to be considered in determining a proper award for loss of future income are the plaintiff's physical condition before and after the injury, the

plaintiff's past work history and consistency thereof, the amount the plaintiff probably would have earned absent the injury complained of, and the probability that the plaintiff would have continued to earn wages over the remainder of his working life. Pennison v. Carrol, 2014-1098 (La. App. 1st Cir. 4/24/15), 167 So. 3d 1065, 1082, writ denied, 2015-1214 (La. 9/25/15), ___ So. 3d ___.

In contrast, loss of earning capacity is not the same as lost earnings. Rather, earning capacity refers to a person's potential. Fecke v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, 2015-0017 (La. App. 1st Cir. 7/7/15), ___ So. 3d ___, ___. The Louisiana Supreme Court has held that damages for a loss of earning capacity should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury. Earning capacity in itself is not necessarily determined by actual loss. Hobgood v. Aucoin, 574 So. 2d 344, 346 (La. 1990). Damages may be assessed for the deprivation of what the injured plaintiff could have earned despite the fact that he may never have seen fit to take advantage of that capacity. The theory is that the injury done him has deprived him of a capacity he would have been entitled to enjoy even though he never profited from it monetarily. Hobgood v. Aucoin, 574 So. 2d at 346.

Like awards for loss of future income, an award for loss of earning capacity is inherently speculative and cannot be calculated with absolute certainty. The most the courts can do is exercise sound discretion and make an award that, in light of all facts and circumstances, is fair to both parties while not being unduly oppressive to either. In determining whether a personal injury plaintiff is entitled to recover for the loss of earning capacity, the trial court should consider whether and how much plaintiff's current condition disadvantages her in the work force. Fecke v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, ___ So. 3d at ___, citing Henry v. National Union Fire

Insurance Company, 542 So. 2d 102, 107, writs denied, 544 So. 2d 405 (La. 1989). Factors to be considered in fixing awards for loss of earning capacity include: age, life expectancy, work life expectancy, past work record, appropriate discount rate, the annual wage rate increase or productivity increase, prospects for rehabilitation, probable future earning capacity, loss of earning ability, and the inflation factor or decreasing purchasing power of the applicable currency. Henry v. National Union Fire Insurance Company, 542 So. 2d at 107.

In the instant case, the trial court was presented with conflicting evidence concerning Dr. Jones's future income and ability to work. Dr. Eiserloh testified that Dr. Jones's "unfortunate reality" is that she will need to begin to work part time to establish some quality of life. He did not think it was possible to eliminate all of her pain and make her pain free. In his opinion, Dr. Jones would not be able to work beyond the age of 50.

Dr. Andrew Todd, an orthopedic surgeon, was asked by the defendants in this matter to perform an independent medical examination of Dr. Jones. After examining Dr. Jones, Dr. Todd disagreed with Dr. Eiserloh and opined that Dr. Jones would be able to work for quite some time beyond the age of 50. Dr. Todd testified that if he were in Dr. Jones's position at her age with her pain level, he would modify his work situation as far as sitting or standing and continue to work full time.

Dr. Jones testified that at the time of trial, she worked a four-and-a-half-day schedule templet as she did prior to the massage herein; however, she increased the reserve time so that she would not "over-book" herself. Dr. Jones testified that she has not inquired about going part-time at the Baton Rouge Clinic and has not discussed with anyone how her schedule at the clinic may be accommodated if she chose to modify it. Although working part-time is something Dr. Jones thinks she will ultimately have to do, she testified that she does not have any intention to

begin a part-time schedule soon. She stated that she has been trying to do the best she can for as long as she can.

With reference to her income, however, Dr. Jones testified that this injury has affected her ability to earn outside of her earnings from the Baton Rouge Clinic. Dr. Jones testified that she had an opportunity to take extra call for older doctors at $30,000.00 per year, which she had to decline. She also stated that she has received offers to teach residents. In particular, Baton Rouge General approached her about having a resident in her office a half a day a week for three years for $12,000.00 a year, which she was also forced to decline.

In response, the defendants point out that Dr. Jones's income in 2013, six years after the massage, was significantly more than her pre-massage income.[12] The defendants point to the testimony of Stephanie Chalfin, plaintiff's vocational rehabilitation consultant, who explained that Dr. Jones advised her that her income had increased because her reports were more comprehensive for which she received a higher compensation rate, although she was not seeing more patients.

In denying Dr. Jones's claims for future loss income and loss of future earning capacity, after considering the conflicting evidence presented, the trial court specifically found in its reasons for judgment:

> Dr. Eiserlo[h] has said she needs to cut back; she has not cut back, and my memory is he said, even with a fusion she will have two percent a year reduction. Two percent a year for ten years is 20%. That is not total disability at 50; that is 20% disability at 50.
>
> So, I do not think Dr. Jones is going to be disabled after 50. Dr. Jones has, in seven years, has not reduced her workload one hour. She has continued to work. I am very impressed that she has continued to work a full schedule. I have no doubt that she works in pain. I have watched her during the trial. She gets up, she is obviously very uncomfortable.

[12]Dr. Jones's income tax returns showed that her income was more in the years following 2007 than it was in 2007, despite that fact that she was seeing fewer patients.

In denying these awards, the trial court obviously recognized that Dr. Jones had the ability to increase her income without working extra hours. Considering the conflicting evidence presented herein, although we may have found differently if sitting as the trier of fact, we are constrained to find no abuse of the trial court's discretion.

This assignment of error lacks merit.

Dr. Jones's Second Assignment of Error:
Future Medical Expenses

In this assignment of error, Dr. Jones contends that the trial court erred in failing to render an award of damages for future medical expenses.

Future medical expenses, as special damages, must be established with some degree of certainty, and a plaintiff must demonstrate that such expenditures will, more probably than not, be incurred as a result of the injury. Menard v. Lafayette Insurance Company, 2009-1869 (La. 3/16/10), 31 So. 3d 996, 1006. The proper standard for determining whether a plaintiff is entitled to future medical expenses is proof by a preponderance of the evidence that the future medical expenses will be medically necessary. Menard v. Lafayette Insurance Company, 31 So. 3d at 1006. An award of future medical expenses is justified if there is medical testimony that they are indicated and that sets out their probable cost. Hanks v. Seale, 2004-1485 (La. 6/17/05), 904 So. 2d 662, 672. The trial court should award all future medical expenses that the medical evidence establishes that the plaintiff, more probably than not, will be required to incur. Hymel v. HMO of Louisiana, Inc., 2006-0042 (La. App. 1st Cir. 11/15/06), 951 So. 2d 187, 206, writ denied, 2006-2938 (La. 2/16/07), 949 So. 2d 425. When the record establishes that future medical expenses will be necessary and inevitable, courts should not reject the award because the record does not provide the exact value, if the court can determine from the record, past medical expenses, and other evidence a minimum

amount that reasonable minds could not disagree would be required. Levy v. Bayou Industrial Maintenance Services, Inc., 2003-0037 (La. App. 1st Cir. 9/26/03), 855 So. 2d 968, 975, writs denied, 2003-3161 and 2003-3200, (La. 2/6/04), 865 So. 2d 724 and 727. In such cases, all future medical expenses that the medical evidence establishes the plaintiff, more probable than not, will be required to incur. Bass v. State, 2014-0441 (La. App. 1st Cir. 11/7/14), 167 So. 3d 711, 716. Such awards generally "turn on questions of credibility and inferences, i.e., whose experts and other witnesses does the jury believe?" Menard v. Lafayette Insurance Company, 31 So. 3d at 1006 (quoting Frank L. Maraist & Thomas C. Galligan, Jr., Louisiana Tort Law § 7.02, 7-4 (Michie 2009)).

In the instant case, Dr. Eiserloh testified that on a recent visit with Dr. Jones on January 29, 2014, she presented with complaints of back pain, pain in both legs, and numbness as well as leg weakness, which was confirmed by neurologic testing and an additional MRI scan that demonstrated the disc pathology at L4-5. Based on the chronicity of her symptoms and the fact that she had a prior surgery and the progression or worsening of her symptoms, they talked about the possibility of proceeding down the surgical pathway once again. Dr. Eiserloh recommended that Dr. Jones undergo either a revision decompression or re-exploration of the nerves or a fusion at L4-5. Essentially, Dr. Eiserloh talked to her about trying to modify her activities or the possibility of proceeding down the surgical pathway to try to alleviate some of her symptoms. Dr. Eiserloh testified that the surgery was something that she could do later and was not urgent. Dr. Eiserloh testified that he did not believe that surgery would make her pain free, but that it would alleviate some pain and make her more functional.

Dr. Todd did not agree with Dr. Eiserloh that Dr. Jones would likely need another discectomy and a fusion. Dr. Todd explained:

> Well, frankly, she has not had a very good response to the first surgery, so I would be very hesitant to recommend a second surgery, specifically another decompressive surgery, and the logic that having had multiple decompressive surgeries ultimately will lead to a fusion, I would disagree with that. There is many times we do one or two, even a third decompression per patient and we do not perform a fusion, and they do fine.
>
> Also, I would be hesitant to recommend any kind of major operation in someone who is managing to continue to work with modifications, and taking only an over-the-counter anti-inflammatory for pain. I think that the chances of that surgery causing them to be worse, or feeling worse afterwards, I would be very, very hesitant to recommend it as a result.

The defendants contend that the trial court's determination concerning the award of future medical expenses is further supported by Dr. Jho's office note of February 3, 2010, where, after examining Dr. Jones on a follow-up visit from her L4-5 endoscopic discectomy of May 14, 2009, Dr. Jho opined that based on her most recent MRI scans, there was "no evidence of any significant pathology that would need to be addressed surgically."

Dr. Jones testified that having more surgery would lead to more back pain and it would go on until she had a fusion. She stated that she has not scheduled surgery yet because she is trying to avoid having a fusion at such a young age. Notably, Dr. Jones testified that the only medication she takes for pain is Aleve.

After reviewing the conflicting expert testimony and Dr. Jones's testimony presented at trial, the trial court specifically found, "I do not think Dr. Jones is going to have two surgeries." The trial court then awarded Dr. Jones $3,650.00, to cover the future costs of Aleve.

On review, considering the conflicting expert testimony as to whether Dr. Jones will require any future surgeries, we find no error with the trial court's determination that plaintiff failed to prove by a preponderance of the evidence that the claimed future medical expenses will be medically necessary or inevitable. See Ketchum v. Roberts, 2012-1885 (La. App. 1st Cir. 5/29/14) (unpublished opinion)

and Howard v. United Services Automobile Association, 2014-1429 (La. App. 1st Cir. 7/22/15), ___So. 3d ___, ___.

As such, we find no merit to this assignment of error.

CONCLUSION

For the above and foregoing reasons, the December 15, 2014 judgment of the trial court is affirmed. Costs of this appeal are assessed one half to the plaintiff, Dr. Maureen Jones, and one half to the defendants, Neill Corporation and Larry Ashton, Jr.

AFFIRMED.

DIANE JOHNSON **NO. 2015 CA 0430**

VERSUS

COURT OF APPEAL

NEILL CORPORATION, PARIS PARKER SALONS AND/OR NEILL CORPORATION D/B/A PARIS PARKER SALONS; LARRY DONNIE ASHTON, JR., AND ABC INSURANCE COMPANY

FIRST CIRCUIT

STATE OF LOUISIANA

WELCH, J., dissenting in part.

I respectfully disagree with the well-reasoned, well written majority opinion insofar as it affirms the trial court's award of future medical expenses. The trial court awarded the plaintiff future medical expenses in the amount of $3,650.00 to cover the future cost of Aleve. It is well settled that an award for future medical expenses is justified if there is medical testimony that they are indicated and setting out their probable cost. **Hymel v. HMO of Louisiana, Inc.**, 2006-0042 (La. App. 1st Cir. 11/15/06), 951 So.2d 187, 206, writ denied, 2006-2938 (La. 2/16/07), 949 So.2d 425. In such a case, the court should award all future medical expenses that the medical evidence establishes the plaintiff, more probably than not, will be required to incur. *Id.* Based on the evidence in the record, it was unreasonable and an abuse of the trial court's discretion to conclude that the plaintiff will, more likely than not, only incur as future medical expenses the cost of Aleve.

The record establishes that the plaintiff, despite already having one surgery, continues to have difficulty with back pain, with symptoms that radiate into her buttocks, legs, and feet. Although she currently only takes Aleve for her pain (because other medications affect her ability to work), she has continued to seek medical treatment for that pain with Dr. Eiserloh, her treating physician. Based on the progressive worsening of her symptoms, the plaintiff and Dr. Eiserloh have discussed the likelihood that the plaintiff will need another surgery. According to Dr. Eiserloh, while a second surgery is not immediately urgent, another surgery

will have to be done in the future because her back pain is not going to abate without it. Although Dr. Todd did not agree with Dr. Eiserloh that the plaintiff would likely need another surgery, his opinion was based on the fact that she had a very good response to the first surgery and because she has been able to work with modifications and manage her pain with over-the-counter anti-inflammatory medication. However, Dr. Eiserloh was able to explain that although the plaintiff initially had some diminution of her symptoms following the surgery, her pain symptoms have subsequently increased, particularly on the right side. In addition, he explained that as her symptoms get worse, she will require additional medication and will not be able to work the hours she is working now. It is well-settled that the testimony of a plaintiff's treating physician is entitled to greater weight than the testimony of a physician who examines the patient only once or twice. **Robichaux v. Randolph**, 555 So.2d 581, 585 (La. 1989). The reasons for the preference of a treating physician's testimony is that the treating physician is more likely to know the patient's symptoms and complaints due to repeated examinations and sustained observations. *Id.*

Furthermore, regardless of the difference of opinion as to whether the plaintiff will need a second surgery, the undisputed evidence at trial indicated that the plaintiff will still need to be followed or monitored by a physician for her back pain several times a year and would, eventually, need additional medication for managing pain and for spasms and inflammation. Given all of the evidence in the record, it was an abuse of the trial court's discretion to only award the plaintiff the future cost of Aleve and an increase in that award is warranted.[1]

The testimony of the plaintiff's experts (vocational rehabilitation and economist) that the cost of the surgery that the plaintiff will need to undergo is approximately $101,204.00; adding to that the cost of three doctor visits per year at

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[1] An appellate court should not set aside an award for future medical expenses absent an abuse of the trier of fact's discretion. **Hymel**, 951 So.2d at 206.

a cost of $98 per visit (or approximately $300 per year), plus monthly medication in the amount of $125.00 per month (or $1500 per year), the plaintiff's future medical expenses were calculated to be approximately $216,746.00. Without the cost of the surgery, her future medical expenses would total approximately $115,542.00.[2] The defendant's experts offered no testimony with respect to the plaintiff's future medical expenses other than that the cost of Aleve would be approximately $4,260.00 per year. Therefore, at a minimum, the plaintiff should be awarded $115,542.00 in future medical expenses and the judgment of the trial court amended to reflect that amount.

In all other respects, I agree with the majority opinion. Thus, I respectfully dissent in part.

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[2] $216,746.00 (total future medicals) - $101,204.00 (cost of surgery) = $115,542.00