STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0120

SHERRY BOOTHE AND BARRY BOOTHE, INDIVIDUALLY
AND ON BEHALF OF THEIR MINOR CHILDREN,
AMBER AND AMANDA BOOTHE

VERSUS

STATE OF LOUISIANA DEPARTMENT
OF TRANSPORTATION AND DEVELOPMENT
AND PARISH OF EAST BATON ROUGE

Judgment rendered September 21, 2018.

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. C585216
Honorable Janice Clark, Judge

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MELANIE NEWKOME JONES
BATON ROUGE, LA
AND
DAVID L. BATEMAN
BATON ROUGE, LA

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PLAINTIFFS-APPELLEES
SHERRY BOOTHE AND BARRY BOOTHE,
INDIVIDUALLY AND ON BEHALF OF
THEIR MINOR CHILDREN, AMBER AND
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ATTORNEYS FOR
DEFENDANT-APPELLANT
STATE OF LOUISIANA THROUGH THE
DEPARTMENT OF TRANSPORTATION
AND DEVELOPMENT

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Welch J. Concurs in result without reasons.

PETTIGREW, J.

The State of Louisiana, through the Department of Transportation and Development ("DOTD"), appeals the trial court's grant of a judgment notwithstanding the verdict (JNOV) in this matter. For the reasons that follow, we vacate in part, amend, and as amended, affirm.

FACTS AND PROCEDURAL BACKGROUND

This case arises out of a single-car accident that occurred on December 12, 2008, in East Baton Rouge Parish. Sherry Boothe was operating her 2004 Chrysler Pacifica eastbound on Greenwell Springs Road, after bringing her daughter to school. There had been a snow event in Baton Rouge, which, according to Mrs. Boothe, caused the school's closure the day before. As Mrs. Boothe crossed the Comite River Bridge to return home, she lost control of her vehicle, went across the median, flipped, and came to rest in the opposite lane of oncoming traffic. According to Mrs. Boothe, after exiting her vehicle, she immediately knew she had hit either ice or oil because of how slippery the road was.

Mrs. Boothe noted that traffic was heavy going into Baton Rouge that morning, but stated that she had no problems traversing the bridge on the way to bring her daughter to school. According to Mrs. Boothe, following the accident, she was able to immediately open her door and stand up. However, because of the pain she was experiencing, Mrs. Boothe had to sit back down quickly. She kept saying to others at the scene, "Get that bridge closed." Mrs. Boothe expressed her fear that another motorist would come along, skid on the bridge, and roll right into her. Mrs. Boothe did not know if there was sand on either side of the bridge, adding, "I wouldn't think there was any [sand] on the side that had the black ice but." Mrs. Boothe stated that "there was no reason for [her] to be going over" the posted speed limit of 50 miles per hour. When asked if there was any reason why she should have taken extra precautions that morning, Mrs. Boothe replied:

> I mean, not really. I had just come over that bridge and there was no sign of any problem. So, I don't recall when I entered going over it again thinking there could be ice on this bridge or, you know, I just -- there was just nothing to indicate there were any problems with that bridge.

As a result of the accident, Mrs. Boothe suffered a fractured cervical disc at C-2 and an aggravation of a preexisting congenital condition, neither of which required surgery. She was treated conservatively, including wearing a hard cervical collar for approximately three months.

Mrs. Boothe and her husband Barry, individually and on behalf of their minor children ("plaintiffs"), filed a petition against DOTD seeking damages related to the accident.[1] After extensive discovery, the case was tried to a jury on January 25 and 26, 2017. On January 26, 2017, the jury answered "No" to the following jury interrogatory: "Was the State of Louisiana, Department of Transportation and Development at fault for Sherry Boothe's accident on December 12, 2008?" The jury was polled, confirming a 9-3 verdict, and the verdict was made the judgment of the trial court in a written judgment signed by the trial court on February 22, 2017.

The plaintiffs filed a motion for a JNOV and a motion for a new trial. Following a hearing on June 12, 2017, the trial court granted the motion for JNOV and rendered judgment in favor of the plaintiffs in the amount of $919,191.20, plus judicial interest until paid, and all court costs. The trial court also conditionally granted the motion for new trial in favor of the plaintiffs. The trial court signed a judgment in accordance with these findings on November 2, 2017.

It is from this judgment that DOTD has appealed, assigning the following specifications of error:

> I. The trial court erred in granting a JNOV, which effectively deprives [DOTD] of a trial by jury.
>
> II. The trial court awarded damages pursuant to the JNOV, which are excessive or not recoverable based on the evidence presented and available to the jury.
>
> III. The form of judgment concerning future medical exposure is improper. Future medical expense should be awarded in accordance with La. R.S. 13:5106 and La. R.S. 13:5106(B)(3)(C).

[1] The Parish of East Baton Rouge, also originally named as a defendant in this suit, was dismissed on motion of the plaintiffs in a judgment signed by the trial court on September 8, 2015.

ANALYSIS

In order for DOTD to be held liable, the plaintiffs must prove that (1) DOTD had custody of the thing which caused plaintiffs' damages, (2) the thing was defective because it had a condition which created an unreasonable risk of harm, (3) DOTD had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time, and (4) the defect was a cause-in-fact of plaintiffs' injuries. **Cormier v. Comeaux**, 98-2378 (La. 7/7/99), 748 So.2d 1123, 1127. DOTD's general duty is to maintain the public roadways in a condition that is reasonably safe and does not present an unreasonable risk of harm to the motoring public exercising ordinary care and reasonable prudence. Whether DOTD breached its duty to the public, by knowingly maintaining a defective or unreasonably dangerous roadway, depends on all the facts and circumstances on a case by case basis. **Falcon v. Louisiana Dept. of Transp.**, 2013-1404 (La. App. 1 Cir. 12/19/14), 168 So.3d 476, 483, writ denied, 2015-0133 (La. 4/10/15), 163 So.3d 813.

Not every imperfection or irregularity will give rise to liability, but only a condition that could reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances. The existence of an unreasonable risk of harm may not be inferred solely from the fact that an accident occurred. **Netecke v. State ex rel. DOTD**, 98-1182 (La. 10/19/99), 747 So.2d 489, 495.

JUDGMENT NOTWITHSTANDING THE VERDICT

A JNOV is a procedural device authorized by La. Code Civ. P. art. 1811, by which the trial court may modify the jury's findings to correct an erroneous jury verdict. **Wood v. Humphries**, 2011-2161 (La. App. 1 Cir. 10/9/12), 103 So.3d 1105, 1109, writ denied, 2012-2712 (La. 2/22/13), 108 So.3d 769. Article 1811 states, in pertinent part:

> A. (1) Not later than seven days, exclusive of legal holidays, after the clerk has mailed or the sheriff has served the notice of judgment under Article 1913, a party may move for a judgment notwithstanding the verdict. ...
>
> (2) A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.

> B. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or render a judgment notwithstanding the verdict. ...
>
> C. (1) If the motion for a judgment notwithstanding the verdict is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment.
>
> (2) If the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court orders otherwise.
>
> (3) If the motion for a new trial has been conditionally denied and the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

Article 1811 does not set out the criteria to be used when deciding a motion for JNOV. **Wood**, 103 So.3d at 1110. However, the Louisiana Supreme Court has established the standard to be used in determining whether a JNOV is legally called for, stating:

> JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party. This rigorous standard is based upon the principle that "[w]hen there is a jury, the jury is the trier of fact."

Joseph v. Broussard Rice Mill, Inc., 2000-0628 (La. 10/30/00), 772 So.2d 94, 99 (citations omitted).

In a case such as this, the trial court must first determine whether the facts and inferences point so strongly and overwhelmingly in favor of the plaintiffs that reasonable jurors could not arrive at a contrary verdict. Stated simply, if reasonable persons could have arrived at the same verdict, given the evidence presented to the jury, then a JNOV is improper. **Cavalier v. State, ex rel. Dept. of Transp. and Development**, 2008-0561 (La. App. 1 Cir. 9/12/08), 994 So.2d 635, 644.

An appellate court reviewing a trial court's grant of a JNOV employs the same criteria used by the trial court in deciding whether to grant the motion. See **Smith v. State, Dept. of Transp. and Development**, 2004-1317 (La. 3/11/05), 899 So.2d 516, 525. In other words, the appellate court must determine whether the facts and inferences adduced at trial point so overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary finding of fact. If the answer is in the affirmative, then the appellate court must affirm the grant of the JNOV. However, if the appellate court determines that reasonable minds could differ on that finding, then the trial court erred in granting the JNOV, and the jury verdict should be reinstated. Neither the trial court nor this court may substitute its evaluation of the evidence for that of the jury, unless the jury's conclusions totally offend reasonable inferences from the evidence. **Gutierrez v. Louisiana Dept. of Transp. and Development**, 2011-1774 (La. App. 1 Cir. 3/23/12), 92 So.3d 380, 386, writ denied, 2012-1237 (La. 9/21/12), 98 So.3d 343.

We turn now to a review of the evidence to determine whether it "overwhelmingly" supports the plaintiffs' contention that the evidence presented at trial clearly established liability on behalf of DOTD and the resulting damages to the plaintiffs.

The crux of the plaintiffs' case at trial was that DOTD was negligent in failing to treat the roadway's icy conditions or to close the roadway until it was safe to travel. The plaintiffs maintained that there was ice on the Comite River Bridge that was not treated until after the accident in question. In support of their motion for JNOV, plaintiffs noted that during deliberations, the jury requested several items for review, including the police report, the meteorologist's report, the deposition of Conard Monroe, and the DOTD work orders. Plaintiffs argued, however, that because the work orders were the only items in evidence and available for review, "the fact that [the jury was] not allowed to see the items they requested, influenced them to determine their ultimate decision that the plaintiffs had not proven their case."

In response to DOTD's appeal herein, the plaintiffs maintain that all four requirements necessary to prove a case against DOTD were satisfied, *i.e.*, DOTD's custody of the roadway, the icy condition that presented an unreasonable risk of harm, DOTD's requisite knowledge of the defect in question, and causation. Thus, the plaintiffs contend, JNOV was appropriate in this case as the trial court properly found that the evidence presented at trial clearly established liability on behalf of DOTD and the resulting damages to the plaintiffs.

At trial, DOTD argued that the sole cause of the accident was a combination of an act of God and the careless driving of Mrs. Boothe. On appeal, DOTD asserts that there is no overwhelming evidence one way or the other; rather, DOTD maintains the evidence available to the jury was inconclusive. Thus, DOTD contends, the plaintiffs failed to bear their burden of proof on the issue of liability, and the JNOV must be reversed. We find no merit to DOTD's arguments regarding this issue and agree with the plaintiffs that the JNOV was appropriately granted in their favor.

Among the witnesses to testify before the jury was Lieutenant Chad Ruiz, the investigating officer on the day of Mrs. Boothe's accident. Lt. Ruiz testified that he did not issue a citation to Mrs. Boothe in connection with the accident. Following the accident, Lt. Ruiz walked the centerline and the fog line, looking for skid marks or points of impact on the curb and physical evidence of the accident. He indicated that "there was ice in the fog line, the centerline, and the opposite fog line." Lt. Ruiz closed both sides of the roadway and remained on the scene until the road was sanded. When asked how he thought the accident had occurred, Lt. Ruiz opined that Mrs. Boothe had travelled too close to the fog line, causing her vehicle to skid, hit the curb on the median, and flip.

Lt. Ruiz noted that he did not remember if the bridge was solidly iced over; he did acknowledge, however, that he did not recall slipping in the middle of the bridge. Lt. Ruiz testified that he did not see any evidence of sanding on the bridge, adding that it was a "safe assumption" and "something [he] probably would have documented" had it been there.

Several employees from DOTD also presented testimony concerning DOTD's storm protocol and the actual events leading up to Mrs. Boothe's accident. The employees all worked in the East Baton Rouge Parish area, which is where the Comite River Bridge is located. The employees all testified that icy roads are a hazard to the motoring public and that motorist safety is the number one priority of DOTD.

Conard Monroe, a highway foreman 1 at DOTD for 19 years, testified about his involvement with this case. Mr. Monroe indicated that his general duties include repairing potholes, digging ditches, picking up downed trees and dead animals, and cleaning up accidents and oil spills. Mr. Monroe stated that he has worked several ice/snow events during his employment with DOTD.

On December 12, 2008, Mr. Monroe was the foreman of a 3-man crew with a work order to sand the Comite River Bridge. Mr. Monroe testified that although he did not recall what time of the day it was when his crew went out to the bridge, he did know that no accidents had occurred before they arrived. Mr. Monroe stated that when they sand bridges, they work with a sand truck that can hold up to 6 yards of sand; he noted that DOTD's maintenance yard (where the sand is kept) was only about 6-8 minutes away from the Comite River Bridge.

When asked about his work order for the sanding of the Comite River Bridge on the day in question, Mr. Monroe acknowledged that the work order indicated that only 1 cubic yard of sand was used on the job. Thereafter, the following colloquy occurred between Mr. Monroe and the plaintiffs' counsel:

> Q. And -- and the crew only sanded half the bridge, correct?
> A. I'm not sure about the crew that I had said half a bridge. Most times we sand a bridge, we sand both sides, all four lanes.
> Q. Because that's the goal, you want to make both sides of this bridge safe, correct?
> A. Yes, sir.
> Q. But on this date, your crew, before [Mrs.] Boothe's accident, only sanded half of the bridge; is that true?
> A. I'll say again, when I sand bridges, I sand both sides of the bridge, east and west.
> Q. That's what you -- that's what you try to do, correct?
> A. That's pretty much what I do.
> Q. Okay. Well, do you remember giving your testimony in this case, a deposition?
> A. No, I don't.

The plaintiffs' counsel went on to question Mr. Monroe about his deposition testimony wherein Mr. Monroe had stated 1 yard of sand was used on the bridge and that would be enough sand to cover at least one side. Mr. Monroe was also directed to his deposition testimony where he was asked about which side of the bridge he had sanded, to which he replied, "maybe the east side." Mr. Monroe's testimony continued:

> Q. ... And then you were asked, ["]Do you remember or you're just guessing?["] And what was your answer line 12, 13?
> A. Line 12. ["]I can't. I don't remember exactly which side, but I did sand one side.["]
> Q. So you agree with me in your deposition you testified you only sanded -- your crew only sanded one side of the bridge that day?
> A. Yes.
> Q. And that's not what you ordinarily do?
> A. No, most of the times we -- we sand both -- both sides of the bridge.
> Q. Because that's the safe thing to do because you've got motorists going both ways?
> A. Right.

Mr. Monroe reiterated that he did not remember giving his deposition in this case, nor did he have any independent recollection of the incident in question. Mr. Monroe added that he sanded bridges other than the Comite River Bridge on the day in question. When asked to review the work order for the sanding of the Comite River Bridge, Mr. Monroe agreed that according to the work order, the work started at milepost 7.21 and ended at milepost 7.21, indicating to him that his crew worked in only one spot. Mr. Monroe could not think of any reason why they would have only sanded one side of the bridge and not the other.

Patrick Batieste was another DOTD employee to testify about his involvement in this incident. Mr. Batieste, who is currently an engineer/technician 3 at DOTD, was a highway foreman 1 at the time of the accident. On December 11, 2008, Mr. Batieste was the foreman on a job for tree removal, northbound from Sullivan Road to Stoney Point Burch Road. According to Mr. Batieste, he would have driven over the Comite River Bridge from his office on the morning of December 11, 2008, to get to the tree removal job. Mr. Batieste did not remember there having been ice on the Comite River Bridge on that day, but noted that if he had encountered ice, he would have checked with his superintendent for permission to sand the roadway.

On December 12, 2008, Mr. Batieste was the foreman on a crew that sanded the Comite River Bridge. Mr. Batieste testified that he did not have any independent recollection of the work his crew did that day. However, according to Mr. Batieste's deposition testimony, when his crew arrived on the scene, the police were already there and blocked the traffic to allow Mr. Batieste and his crew to sand the bridge.

With regard to DOTD's procedures for deciding which bridges and/or roadways need to be sanded during an ice/snow event, Mr. Batieste indicated that when the storms are coming in, DOTD Superintendent Albert Shields rides the roads, looking for spots that are unsafe to motorists. Mr. Batieste explained that in an emergency situation like this, the ultimate decision on which bridges to sand is with the superintendent. Mr. Batieste also indicated that if he were to find a condition on the roadway that he believed presented a hazard to the motoring public, he would check with his supervisor about either putting up barricades or contacting the police to block the roadway.

Albert Shields testified that he has been employed at DOTD for over 40 years and has been the parish highway maintenance superintendent since 2004. Superintendent Shields explained that in a non-storm situation, he covers the East Baton Rouge Parish area at least once every 2 weeks looking for any areas that would be dangerous to the motoring public on the roadways, shoulders, and medians. When a storm is coming, however, DOTD has more inspectors out on the roads during the event looking for bad spots on the roads. DOTD monitors the weather through weather information received from the engineer techs, the district administrator, or from DOTD's downtown headquarters.

Superintendent Shields stated that DOTD decides when and where to sand based on priority, noting "Our first priority is the interstate system, the major bridges, which is the new bridge[,] is I-10[,] and also the Huey P. Long Bridge. That's the top priorities. Those are major contributories that are used for high volume traffic." DOTD also has a priority list of bridges in East Baton Rouge Parish that are most worrisome during an ice/snow event, and the Comite River Bridge ranks in the top third of priority.

DOTD monitors the areas by doing "drive-thrus" and are often assisted in this task by the State Police, the City Police, and engineer techs from the construction crews. When asked how he looks for ice on a bridge, Superintendent Shields replied:

> It depend[s] on what bridge I'm riding. If I'm riding the new bridge, I cannot stop in the lane of travel so I drive at a very low speed. If I suspect there is a[n] ice condition that would cause a hazard, I do what they call [a] braking procedure, that's driving about 20 miles an hour and I slow down and apply my brake. If I find out they skid, then I call in to the higher up to say that we have a problem.

Superintendent Shields continued, noting that to inspect the Comite River Bridge, he would either do a drive-thru or, as he has done in the past, get out and walk some of the bridge.

Superintendent Shields explained that at the time of the accident in question, the state troopers would recommend highway closures. On the lower level with DOTD, Superintendent Shields did not have the authority to close a highway, but rather the word had to come from either the district administrator and/or the downtown office. Superintendent Shields explained that if he had received a call from Mr. Batieste about ice on the Comite River Bridge, he would have gone to the bridge and made a judgment call and then called the engineer tech; neither Superintendent Shields nor Mr. Batieste have the authority to close the highway. Superintendent Shields noted, "You have to follow proper protocol."

Superintendent Shields testified that he remembered the snow event in December 2008, but did not remember exactly what he was doing at that time with regard to the inspection of bridges. He stated that DOTD now has 2 sand trucks in their unit, but at the time of the accident, they only had 1 sand truck. With regard to the Comite River Bridge, Superintendent Shields noted that it is about 700 feet long and that at the time of the accident, the bridge had a high volume of traffic in the morning travelling westbound to Baton Rouge. He explained that each sanding job is a "judgment call," depending on what's on the road and the severity of the ice situation. Superintendent Shields' testimony continued as follows:

Q. And you have two sections of roadway [on the Comite River Bridge], you have what we generally call a westbound lane and an eastbound lane; correct?
A. Yes.
Q. And there's two lanes on either side; right?
A. Yes.
Q. Okay. So, when a worker like Batieste or Monroe goes out, they're going to sand both the east and the westbound lanes; right?
A. Not necessarily.
Q. Okay. Why wouldn't they?
A. It depend[s] on when you got called out to do the work. If they got called out during the day and only one side was froze up and the other side didn't have any accumulation of ice or snow on the road, it wouldn't be necessary to sand the other side.
Q. Okay. But when they get sent out to sand the roadway, they're supposed to sand what is icy; right?
A. Correct.

In ruling on the JNOV, the trial court stated:

> The court has before it a motion for JNOV and motion for new trial. The court has reviewed this matter together with memoranda and the law and the evidence pertaining to actions of this type in nature. The court has reviewed the Supreme Court of Louisiana standard and when it is proper to grant a JNOV, judgment notwithstanding verdict, in which it stated that it is warranted when the facts and inferences point so strongly and overwhelming in favor of one party, and the trial court believes that reasonable persons could not arrive in a contrary verdict. In making this determination, this court is not evaluating the credibility of the witnesses and all reasonable inferences or factual questions other than that they should be resolved in favor of the non moving (sic) party. The court had thusly done so. In this matter, the court having reviewed the evidence is firmly of the opinion that this court should grant the JNOV for the following reasons: the road in question was under the care, custody, and control of the Department of Transportation and Development, which certainly had notice and knowledge of the hazard. The roadway was unreasonably dangerous and in accordance with the testimony of the witnesses, they received notice on the ice on the road. They sanded one-half of the road and not the other half. The record also reflects they had sufficient man power and sanding materials and should have sanded both directions on the roadway. Therefore, the court is firmly of the opinion the judgment notwithstanding the verdict should be granted. The court has wrestled with this and does not likely easily come to this conclusion, but the law and the evidence compels this conclusion by the court.

Based on our thorough review of the record, we conclude that the evidence overwhelmingly establishes and supports a finding that the icy condition of the Comite River Bridge created an unreasonable risk of harm to Mrs. Boothe and was a substantial factor in bringing about the accident. As noted by the trial court below, the evidence is overwhelmingly in favor of a finding that DOTD had notice of the condition of the bridge and failed to take corrective measures within a reasonable time. Thus, the trial court

was correct in granting a JNOV on the liability issue as it pertains to the unreasonably dangerous condition of the roadway. Weighing the evidence, we find that reasonable men in the exercise of impartial justice could not reach a different conclusion as to DOTD's liability for Mrs. Boothe's accident.

DAMAGES

Having determined that the trial court correctly applied the standard of review as to the jury verdict and correctly granted the JNOV, we must now review the damages it awarded under the appropriate standard of review. Once a trial court has granted a JNOV on the issue of damages and has conducted its own independent assessment of the damages as trier of fact, that decision becomes the judgment of the trial court and is reviewed on appeal for an abuse of discretion. **Adams v. Parish of East Baton Rouge**, 2000-0424 (La. App. 1 Cir. 11/14/01), 804 So.2d 679, 699-700, writ denied, 2002-0448 (La. 4/19/02), 813 So.2d 1090.

In the instant case, after granting the JNOV in favor of the plaintiffs, the trial court awarded the plaintiffs damages as follows:

Damages of Sherry Boothe and Barry Boothe:

Past Medical Expense	$32,431.20
Future Medical Expenses	$44,760.00
Past and Future Physical Pain and Suffering	$300,000.00
Past and Future Mental Anguish	$100,000.00
Past and Future Loss of Enjoyment of Life	$100,000.00
Past and Future Disability	$100,000.00
Loss of wages/earning capacity	$75,000.00
Loss of society, services and relations	$150,000.00
TOTAL	**$902,191.20**

Damages of Amber Boothe and Amanda Boothe for loss of society, services and relations[:]

Amber Boothe	$8500.00
Amanda Boothe	$8500.00

General Damages

It is well settled that the trier of fact has much discretion in awarding damages. La. Civ. Code art. 2324.1. The standard for appellate review of general damages is set forth in **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994), wherein the Louisiana Supreme Court stated that "the discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages." **Youn**, 623 So.2d at 1260. The appellate court's first inquiry should be "whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the 'much discretion' of the trier of fact." **Youn**, 623 So.2d at 1260. "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**, 623 So.2d at 1261. The role of the appellate court in reviewing general damage awards 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. **Youn**, 623 So.2d at 1260.

On appeal, DOTD argues that the $600,000.00 awarded to Mrs. Boothe in general damages is completely unreasonable and unsupported by the evidence. DOTD further maintains that the loss of consortium awards to Mrs. Boothe's husband and daughters, $150,000.00 and $17,000.00, respectively, are not supported by the evidence.

Following the accident, Mrs. Boothe was admitted to Our Lady of the Lake Hospital with complaints of neck pain and headaches. She was diagnosed with a fractured cervical disc at C-2 and spent two days in the hospital under the care of Dr. Scott Soleau, a neurosurgeon who continued as Mrs. Boothe's treating physician through the trial date. Upon discharge from the hospital, Mrs. Boothe was placed in a hard cervical collar. Mrs. Boothe indicated that after "coming out of the [cervical] collar," she had little to no movement in her neck and initially underwent approximately six weeks of physical therapy in early 2009, which allowed her to start regaining motion. Mrs. Boothe later

began seeing Dr. S. Nyboer, a pain management doctor. Mrs. Boothe testified that Dr. Nyboer prescribed two or three different muscle relaxers for her, but that nothing seemed to help her gain more motion in her neck. Eventually, on the advice of Dr. Soleau, she began to wean herself from the muscle relaxers as they were causing her to be lethargic. Over the next several years, Mrs. Boothe continued to be sporadically treated by Drs. Soleau and Nyboer, submitting to several MRIs and x-rays, and undergoing almost twenty more physical therapy sessions from July 2012-August 2012 and September 2015-November 2015. At the time of trial, Mrs. Boothe indicated that she was still seeing Dr. Soleau as needed.

Mrs. Boothe, who had worked as a legal assistant for 27 years, testified that she was unable to work for about four to six weeks after the accident and that when she did return to work, she typically worked three and a half days a week. When asked about limitations on Mrs. Boothe's activities, Dr. Soleau indicated that he would "let pain limit her activities." Dr. Soleau further testified that he had taken her out of the collar and that from a structural/stability standpoint, "she was good;" he would simply tell her to use common sense.

Dr. Soleau stated that although surgery would remain an option for Mrs. Boothe going into the future, he would not "pull [the trigger] until we have to." Moreover, based on all of the MRIs that Mrs. Boothe had undergone over the years, Dr. Soleau considered her condition to be "stable" and believed that conservative treatment remained appropriate. He added, "A combination of the MRIs and her symptoms would determine the treatment course." Dr. Soleau has treated Mrs. Boothe for her injury related to this accident for over eight years.

According to the record, Mrs. Boothe never regained complete range of motion in her neck following the accident; she was limited in her physical activities through the date of trial due to her injury and pain. Mrs. Boothe, her husband Barry, and her two minor daughters all testified about the activities that Mrs. Boothe could no longer participate in because of her injury such as gardening, riding four wheelers, hiking, riding jet skis, participating in other water sports, and riding amusement park rides.

Though we find the damages awarded in this case relatively high, we cannot say that the award is outside the scope of what a reasonable trier of fact could assess for the injury sustained by Mrs. Boothe. Given this particular injury and the effects on Mrs. Boothe and her family under the particular circumstances, the trial court's damage awards are not beyond that which a reasonable trier of fact could assess. After a thorough review of the record, we conclude the trial court did not abuse its discretion in awarding $600,000.00 in general damages to Mrs. Boothe, $150,000.00 for loss of society, services, and relations to Barry Boothe, and $8,500.00 each to Mrs. Boothe's two minor daughters for loss of society, services, and relations. Thus, we need not resort to a review of prior cases. **Youn**, 623 So.2d at 1260. However, our discussion of damages does not end here.

Although we cannot conclude, given the evidence, that the trial court abused its discretion in the amount of its awards for loss of society, services, and relations, we find that the final awards for such damages contained in the trial court's judgment are legally excessive. Louisiana Revised Statutes 13:5106(B)(1) provides as follows with regard to limitations on suits against the state, a state agency, or a political subdivision:

> The total liability of the state and political subdivisions for all damages for personal injury to any one person, including all claims and derivative claims, exclusive of property damages, medical care and related benefits and loss of earnings, and loss of future earnings, as provided in this Section, shall not exceed five hundred thousand dollars, regardless of the number of suits filed or claims made for the personal injury to that person.

Pursuant to La. R.S. 13:5106(D)(4), "'Derivative claims' include but are not limited to claims for survival or loss of consortium." In **Engles v. City of New Orleans**, 2003-0692 (La. App. 4 Cir. 2/25/04), 872 So.2d 1166, 1186-1187, writs denied, 2004-1432 (La. 9/24/04), 882 So.2d 1141, 2004-2654 (La. 1/7/05), 891 So.2d 697, the primary plaintiff was injured in a fall from his bicycle caused by a street defect. The court held that a claim for loss of consortium under La. Civ. Code art. 2315(B) was a derivative claim, derived from the personal injuries sustained by the primary victim. It therefore held that the award of the maximum $500,000.00 in general damages to the primary plaintiff served to legally extinguish his wife's derivative claim for loss of consortium pursuant to

La. R.S. 13:5106(B)(1), and reversed the trial court's award of $100,000.00 for such damages. See also **Jenkins v. State ex rel. Dept. of Transp. and Development**, 2006-1804 (La. App. 1 Cir. 8/19/08), 993 So.2d 749, 778, writ denied, 2008-2471 (La. 12/19/08), 996 So.2d 1133 (General damages awarded to plaintiff in the amount of $450,000.00, reduced by 10 percent fault assessed to the defendants, served to legally extinguish the derivative awards for loss of consortium, services, and society, as the maximum recoverable amount of $500,000.00 applied to the defendants as political subdivisions of the state.).

Based on the above and foregoing, we amend the $600,000.00 general damage award to Mrs. Boothe to reflect the statutorily imposed $500,000.00 cap set forth in La. R.S. 13:5106(B)(1), and, as amended, affirm. We further vacate the damage awards to Barry Boothe, Amber Boothe, and Amanda Boothe for loss of society, services, and relations, as these claims were legally extinguished pursuant to La. R.S. 13:5106(B)(1).

Loss of Wages/Earning Capacity

The trial court awarded Mrs. Boothe $75,000.00 in loss of wages/earning capacity. DOTD argues on appeal that the record is devoid of any evidence of Mrs. Boothe's wages prior to the accident or evidence concerning lost wages or earning capacity. We agree.

With regard to a claim for loss of earning capacity, earning capacity refers to a person's potential and is not determined by actual loss. **Hobgood v. Aucoin**, 574 So.2d 344, 346 (1990); **Woods v. Hall**, 2015-1162 (La. App. 1 Cir. 4/20/16), 194 So.3d 689, 693-694. An award of loss of future income is not predicated merely upon the difference between a plaintiff's earnings before and after a disabling injury, but also encompasses the loss of one's earning potential or capacity, that is, the loss or reduction of a person's capability to do that for which he is equipped by nature, training, and experience. **David v. Our Lady of Lake Hosp., Inc.**, 2002-1945 (La. App. 1 Cir. 6/27/03), 857 So.2d 529, 533. Factors to consider in fixing awards for loss of earning capacity include age, life expectancy, work life expectancy, appropriate discount rate, the annual wage rate increase, prospects for rehabilitation, probable future earning capacity, loss of earning

ability, and the inflation factor or decreasing purchasing power of the applicable currency. **Tate v. Kenny**, 2014-0265 (La. App. 1 Cir. 12/23/15), 186 So.3d 119, 129.

The fact finder's determination of the amount, if any, of an award of damages, including lost earning capacity, is a finding of fact. **Ryan v. Zurich American Ins. Co.**, 2007-2312 (La. 7/1/08), 988 So.2d 214, 219. However, unlike awards for past lost earnings, awards for lost future income or loss of future earning capacity are inherently speculative and are intrinsically insusceptible of being calculated with mathematical certainty. Therefore, the fact finder is given much discretion in fixing these awards. See La. Civ. Code art. 2324.1; **Graham v. Offshore Specialty Fabricators, Inc.**, 2009-0117 (La. App. 1 Cir. 1/8/10), 37 So.3d 1002, 1016. It is well settled that the proper measure of damages for loss of earning capacity is not an injured person's actual pre-injury earnings. Nevertheless, an expert's projections of loss of future earning capacity must have a factual basis in the record, and an award may not be based upon speculation, possibility, or conjecture. **Jenkins**, 993 So.2d at 775.

In this case, Mrs. Boothe testified that she had "built up a lot of vacation" and that although she had lost some time from work, she did not have any lost wages as a result of the accident. Mrs. Boothe further indicated that after the accident, she only went back to work part time, typically working three or three and a half days a week. There is absolutely no evidence in the record concerning Mrs. Boothe's income; neither Mrs. Boothe nor any other witness provided testimony as to what she earned as a legal assistant over the 27 years she had worked prior to the accident or what she was earning at the time of the trial after returning to her same job in a part-time position. Without a factual basis in the record for the $75,000.00 award for loss of wages/earning capacity, we find the trial court abused its discretion and vacate said award.[2]

[2] We note further that the award is prejudicial to DOTD with regard to the statutory cap set forth in La. R.S. 13:5106(B)(1) on a damage award for a loss of future earning capacity. Even if there had been evidence in the record to support the award, it would have resulted in an award to Mrs. Boothe that was larger than she was statutorily entitled to receive, thus still requiring action by this court.

Future Medicals

DOTD argues on appeal that pursuant to La. R.S. 13:5106(B)(3)(c), any award of future medical expenses in a suit for personal injuries against the state or a state agency shall be placed in a revisionary trust as provided for in La. R.S. 39:1533.2. Mrs. Boothe does not object. Thus, the judgment will be amended accordingly.

DECREE

For the above and foregoing reasons, we vacate that portion of the November 2, 2017 judgment awarding damages to Barry Boothe, Amber Boothe, and Amanda Boothe for loss of society, services, and relations, as these claims were legally extinguished pursuant to La. R.S. 13:5106(B)(1). We further vacate that portion of the November 2, 2017 judgment awarding Mrs. Boothe $75,000.00 for loss of wages/earning capacity. We amend that portion of the trial court's November 2, 2017 judgment that awarded $600,000.00 in general damages to Mrs. Boothe to reflect the statutorily imposed $500,000.00 cap set forth in La. R.S. 13:5106(B)(1), and, as amended, we affirm the general damage award in the amount of $500,000.00. We further amend the November 2, 2017 judgment to provide that pursuant to La. R.S. 13:5106(B)(3)(c), the $44,760.00 award for future medical expenses shall be placed in a revisionary trust as provided for in La. R.S. 39:1533.2. In all other respects, we affirm the November 2, 2017 judgment. Appeal costs in the amount of $1,160.00 are to be divided equally between the parties.

VACATED IN PART; AMENDED, AND AS AMENDED, AFFIRMED.