STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1213

ES AND JS, ON BEHALF OF
THEIR MINOR CHILDREN, TBB, TBS AND TNS[1]

VERSUS

DERRICK THOMAS, TANGIPAHOA PARISH SCHOOL BOARD,
AND BERKLEY INSURANCE COMPANY

Judgment Rendered: MAY 31 2019

Appealed from the
21st Judicial District Court
Tangipahoa Parish, Louisiana
Docket Number 2015-0000149

Honorable Brenda B. Ricks, Judge Presiding

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| Matthew Todd<br>Sherman Q. Mack<br>Albany, LA | Counsel for Plaintiffs/Appellees,<br>ES and JS, on behalf of TBB, TBS, and TNS |
| Christopher M. Moody<br>Albert D. Giraud<br>Hammond, LA | Counsel for Defendants/Appellants,<br>Derrick Thomas, Tangipahoa Parish School<br>Board and Berkley Insurance Company |

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BEFORE: WHIPPLE, C.J., McDONALD, McCLENDON, THERIOT, and CHUTZ, JJ.

Whipple, C.J. dissents for reasons assigned.
McClendon, J. concurs (by JMM)
Chutz, J. dissents for the reasons assigned by Chief Judge Whipple. (by JMM)

[1] We have altered the caption, using initials in lieu of the full names of the plaintiffs/appellees, to protect the identity of the minor children involved in this appeal.

**McDONALD, J.**

This matter is before us on appeal by defendants/appellants, Derrick Thomas and the Tangipahoa Parish School Board, from a judgment in favor of plaintiffs/appellees, ES and JS, on behalf of their minor children, TBB, TBS, and TNS. For the following reasons, we affirm in part and amend in part.

## FACTS AND PROCEDURAL HISTORY

On January 22, 2014, Derrick Thomas, a bus driver for the Tangipahoa Parish School System, was operating a school bus in Amite, Louisiana, traveling southbound on South Myrtle Street. After stopping at the stop sign at the intersection of South Myrtle Street and East Magnolia Street, Mr. Thomas attempted to make a left turn onto East Magnolia Street. At the same time, Francine George was driving westbound on East Magnolia Street and was making a right turn (or turning north) onto South Myrtle Street when her vehicle and the school bus made contact. East Magnolia Street was the favored street and Ms. George was not faced with a stop sign prior to her turn onto South Myrtle Street. After observing the vehicles in the position where they made contact, the investigating officer recorded that the point of impact occurred north of the center line of East Magnolia Street and east of the center line of South Myrtle Street in Ms. George's lane of travel.

TBB, TBS, and TNS were student passengers on the school bus at the time of the accident.[2] On February 14, 2014, about three weeks after the accident, the three minor children sought treatment with Anthony Zuppardo, D.C., at Zuppardo Chiropractic for injuries sustained in the accident. Thereafter, the children continued treatment with Dr. Zuppardo on 15 visits over the course of a three-month period, until their release from Dr. Zuppardo's care on May 13, 2014. Thereafter, their parents, ES and JS, filed this suit for damages on behalf of the children against Mr. Thomas, the Tangipahoa Parish School Board ("TPSB"), and Berkley Insurance Company ("Berkley"), TPSB's excess liability insurer.

Berkley filed a motion for summary judgment, seeking dismissal of plaintiffs' claims against it on the basis that the self-insured retention limit under the policy was

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[2] The children were approximately ages seven, nine, and eleven at the time of the accident.

$150,000 and that plaintiffs' stipulated value of their claims was under $50,000. The trial court subsequently dismissed Berkley as a party defendant with prejudice. Thereafter, following discovery, the matter proceeded to a bench trial solely against Mr. Thomas and TPSB.

At the conclusion of trial, the trial court took the matter under advisement. On November 15, 2016, the trial court issued "Reasons for Judgment," finding that Mr. Thomas' failure to yield to traffic and failure to obey a stop sign was the sole cause of the collision. The trial court further determined that the defendants were liable to the plaintiffs for "damages sustained."

On January 4, 2017, plaintiffs' counsel requested written findings of fact and reasons for judgment on the issue of quantum/damages. Thus, on April 11, 2017, the trial court issued a "JUDGMENT ON QUANTUM," wherein it reiterated its finding that Mr. Thomas' failure to yield to traffic and failure to obey the stop sign was the sole cause of the collision and then awarded TBB, TBS, and TNS general damages in the amount of $12,000 each, "plus medicals and all costs."

On June 14, 2017, however, the trial court signed a second judgment on the merits, submitted by plaintiffs' counsel and approved as to form by defendants' counsel, which again awarded TBB, TBS, and TNS general damages in the amount of $12,000 each, but which additionally awarded special damages to the children in the amounts of $1,125 each to TBB and TNS and $1,245 to TBS, together with judicial interest, and all court costs.

The defendants suspensively appealed from the June 14, 2017 judgment, contending the trial court:

(1) committed manifest error in failing to find any fault on the part of Ms. George for the accident and damages in question;

(2) abused its discretion in awarding general damages to TBB, when he testified under oath that he sustained no injuries as a result of the accident herein;

(3) abused its discretion in awarding general damages of $12,000 to TBB, where under the applicable law, the highest reasonable amount it could have awarded was $500.00; and

(4) abused its discretion in awarding general damages of $12,000 each to TBS and TNS, where the evidence showed that they sustained

minor soft tissue strains of the back and/or neck and were treated for only three months.

## DISCUSSION

### Rule to Show Cause

At the outset, we will address a rule to show cause issued by this court and must resolve whether this appeal should be dismissed, where the record is unclear as to which judgment relating to the October 21, 2016 trial on the merits is the subject of this appeal.

As noted above, the trial court signed a "JUDGMENT ON QUANTUM" on April 11, 2017, awarding general damages of $12,000 each to TBB, TBS, and TNS, "plus medicals and all costs." However, the court then signed a second judgment on June 14, 2017, which again awarded general damages of $12,000 each to TBB, TBS, and TNS, but further awarded special damages of $1,125 each to TBB and TNS, $1,245 to TBS, judicial interest, and "any and all court costs." The defendants filed their appeal herein "from the judgment on quantum herein read, rendered, and signed on the 14th day of June, 2017[.]"

It is well settled under our jurisprudence that once a trial court signs a final judgment, then signs another judgment containing prohibited substantive changes, the second judgment is null and without legal effect. We note, however, that the April 11, 2017 judgment does not state a specific amount for medical or special damages. *See* LSA-C.C.P. art. 1951; *Mack v. Wiley*, 07-2344 (La. App. 1 Cir. 5/2/08), 991 So.2d 479, 485-486. Thus, to the extent the April 11, 2017 judgment awarded "medicals," but did not specify the exact amount of medical damages, and because the exact amount of medical damages cannot otherwise be determined from the judgment, the first judgment did not constitute a final judgment for purposes of appeal over which this court has jurisdiction. *See Advanced Leveling & Concrete Solutions v. Lathan Company, Inc.*, 17-1250 (La. App. 1 Cir. 12/20/18), ___ So.3d ___, ___, 2018 WL 6716997 (en banc). As such, the April 11, 2017 judgment was subject to revision as a non-final judgment and therefore, the appeal taken from the June 14, 2017 judgment is properly before us. Thus, we hereby recall the show cause order issued herein.

**Apportionment of Fault**
**(Assignment of Error Number One)**

In this assignment of error, the defendants contend the trial court committed manifest error in failing to apportion any fault to Ms. George for the January 22, 2014 accident.

This court must give great deference to the trier of fact's determination regarding allocation of fault. *Fontenot v. Patterson Insurance*, 09-0669 (La. 10/20/09), 23 So.3d 259, 274, *rehearing granted in part on other grounds*. The allocation of fault is within the trier of fact's sound discretion, and we will not disturb such a finding on appeal in the absence of manifest error. *Edmond v. Cherokee Insurance Company*, 14-1509 (La. App. 1 Cir. 4/24/15), 170 So.3d 1029, 1036-37. Thus, under the standards which govern our review, if the trial court's findings are reasonable after reviewing the record, we cannot reverse those findings even if we may have decided differently had we been sitting as the trier of fact. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989).

All motorists owe a general duty to observe what should be observed. *Mart v. Hill*, 505 So.2d 1120, 1123 (La. 1987). Additional duties also arise depending on the motorist's movements on the roadway in relation to other vehicles. The duty of a motorist approaching an intersection controlled by a stop sign, such as Mr. Thomas herein, is set forth in LSA-R.S. 32:123, which provides as follows:

> A. Preferential right of way at an intersection may be indicated by stop signs or yield signs.
>
> B. Except when directed to proceed by a police officer or traffic-control signal, every driver and operator of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the crosswalk on the near side at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right-of-way to all vehicles which have entered the intersection from another highway or which are approaching so closely on said highway as to constitute an immediate hazard.

As is clear from LSA-R.S. 32:123B, stopping is only half of the motorist's duty. The other half of this duty is to assess traffic and make certain the way is clear before proceeding. *See Toston v. Pardon*, 03-1747 (La. 4/23/04), 874 So.2d 791, 802; *Ritchey v. State Farm Mutual Automobile Insurance Company*, 17-0233 (La. App. 1 Cir.

9/15/17), 228 So. 3d 272, 276. A left turn is one of the most dangerous maneuvers a driver can execute, and therefore, before attempting same, a driver must ascertain whether it can be completed safely. *Charles v. Travelers Indemnity Company*, 15-0956 (La. App. 1 Cir. 5/10/16), 2016 WL 2669821 *6 (unpublished).

Conversely, the duty of a motorist traveling on the favored street, such as Ms. George, is minimal. *Ritchey v. State Farm*, 228 So.3d at 277. This duty was explained by the Louisiana Supreme Court in *Sanchez Fernandez v. General Motors Corporation*, 491 So.2d 633, 636 (La. 1986), as follows:

> A motorist on a right of way street is entitled to assume that motorists on the unfavored street approaching a stop sign will obey the traffic signal and will stop, look and yield the right of way to traffic proceeding on the favored street. Of course, once a right of way motorist in the exercise of ordinary [vigilance] sees that another motorist has failed to yield the right of way, a new duty thereafter devolves on the right of way motorist to take reasonable steps to avoid an accident if there is enough time to afford him a reasonable opportunity to do so. [Citation and footnote omitted.]

The motorist on the favored street will be considered negligent only in exceptional cases in which he could have avoided the accident by the exercise of the slightest degree of care. *Ritchey v. State Farm*, 228 So.3d at 277.

Despite these legal precepts, the defendants contend the trial court erred in failing to apportion any fault to Ms. George for the accident and resulting damages where Ms. George failed to carry out her duty of reasonable care, failed to maintain a proper lookout, and did not attempt to avoid the accident. The defendants further contend that "[a]ll Ms. George had to do was stop and allow the bus to clear the obviously occupied roadway before turning[,]" but instead, she paid no attention to what was in front of her and she proceeded into her turn making contact with the bus.

Plaintiffs, on the other hand, contend the trial court correctly allocated the fault in causing the accident to Mr. Thomas, as he was governed by a stop sign and had a duty to bring his vehicle to a stop, evaluate the traffic to make sure the way was clear before he entered the intersection, and to make certain he could negotiate a turn onto East Magnolia Street safely. Plaintiffs claim that instead, Mr. Thomas failed to wait for traffic to clear on Magnolia Street before proceeding and thus, he breached this duty. Plaintiffs also contend that moreover, where Ms. George was travelling on the favored

street, which was not governed by a stop sign, she had the right of way to make a right turn onto South Myrtle Street.

Mr. Thomas testified that as he stopped at the stop sign, Ms. George's vehicle stopped as well. Mr. Thomas testified that after both vehicles stopped, Ms. George could not make the turn due to the width of his bus on the narrow side street, and that he saw that he could make the turn if Ms. George would have just stopped her vehicle. He testified that Ms. George's vehicle stayed at a stop until after he began making his turn. According to Mr. Thomas, he was already into his turn when Ms. George also tried to make her turn, causing her vehicle to make contact with the bus.

TNS, who was a passenger on the bus at the time of the accident, testified that she saw Ms. George's vehicle before it made contact with the bus. TNS testified that it did not seem like Ms. George was paying attention.

Although Ms. George was not called to testify at trial, the police report introduced by plaintiffs indicated that Ms. George stated she was turning north onto South Myrtle Street as Mr. Thomas was turning east onto East Magnolia Street when Ms. George's vehicle made contact with Mr. Thomas' bus.

As reflected in its reasons for judgment, the trial court found that Mr. Thomas' failure to yield to traffic and failure to obey the stop sign was the sole cause of the accident. In doing so, the trial court noted that Ms. George was not governed by a stop sign or signal and had the right of way to make a right turn onto Myrtle Street, while Mr. Thomas had the duty to stop at the stop sign at the end of South Myrtle Street and to wait for the traffic to clear on Magnolia Street before proceeding forward. The trial court found that the fact that the point of impact was in Ms. George's lane of travel made it "clear" that Mr. Thomas caused the accident by failing to yield and by instead entering Ms. George's lane of travel. We agree.

Under LSA-R.S. 32:123(B), Mr. Thomas had an affirmative duty to not only stop at the stop sign, but after having stopped, to yield the right of way to all vehicles and traffic approaching so closely on the favored street as to constitute an immediate hazard, and to make certain the way was clear before proceeding. The trial court concluded Mr. Thomas failed to do so. Following a thorough review of the record, and

considering the pertinent factors and requisite duties of the respective drivers, we find the record amply supports the trial court's findings. Thus, we find no manifest error in the trial court's finding that Mr. Thomas breached his duty and was the sole cause of the accident.

**Award of General Damages to TBB**
**(Assignment of Error Number Two)**

In this assignment of error, the defendants contend the trial court erred in awarding any general damages to TBB, when he testified in a pretrial deposition that he sustained no injuries as a result of the accident.

In support of their contention, the defendants point to TBB's June 18, 2015 deposition testimony, taken approximately a year and a half after the accident, where the following colloquy occurred:

Q. You didn't tell [the police officer] you were hurt either; is that right?

[TBB]: No, sir, because I wasn't hurt.

Q. You weren't hurt?

[TBB]: Huh-uh (NEGATIVE RESPONSE).

Q. Is that right?

[TBB]: Yes, sir.

* * *

Q. What about you, young man?

[TBB]: No, sir.

Q. You weren't hurting at all?

[TBB]: Huh-uh (NEGATIVE RESPONSE).

Q. So you just went to the chiropractor just to kind of get checked out?

[TBB]: (WITNESS NODS HEAD UP AND DOWN.)

At trial, however, TBB was again questioned concerning whether he was injured as a result of the accident. When asked if he was hurt, TBB responded, "Yes, sir. I hit my, I hit the seat when the bus had hit the car." In response to further questioning, TBB specifically denied having any recollection of his deposition testimony cited above.

The defendants contend that given TBB's conflicting deposition and trial testimony, the trial court abused its discretion in awarding TBB any general damages. We note, however, that TBB's medical records were also introduced at trial. According to TBB's medical records, he initially presented with complaints of neck pain that were "off and on" and reported pain that increased with movement. On examination, he showed tension in his left neck, left lumbar, left thoracic, levator scapular, left upper and lower trapezius, slight swelling in left neck, and spasm of the left anterior neck. Dr. Zuppardo diagnosed TBB with "[c]hronic post traumatic cervical strain with accompanying cervical nerve compression causing swelling [of the] left neck, spasm left anterior neck, tension left upper trapezius, and left neck musculature." His review of TBB's medical records reflect that throughout his treatment and as late as April 10, 2014, TBB complained of neck pain and in particular, a February 27, 2014 entry states that he had "a lot [of] neck pain [and has] been hurting every day." TBB had no complaints of pain prior to this accident.

When factual findings are based on determinations regarding witness credibility, the manifest error/clearly wrong standard of review demands great deference to the trier of fact's findings. *Gordon v. Doe*, 16-0644 (La. App. 1 Cir. 1/19/17), 2017 WL 227693 *3 (unpublished). Moreover, as the trier of fact, the trial court was entitled to accept or reject, in whole or in part, the testimony of any witness, including TBB's testimony herein. *See Smith v. Roussel*, 00-1028 (La. App. 1 Cir. 6/22/01), 809 So.2d 159, 164.

In its reasons for judgment, the trial court stated that in awarding damages, it was giving greater deference to the treating physician's testimony than to the minor children's deposition testimony. On review, considering the applicable standard of review for appellate courts, we find no manifest error in the trial court's decision to award general damages to TBB, which award was rendered after weighing all of the evidence, including TBB's deposition testimony, his trial testimony, and Dr. Zuppardo's medical records detailing TBB's injuries and past complaints of pain. Thus, we find no merit to this assignment of error.

**General Damage Awards**
**(Assignments of Error Numbers Three and Four)**

In these assignments of error, the defendants challenge the amounts awarded, contending the trial court abused its discretion: in awarding general damages of $12,000 to TBB, where under the applicable law, the highest reasonable amount it could have awarded TBB was $500; and, in awarding general damages of $12,000 each to TBS and TNS, for minor soft tissue strains of the back and/or neck for which they were treated for only three months, such that the highest reasonable general damage award that the trial court could have made to TBS and TNS was $7,500 each.

General damages are defined as those which may not be fixed with pecuniary exactitude; instead, they involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or lifestyle which cannot be definitely measured in monetary terms. *Pinn v. Pennison*, 16-0614, 16-0615 (La. App. 1 Cir. 12/22/16), 209 So.3d 844, 849. For that reason, and in accordance with LSA-C.C. art. 2324.1, this court reviews general damage awards under the "much discretion" standard. *See Youn v. Maritime Overseas Corporation*, 623 So.2d 1257, 1261 (La. 1993). Because the trier of fact's discretion is so great, and even vast, an appellate court should rarely disturb a damage award on review. *Guillory v. Lee*, 09-0075 (La. 6/26/09), 16 So.3d 1104, 1117.

On appellate review, this court will disturb a damage award only when there has been a clear abuse of the trier of fact's discretion. *Blake v. City of Port Allen*, 14-0528 (La. App. 1 Cir. 11/20/14), 167 So.3d 781, 791. The role of an appellate court in reviewing a general damage award is not to decide what it considers to be an appropriate award, but rather, to review the trier of fact's exercise of discretion. *Bouquet v. Wal-Mart Stores, Inc.*, 08-0309 (La. 4/4/08), 979 So.2d 456, 459 (per curiam). Thus, a resort to prior awards is appropriate only after the reviewing court determines that there has been an abuse of discretion, and then only to determine the highest or lowest point of an award within that discretion. *Graham v. Offshore Specialty Fabricators, Inc.*, 09-0117 (La. App. 1 Cir. 1/8/10), 37 So.3d 1002, 1018.

TNS's medical records show that she presented for chiropractic treatment with complaints of pain in the mid back and right neck that was "off and on" and increased with movement, lower back pain that was "off and on," and pain in both her right and left knees. Upon examination, Dr. Zuppardo found that TNS had tension in her left neck, right lower leg, left lumbar, left thoracic, and right knee musculature. Dr. Zuppardo diagnosed her condition as "[c]hronic post traumatic cervical strain with accompanying cervical nerve compression causing tension left neck musculature," "[c]hronic post traumatic lumbar strain with accompanying lumbar nerve compression causing tension left lumbar musculature," "[c]hronic post traumatic thoracic strain with accompanying thoracic nerve compression causing tension left thoracic musculature," and "[r]ight knee strain causing tension right knee musculature." TNS had no complaints of pain prior to this accident.

TBS's medical records reflect that she presented for chiropractic treatment with complaints of pain in the neck, mid back, and left ribcage, which was "off and on" and increased with movement. Upon examination, Dr. Zuppardo found that TBS had slight spasm of the anterior and posterior neck, and tension in the left upper and lower trapezius, left levator scapular, right rhomboids, left ribcage, left lumbar, left thoracic, and left buttocks. Dr. Zuppardo diagnosed her condition as "[c]hronic post traumatic thoracic strain with accompanying thoracic nerve root compression causing tension [in the] right rhomboids and left thoracic musculature" and "[c]hronic post traumatic cervical strain with accompanying cervical nerve root compression causing spasm anterior and posterior neck musculature and tension upper trapezius, tension left levator scapular." TBS likewise had no complaints of pain prior to this accident.

TBB's medical records show that he presented for chiropractic treatment with complaints of right neck pain, which was "off and on" and increased with movement. Upon examination, Dr. Zuppardo found that TBB had tension in the left neck, left lumbar, levator scapular, and left upper and lower trapezius. Dr. Zuppardo diagnosed his condition as "[c]hronic post traumatic cervical strain with accompanying cervical nerve compression causing swelling [in the] left neck, spasm left anterior neck[, and] tension left upper trapezius, and left neck musculature."

ES, the father of the three minor children, testified at trial. ES testified that after the accident, the children complained of neck, back, and leg pain and that he took them to North Oaks Hospital for evaluation, then to Dr. Zuppardo for treatment. He testified that during and after their treatment with Dr. Zuppardo, they complained of their injuries and that although they have completed treatment, they continue to complain "every now and then." ES explained that TBB was unable to run track due to his injuries and that TBS and TNS wanted to go outside and play for a while after the accident, but were limited in doing so.

On review, we conclude the trial court abused its discretion in awarding $12,000 in general damages to each child. They were involved in a minor accident between two vehicles that were barely moving at the time contact was made. They were passengers on the much larger vehicle, a school bus, which would have more readily absorbed any possible jolt caused by the slight impact. The children sustained minor soft tissue injuries at most and waited over three weeks after the accident to begin medical treatment. There is no evidence that they took pain medication or had to miss any school because of their injuries, and their father admitted their grades did not suffer after the accident. Although TBB was unable to run track, and the two girls did not play outside "for a while," there is no evidence if these limitations lasted days, weeks, or months. All three children were released from chiropractic care after only about three months of treatment, consisting of six appointments in February 2014, eight appointments in March 2014, and four appointments in April 2014. Overall, the evidence does not show the children sustained considerable mental or physical pain and suffering, nor significant inconveniences.

Further, the trial court's abuse of discretion is also shown by its exact same award to each child despite the differences in their injuries. While we recognize the trial court's vast discretion on the issue of quantum, we note that the trial court has the responsibility to tailor the damage award in each case to fit the specific facts of the case and may not use a "cookie cutter" approach in determining the amount of damages. To do so is an abuse of discretion or a lack of the exercise of discretion. *See Lee v. Briggs*, 08-2120 (La. App. 1 Cir. 9/10/09), 23 So.3d 362, 365. Here, the trial

court's "cookie cutter" amount of $12,000 to each child ignores their particular injuries and their effects under the particular circumstances on each particular injured child. *Id.; also see Woods v. Hall*, 15-1162 (La. App. 1 Cir. 4/20/16), 194 So.3d 689, 696.[3] The medical records show TNS had soft tissue injuries to her neck and lumbar spine and a right knee injury; TBS had similar soft tissue injuries to her neck and thoracic spine, but no lower extremity injuries; and TBB had a soft tissue injury to his neck. Further, the medical records show the children's appointments in April 2014 were only one-half the number of appointments in March 2014, indicating a decrease in any general damages they experienced. Nonetheless, despite the differing injuries and lessened frequency of treatment, the trial court rendered the same general damage award to each of them, namely $4,000 per month, for three months of treatment.

Having found the trial court abused its discretion, we have reviewed prior general damage awards to determine the highest reasonable awards within that discretion. *See Graham*, 37 So.3d at 1018. Based on our quantum review, and based on the evidence as to the particular circumstances of each child, we conclude TNS had the greatest injuries and the highest general damage award to her is $9,000; TBS had lesser injuries than TBS and the highest general damage award to her is $8,000; and, TBB had minimal injuries and the highest general damage award to him is $6,000.[4]

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[3] *Compare Prejeant v. Gray Ins. Co.*, 15-87 (La. App. 5 Cir. 9/23/15), 176 So.3d 704, 711 (noting the Fifth Circuit's use of the "unit-of-time method" for calculating a general damage award).

[4] The following cases support a reduction in the general damage awards: *Burrell v. Williams,* 05-1625 (La. App. 1 Cir. 6/9/06), 938 So.2d 694, 698-99 (award of $10,000 in general damages to injured motorist who sustained cervical strain, back strain, and contusions to ribs, where injuries resolved within *five months*); *Lee v. Briggs,* 23 So.3d at 365 (reduction of $10,000 general damage award to $6,225 for soft-tissue neck and back injuries sustained in motor vehicle collision, treated for *two months* after the accident, with some pain flare ups); *Ursin v. Russell,* 07-859 (La. App. 5 Cir. 2/6/08), 979 So.2d 554, 559-62 (awarded $3,325 in medical expenses and $7,500 in general damages for soft-tissue neck and back injuries sustained in rear-end collision; treated with chiropractor for approximately *six months); Marcum v. Johnston,* 32,634 (La. App. 2 Cir. 1/26/00), 750 So.2d 1186, 1190-91 (award of $5,500 general damages for *ten-month* neck and lower back soft-tissue injury not resolved at trial); *Marcum v. Johnston,* 750 So.2d at 1190-91 (different plaintiff) (affirming $10,000 general damage award to plaintiff who suffered from soft tissue injuries to the neck and lower back, where plaintiff was given a "fairly good prognosis" after over *two years of treatment,* but where medical evidence indicated plaintiff could remain symptomatic for an indefinite period thereafter); *Williams v. Roberts,* 05-852 (La. App. 5 Cir. 4/11/06), 930 So.2d 121, 122-24 (reducing general damage award from $14,000 to $7,500 to plaintiff who suffered from cervical, thoracic, and lumbosacral spine injuries, where plaintiff's injuries resolved after *three months* of conservative chiropractic care; *Volion v. Henry,* 04-294 (La. App. 5 Cir. 10/26/04), 888 So.2d 265, 272 (affirming $6,000 general damage award to plaintiff who suffered from soft tissue injuries to the neck, back, and arm, where plaintiff was treated by a chiropractor for approximately *six to seven months, but suffered from residual pain* thereafter and proved the possibility of permanent injury).

## CONCLUSION

For the above reasons, this court's show cause order is recalled, and the June 14, 2017 judgment in favor of plaintiffs, ES and JS, on behalf of their minor children, TBB, TBS and TNS, and against defendants, Derrick Thomas and Tangipahoa Parish School Board, is hereby amended, in part, to reduce the amount of general damages awarded for TNS's injuries to $9,000; for TBS's injuries to $8,000; and for TBB's injuries to $6,000. In all other respects, the judgment is affirmed. Costs of this appeal in the amount of $1,255 are assessed equally to the plaintiffs and defendants.

**SHOW CAUSE ORDER RECALLED; JUDGMENT AFFIRMED IN PART AND AMENDED IN PART.**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NUMBER 2017 CA 1213**

**E.S. AND J.S., ON BEHALF OF THEIR MINOR CHILDREN, TBB, TNS, AND TNS**

**VERSUS**

**DERRICK THOMAS, TANGIPAHOA PARISH SCHOOL BOARD, AND BERKLEY INSURANCE COMPANY**

**WHIPPLE, C.J., dissenting**

I respectfully dissent from the portion of the majority opinion reducing the amount of general damages awarded to TBS and TNS.

The medical records in this case establish that TBS sustained a soft tissue injury of the neck/cervical/trapezius/scapular musculature and a soft tissue thoracic injury and TNS suffered a soft tissue injury of the neck/cervical spine, a soft tissue lumbar injury, as well as a right knee injury. The testimonial evidence further established that TBS and TNS complained of neck, back and leg pain, that they continued to complain of pain, and that their injuries prevented them from participating in regular activities. Accordingly, I find no error or abuse of discretion in the trial court's general damage awards to TBS and TNS, considering the evidence presented as to the injuries they sustained and the treatment they required.

While the trial court's general damage awards to TBS and TNS may be on the high end of the general damage spectrum, I cannot say that its awards are outside the scope of what a reasonable trier of fact could assess for the injuries sustained by TBS and TNS herein. Accordingly, under the particular facts of this

case and the evidence before us, including the tender age of the children at the time of the accident, I am unable to say that the trial court abused its vast discretion in its general damage award of $12,000.00 to TBS and TNS.

Mindful that on appeal, the role of the appellate court is to review the exercise of discretion by the trial court, not to decide what it considers to be an appropriate award, Gaspard v. Southern Farm Bureau Insurance Company, 2013-0800 (La. App. 1st Cir. 9/24/14), 155 So. 3d 24, I would affirm the trial court's awards of general damages to TBS and TNS.