

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 1206

PATRICIA AGUILLARD

VERSUS

JEREMIE GREGORY AND THE CITY OF BATON ROUGE

Judgment Rendered: **MAR 22 2016**

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C594908

The Honorable Todd Hernandez, Judge Presiding

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**Counsel for Plaintiff/Appellee
Patricia Aguillard**

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

THERIOT, J.

This appeal is taken from a judgment notwithstanding the verdict entered by the Nineteenth Judicial District Court, substantially increasing the award to the plaintiff-appellee, Patricia Aguillard. For the following reasons, we affirm the judgment notwithstanding the verdict, amend the award of general damages and affirm the award as amended.

FACTS AND PROCEDURAL HISTORY

On the morning of October 1, 2009, Patricia Aguillard was travelling eastbound on Interstate 10 (I-10) through East Baton Rouge Parish in her 1994 Mazda 929. The defendant-appellant, Jeremie Gregory, was also travelling eastbound on I-10 in a 2003 Dodge 6000, which was owned by the defendant-appellant, the City of Baton Rouge (the City).¹ Ms. Aguillard slowed and then stopped due to traffic ahead of her. At that time, Mr. Gregory failed to stop his vehicle and collided into the rear of Ms. Aguillard’s vehicle. Ms. Aguillard filed a petition for damages on September 22, 2010 in which she claimed a long list of injuries stemming from the accident, including pain in her upper extremities, headaches, and other soreness. Ms. Aguillard sought damages for physical and mental pain and suffering, loss of enjoyment of life, lost wages, disability, loss of earning capacity, medical expenses, and property damage.

Following a jury trial, the jury found that Mr. Gregory was the sole cause of the accident and awarded damages to Ms. Aguillard as follows:

- 1. Past Medical Care and Expenses.....\$122,751.21
- 2. Future Medical Care and Expenses.....\$450,150.00
- 3. Physical Pain and Suffering.....\$0.00
- 4. Mental Pain and Suffering.....\$0.00
- 5. Loss of Enjoyment of Life.....\$0.00

¹ Since Mr. Gregory and the City join together in this appeal, they will be collectively referred to as “the City.”

Ms. Aguiard's damages totaled \$572,901.21.²

On September 8, 2014, Ms. Aguiard filed a motion for judgment notwithstanding the verdict (JNOV), claiming that the jury abused its discretion by not awarding all of her future medical expenses and not awarding general damages, both of which she claims to have proven through competent evidence. The motion was heard by the trial court on November 24, 2014, and the matter was taken under advisement. On April 27, 2015, the trial court signed a judgment granting the JNOV as to general damages, but denying the JNOV as to any future medical expenses. The trial court added to the jury's award the following damages:

- 1. Physical Pain and Suffering.....\$350,000.00
- 2. Mental Pain and Suffering.....\$75,000.00
- 3. Loss of Enjoyment of Life.....\$15,000.00

The JNOV brought the total of damages to \$1,012,901.20.

The appellants filed the instant suspensive appeal on May 5, 2015.

ASSIGNMENTS OF ERROR

The appellants cite three assignments of error:

- 1. In light of the facts adduced at trial, which provided a reasonable basis for the jury's total award of damages, the trial court erred in granting Ms. Aguiard's JNOV.
- 2. The trial court erred in awarding excessive damages for pain and suffering.
- 3. The trial court erred in awarding excessive damages for past, present, and future loss of enjoyment of life.

STANDARD OF REVIEW

A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. *Davis v. Wal-Mart Stores, Inc.*, 2000-0445 (La. 11/28/00), 774 So.2d 84, 89. A JNOV may be

² The judgment reflecting the jury's verdict was signed by the trial court on August 26, 2014.

granted on either the issue of liability or damages, or both. La. C.C.P. art. 1811(F).

This Court has ruled that the standard of review of a JNOV is twofold:

First, we must determine whether the jury verdict is supported by competent evidence and is not wholly unreasonable. To make this determination, we must, after considering all of the evidence in the light most favorable to the party opposing the motion, find that it points so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict on the issue. Second, after determining that the trial court correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review. (Citation omitted.)

Smith v. Davill Petroleum Co., Inc., 97-1596 (La. App. 1 Cir. 12/9/98), 744 So.2d 23, 27.

More specifically, when a trial court grants a JNOV as to quantum, both the decision to grant the JNOV (i.e., that facts and inferences point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict) and the resulting increase or decrease in the award must be reviewed. *Id.*

DISCUSSION

The City's first assignment of error calls into question the validity of the JNOV itself. The original jury verdict awarded special damages to Ms. Aguilard, but no general damages. Compensatory damages are divided into the broad categories of special damages and general damages. *Wainwright v. Fontenot*, 2000-0492 (La. 10/17/00), 774 So.2d 70, 74. Special damages are those which either must be specially pled or have a ready market value, i.e., the amount of the damages supposedly can be determined with relative certainty. Included under the heading of special damages are the plaintiff's medical expenses incurred as a result of the tort. *Id.* On the other hand, general damages are those that are inherently speculative in nature and

cannot be fixed with mathematical certainty. These include pain and suffering. *Id.*

When a jury finds a plaintiff suffered injuries in an accident, awards special damages, but fails to award general damages, the verdict is generally inconsistent. The reviewing court must determine whether the jury's finding is so inconsistent as to constitute an abuse of discretion. Based on the facts in the record, we find that the jury in the instant case abused its discretion by awarding special damages without awarding general damages. See *Wainwright* 774 So.2d at 76. The verdict in the instant case was an inconsistent verdict, and the trial court recognized it as such. Therefore, the granting of the JNOV was proper.

The City's next two assignments of error both deal with the trial court's award of general damages. In the trial court's written reasons for JNOV, it first notes Ms. Aguillard's expert witness testimony that was not contradicted by the City. In fact, the City presented no contradictory evidence at trial, save for one photograph of the interior of a vehicle. Ms. Aguillard's expert testimony was given by her treating physicians and rehabilitation specialist.

One such expert was J. Michael Burdine, Ms. Aguillard's pain management specialist. He testified that Ms. Aguillard was diagnosed with an annular tear in her spinal cord due to trauma. This annular tear was the source of Ms. Aguillard's pain for which she sought treatment. In order to avoid spinal fusion surgery, Dr. Burdine attempted to use a spinal stimulator on Ms. Aguillard to alleviate the pain. The stimulator failed to alleviate sufficient pain from Ms. Aguillard, and a discogram was performed. With the source of Ms. Aguillard's pain located, spinal fusion surgery became an option.

Dr. Burdine explained, however, that a spinal fusion is a drastic procedure that can create other problems for the patient, and he preferred that Ms. Aguillard continue with pain management for as long as possible until more advanced surgical procedures were hopefully developed. Ms. Aguillard was born in 1970 and was in her forties at the time of the accident. Dr. Burdine estimated that she would probably live for another forty years and would have to continue to seek pain management, including dosages of narcotic medication. Dr. Burdine further stated that Ms. Aguillard's need for pain medicine may vary in the future from an increased need at times, to virtually no need at all.

Testimony was also given by John Fidanza, III, M.D., a medical psychologist, who diagnosed Ms. Aguillard with generalized anxiety disorder, simple phobia, major depression, pain disorder, and some symptoms of post-traumatic stress disorder. Dr. Fidanza described Ms. Aguillard's phobia as an "avoidance when driving," constantly looking in the rearview mirror, "afraid that she was going to be rear ended." Dr. Fidanza attributed this phobia to the accident of 2009. He saw no evidence of a pain disorder or phobia diagnosis in Ms. Aguillard's medical records before the date of the accident.

While Ms. Aguillard had been diagnosed with depression prior to the accident, Dr. Fidanza did not find a correlation between the pre-existing depression and the major depressive disorder Ms. Aguillard was diagnosed with after the accident. Despite these disorders, Ms. Aguillard has remained employed and has not developed a history of being tardy or absent at work. Dr. Fidanza found that Ms. Aguillard was able to function through her symptoms; however, while driving, she tended to become anxious and

“mechanical” in her driving, and this anxiety exacerbated her other psychological symptoms, mostly during the daytime.

Because of the psychotic medications she takes daily and the symptoms they treat, Dr. Fidanza described Ms. Aguiard as existing and surviving, as opposed to thriving. Nevertheless, she is still able to take care of herself and her family. Dr. Fidanza opined that without her daily medication, Ms. Aguiard would be unable to function in everyday life. Ms. Aguiard will therefore have to continue seeking psychiatric treatment for the rest of her life.

The role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Each case is different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1260 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994); *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 a finding of an abuse of discretion, the appellate court must adjust an inadequate award to a minimum reasonable amount, or an excessive award to a maximum reasonable amount. See *Smith v. Roussel*, 2000-1028 (La. App. 1 Cir. 6/22/01), 809 So.2d 159, 167. In the instant case, since we find the award for physical pain and suffering to be excessive, we must reduce it to its maximum reasonable amount.

While we find the trial court was correct to award general damages to Ms. Aguiard, we find the award of physical pain and suffering to be excessive and an abuse of discretion. The medical experts did testify that Ms. Aguiard will continue to have physical and psychological issues due to

the accident throughout her life; however, Dr. Burdine could not testify with certainty if Ms. Aguillard would need to have spinal fusion surgery, or whether she could continue on a regimen of narcotic pain medication. He also testified that her levels of pain could fluctuate as time goes on, from a level that requires higher dosages to a level that requires almost no dosage.

Dr. Fidanza testified that Ms. Aguillard has several psychological disorders stemming from the accident. While she has suffered from depression prior to the accident, he did not consider her major depressive disorder to be a pre-existing condition. While she will have to undergo psychological treatment for the rest of her life, and while her quality of life is at a level of surviving rather than thriving, she is able to be employed and work competently. She is able to care for herself and her family. Driving raises her level of anxiety and inflames her other symptoms, requiring her to take psychotic medication for the rest of her life.

In sum, Ms. Aguillard is experiencing pain, anxiety, and depression as a result of her accident in 2009, and these issues will plague her for the rest of her life, that is estimated to continue for approximately forty years. She is taking both narcotic and psychotic medications for these issues, but despite the strength of these types of medicines, she is able to function in everyday life, even though her level of enjoyment of life is not optimal. We agree that had this accident never occurred, Ms. Aguillard would be living a happier, more comfortable life; however, we cannot find a reasonable explanation from the trial court's written reasons as to why the award for physical pain and suffering is so much higher than the award for mental pain and suffering. We will therefore reduce the awards of both physical and mental pain and suffering to \$60,000 each, and we reduce loss of enjoyment of life

to \$10,000. We find these to be the highest reasonable amounts. General damages for Ms. Aguiard are as follows:

1. Physical pain and suffering.....\$60,000.00
2. Mental pain and suffering.....\$60,000.00
3. Loss of enjoyment of life.....\$10,000.00

Ms. Aguiard's general damages total \$130,000.00, bringing her total award to \$702,901.21.³

DECREE

The judgment notwithstanding the verdict rendered by the Nineteenth Judicial District Court in favor of Patricia Aguiard is affirmed. The award of general damages to Ms. Aguiard is hereby amended from \$440,000.00 to \$130,000.00. Therefore, the total award of damages is reduced from \$1,012,901.21 to \$702,901.21. The award of general damages is affirmed as amended. Costs for this appeal are assessed evenly between the appellants, Jeremie Gregory and the City of Baton Rouge, and the appellee, Patricia Aguiard.

**JUDGMENT NOTWITHSTANDING THE VERDICT
AFFIRMED; AWARD OF GENERAL DAMAGES AMENDED AND
AFFIRMED AS AMENDED.**

³ We take notice of the fact that the City appealed the JNOV, not the jury verdict itself. As such, we will not review the issue of liability. The special damages of the jury verdict are uncontested, as is the issue of liability, and we do not find that the interest of justice dictates to us that those issues be raised *sua sponte*. See *Wooley v. Lucksinger*, 2009-0571 (La. 4/1/11), 61 So.3d 507, 563. Therefore, the original award by the jury of \$572,901.02 stands, avoiding any uncertainty as to whether this opinion has any effect on the original verdict. See *Delco v. Stafford*, 2001-0018 (La. App. 1 Cir. 2/20/02), 813 So.2d 458, 464, writ denied, 2002-1125 (La. 6/14/02), 818 So.2d 779 (concurring opinion)