STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 0837

RICKI JONES AND CHARLES JONES

VERSUS

FRANK BRAVATA, JR. AND THE CITY OF BATON ROUGE

Judgment Rendered: MAY 09 2019

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. C594788

Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McCLENDON, J.

In this personal injury case, the plaintiff appeals a judgment rendered in accordance with a jury verdict, challenging the adequacy of the jury's awards for general and special damages. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

This suit arises out of a car accident that occurred on March 5, 2010. The plaintiff, Ricki Jones, was driving, and her husband, Charles Jones, was a passenger. Mr. and Ms. Jones were stopped at a red light at the intersection of Choctaw Drive and Florida Boulevard in Baton Rouge, Louisiana when they were rear-ended by defendant, Frank Bravata, Jr.

Mr. and Ms. Jones subsequently filed suit for personal injuries against Mr. Bravata and his employer, the City of Baton Rouge. Prior to trial, the parties stipulated that Mr. Bravata was in the course and scope of his employment with the City of Baton Rouge when the accident occurred and that the defendants were 100% liable for causing the accident. Mr. Jones dismissed his claims against the defendants shortly before trial.

A jury trial was conducted on August 28-31, 2017, where the chief issues were medical causation of Ms. Jones's alleged neck and back injuries, the extent of her injuries, and damages. At the close of evidence, the trial court granted Ms. Jones's motion for directed verdict on the issue of causation, finding that Mr. Bravata's negligence was the legal cause of Ms. Jones's injuries. See LSA-C.C.P. art. 1810. The case was then submitted to the jury for a determination of the amount of general and special damages to be awarded to Ms. Jones. The jury returned a verdict in favor of Ms. Jones and awarded the following damages:

Physical Pain and Suffering, Past & Future	$ 10,000
Mental Suffering and Distress, Past & Future	$ 0
Loss of Enjoyment of Life	$ 5,000
Past Medical Expenses	$ 150,000
Future Medical Expenses	$ 35,000
TOTAL DAMAGES:	$ 200,000

The trial court signed a judgment in conformity with the jury's verdict on December 26, 2017. From this judgment, Ms. Jones filed the instant appeal. In assignment of error one, Ms. Jones contends that the trial court erred in charging the jury on force-of-impact. In assignments of error two, three, and four, Ms. Jones alleges that the jury erred in failing to award adequate damages for past medical expenses, future medical expenses, and general damages, respectively.

DISCUSSION

The record establishes that Ms. Jones did not require medical attention at the scene of the accident; however, she testified that later that afternoon she developed a headache and began experiencing pain throughout her body, particularly in her neck, the back of her head, her mid and low back, and her left leg. She also had pain and bruising across her chest caused by the seat belt. Her pain continued to increase overnight and the following day. Ms. Jones saw Dr. Ronald Sylvest, an orthopedist, five days post-accident with complaints of neck, back, and chest pain. Dr. Sylvest prescribed physical therapy, which Ms. Jones attended for three to four months. He also prescribed medications. Although Ms. Jones's pain levels fluctuated, her symptoms persisted.

Over the next seven-and-a-half years, Ms. Jones treated with several neurosurgeons and orthopedic surgeons in Baton Rouge as well as with the Laser Spine Institute in Tampa, Florida. During this time, Ms. Jones received conservative treatment, had numerous cervical (neck) and lumbar (low back) MRIs, and underwent five relatively non-invasive surgical procedures to address her neck and back complaints. Ms. Jones opted to have these procedures performed in lieu of a lumbar fusion surgery recommended by Dr. Kelly Scrantz, the orthopedic surgeon who treated Ms. Jones in late 2010 and early 2011.

ASSIGNMENT OF ERROR ONE:
Jury Instruction Concerning Force-of-Impact

In this assignment of error, Ms. Jones contends that the trial court erred in charging the jury on force-of-impact. The challenged jury instruction provided:

> While the force of a collision may be considered in determining whether a person was injured by an accident and the extent of the injuries

> sustained, it should not be the only factor to consider in making such a determination. Even though the force of impact may be slight, it does not preclude an award of damages. However, in determining causation, you may consider the minimal nature of the accident.

Ms. Jones objected to this instruction on the basis that no evidence was presented to establish that the accident was a minimal impact accident. The trial court disagreed and concluded that the instruction was appropriate because "there is evidence upon which the jury could decide that this was, in fact, a minimal impact accident and use that in their determination..." On appeal, Ms. Jones does not allege that the instruction was legally incorrect but, instead, asserts that the trial court "included an extraneous force-of-impact instruction, thereby injecting an issue that the evidence did not support."

Trial courts are given broad discretion in formulating jury instructions, and a trial court judgment should not be reversed so long as the charge correctly states the substance of the law. **Adams v. Rhodia, Inc.**, 07-2110 (La. 5/21/08), 983 So.2d 798, 804.[1] An appellate court must exercise great restraint before it reverses a jury verdict because of erroneous jury instructions. **Adams**, 983 So.2d at 804. The manifest error standard for appellate review may not be ignored unless the jury charges were so incorrect or so inadequate as to preclude the jury from reaching a verdict based on the law and facts. **Adams**, 983 So.2d at 805. In the assessment of an alleged erroneous jury instruction, it is the duty of the reviewing court to assess such impropriety in light of the entire jury charge to determine if the charges adequately provide the correct principles of law as applied to the issues framed in the pleadings and the evidence and whether the charges adequately guided the jury in its deliberation. Ultimately, the determinative question is whether the jury instructions misled the jury to the extent that it was prevented from dispensing justice. **Adams**, 983 So.2d at 804.

Ms. Jones correctly points out that no witness specifically testified that this accident was too minor to have caused her alleged injuries. However, as the

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[1] Louisiana Code of Civil Procedure article 1792(B) requires the trial court to instruct jurors on the law applicable to the cause submitted to them. "The trial judge is under no obligation to give any specific jury instructions that may be submitted by either party; the judge must, however, correctly charge the jury." **Adams**, 983 So.2d at 804. Adequate jury instructions are those which fairly and reasonably point out the issues and which provide correct principles of law for the jury to apply to those issues. **Adams**, 983 So.2d at 804.

defendants note and the trial court found, there was evidence in the record upon which the jury could have based their conclusion that this was a minimal impact accident. Photographs introduced into evidence show negligible damage to the rear bumper of Ms. Jones's Toyota Sequoia (SUV) and damage to the front bumper of Mr. Bravata's pick-up truck caused by the Sequoia's trailer hitch. The parties also gave varying descriptions of the accident. Mr. and Ms. Jones described the impact as a "BAM!" Ms. Jones testified that she was "whipped around" and "dazed" after being hit and had a bruise across her chest caused by the seat belt. Conversely, Mr. Bravata described the collision as a "bump." According to his testimony, the accident occurred in stop-and-go traffic. The light turned green, and the vehicle in front of him (Ms. Jones) stopped and he "bumped them in the back." He was uncertain of his speed just before impact but testified, "I was still driving with my foot on the brake."

In granting a directed verdict in favor of Ms. Jones as to causation, the trial court determined only that Ms. Jones's injuries were, *at least in part*, caused by the accident. The jury was responsible for determining the extent of Ms. Jones's injuries and the amount of damages which would adequately compensate Ms. Jones for those injuries. This court has recognized that it is proper for the trier of fact to consider the minimal nature of an accident in order to determine the extent of the plaintiff's injuries. **Boudreaux v. Mid-Continent Casualty**, 09-1379 (La.App. 1 Cir. 5/7/10), 2010 WL 1838560, *4 (unpublished), writ denied, 10-1622 (La. 10/8/10), 46 So.3d 1270. See also **Neoland v. State Farm Mutual Automobile Insurance Co.**, 12-0280 (La.App. 1 Cir. 11/2/12), 2012 WL 5385215, *2 (unpublished). Force-of-impact evidence and testimony may be relevant to the jury's credibility determinations regarding the plaintiff's version of how severe the impact was, how she was allegedly injured, and the extent of her injuries. **Boudreaux**, 2010 WL 1838560,*4.

After reviewing the jury instructions as a whole and considering the evidence in the record and the issues to be resolved by the jury, we find that the trial court did not abuse its broad discretion in including the challenged jury instruction. This assignment of error lacks merit.

ASSIGMENTS OF ERROR TWO, THREE, AND FOUR:
General and Special Damages

In the remaining assignments of error, Ms. Jones challenges the adequacy of the jury's awards for general and special damages.

Standard of Review

The plaintiff in a negligence action bears the burden of proving every element of her case, including damages, by a preponderance of the evidence. **Gaspard v. Safeway Ins. Co.**, 14-1676 (La.App. 1 Cir. 6/5/15), 174 So.3d 692, 694, writ denied, 15-1588 (La. 10/23/15), 184 So.3d 18.

In reviewing an award of damages, the initial inquiry is 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. **Thibodeaux v. Donnell**, 17-0909 (La. 10/27/17), 227 So.3d 812, 813, citing **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) (citations omitted). It is well-settled that the assessment of quantum of general and special damages by a jury is a determination of fact and is entitled to great deference on review.[2] **Guillory v. Lee**, 09-0075 (La. 6/26/09), 16 So.3d 1104, 1116. Because the discretion vested in the trier of fact is so great, and even vast, an appellate court should rarely disturb an award on review. **Guillory**, 16 So.3d at 1117. "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." **Guillory**, 16 So.3d at 1117, quoting **Youn**, 623 So.2d at 1261.

When reviewing the jury's factual findings, the issue to be resolved by the appellate court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Adams**, 983 So.2d at 806, citing **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). If the factual findings are reasonable in light of the record

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[2] Louisiana Civil Code article 2324.1 states, "In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury."

reviewed in its entirety, a reviewing court may not reverse even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. **Adams**, 983 So.2d at 806, citing **Stobart**, 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. **Adams**, 983 So.2d at 806, citing **Stobart**, 617 So.2d at 883.

Further, where the findings are based on determinations regarding the credibility of witnesses, the manifest error standard demands great deference to the jury's findings of fact. **Adams**, 983 So.2d at 806-807, citing **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Indeed, where the 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. **Adams**, 983 So.2d at 807, citing **Rosell**, 549 So.2d at 845. This rule applies equally to the evaluation of expert testimony, including the evaluation and resolution of conflicts in expert testimony. **Adams**, 983 So.2d at 807, citing **Lasyone v. Kansas City Southern Railroad**, 00–2628 (La. 4/3/01), 786 So.2d 682, 693.

An appellate court's role in reviewing a general damages award, one which may not be fixed with pecuniary exactitude, 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. **Guillory**, 16 So.3d at 1117. The abuse of discretion standard of review applies when an appellate court examines a factfinder's award of general damages; therefore, a court of appeal may not disturb an award made by a factfinder unless the record clearly reveals that the trier of fact abused its discretion in making the award. See **Howard v. United Services Automobile Association,** 14-1429 (La.App. 1 Cir. 7/22/15), 180 So.3d 384, 394, writ denied, 15-1595 (La. 10/30/15), 179 So.3d 615, citing **Mack v. Imperial Fire and Casualty Ins. Co.**, 14-0597 (La.App. 1 Cir. 11/7/14), 167 So.3d 691, 696.

Similarly, when reviewing a jury's factual conclusions with regard to special damages, including the jury's decision to award an amount less than the medical expenses claimed by a plaintiff, an appellate court must engage in a two-step process based on the record as a whole. In order to disturb the jury's award of special

damages, there must be no factual basis for the jury's determination and the finding must be clearly wrong. See **McDowell v. Diggs**, 17-0755 (La.App. 1 Cir. 10/3/18) 264 So.3d 489, 496, citing **Kaiser v. Hardin,** 06-2092 (La. 4/11/07), 953 So.2d 802, 810 (*per curiam*).

General Damages

On appeal, Ms. Jones asserts that the jury erred in awarding only $15,000 in general damages where the evidence established that she sustained "serious" neck and back injuries as a result of the accident. She asks this court to increase the general damage award to $500,000, the maximum allowed by LSA-R.S. 13:5106.[3]

In response, the defendants assert that the jury was faced with conflicting testimony concerning the extent of Ms. Jones's back and neck pain, and in reaching its verdict, the jury was ultimately required to make credibility determinations. The defendants reason that the jury awarded less than the damages prayed-for by Ms. Jones because it found that Ms. Jones lacked credibility, and it chose to credit the testimony of Dr. Kyle Girod, the defendant's expert orthopedic surgeon, who opined that the accident aggravated Ms. Jones's pre-existing degenerative back condition, that most aggravations are resolved within six to nine months, and that Ms. Jones may have experienced long-term back pain regardless of whether she was involved in the subject accident. Considering this, the defendants contend that the damages awarded by the jury adequately compensate Ms. Jones for her accident-related injuries.

While we may have found differently, we agree with the defendants that the record contains sufficient evidence to support the jury's factual determinations, including the damage awards. Specifically, the jury could have reasonably concluded that Ms. Jones lacked credibility and exaggerated the extent and duration of her symptoms and the impact her alleged injuries had on her life.

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[3] Louisiana Revised Statute 13:5106B.(1) provides,

> 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.

Ms. Jones testified that the various and numerous medical procedures performed since the accident did not provide relief from her pain. Although she stated that several of the procedures provided "slight improvement" in her symptoms, she was consistent in testifying that the procedures failed to alleviate her pain. Ms. Jones denied experiencing anything other than "slight improvement" in the seven-and-a-half years since the accident, despite undergoing what she estimated to be twenty-five to thirty medical procedures. She testified that her pain varies in intensity but "it's always something there."

However, this testimony from Ms. Jones conflicted with the testimony provided by her husband and her treating physicians. Mr. Charles Jones testified that several medical procedures provided Ms. Jones with relief from her symptoms "quite a bit for a while." According to Mr. Jones, Ms. Jones "had some relief with a lot of the different procedures for a period of time." Although her symptoms eventually returned, Mr. Jones testified that Ms. Jones continued treatment at the Laser Spine Institute because she was improving.

Similarly, Dr. Zoltan Bereczki, Jr. and Dr. Kevin McCarthy, orthopedic surgeons who treated Ms. Jones post-accident, testified that Ms. Jones often reported that her symptoms had improved following various procedures, sometimes significantly or almost entirely. The evidence also established that Ms. Jones went for extended periods of time without requiring medical treatment, sometimes as long as a year.

This testimony was also at odds with Ms. Jones's assertions that her pain prevents her from doing the things she once enjoyed and requires her to depend on her husband and adult children, who live in her home, to help her around the house. The jury was shown a photograph of a rope system attached to the Joneses' bed which Mr. Jones testified that Ms. Jones uses to get in and out of bed. Ms. Jones stated that she has difficulty walking and must plan her activities so that she can ensure she has a place to sit. Nevertheless, Mr. Jones testified that he and Ms. Jones have taken vacations since the accident, including a cruise to Jamaica in the summer of 2016.

Furthermore, as discussed in connection with assignment of error number one, the jury heard conflicting testimony concerning the force-of-impact and may have, in its

discretion, credited the testimony of Mr. Bravata to find that the accident was minimal. This may have further caused the jury to doubt the severity of Ms. Jones's injuries.

The defendants also note that Mr. and Ms. Jones testified that they did not speak to Mr. Bravata at the scene, following the accident. However, Mr. Bravata testified otherwise, and the defendants introduced a photograph of Mr. Jones, Ms. Jones, and Mr. Bravata standing near their vehicles after the accident, in close proximity to one another, and engaging in what the jury could have reasonably interpreted to be a conversation. Finally, one of Ms. Jones's treating physicians testified that she reported that she lost consciousness after the accident, but Mr. and Ms. Jones testified about discussions they had immediately after the accident and confirmed that Ms. Jones drove away from the accident scene and proceeded to complete her originally scheduled errands.

General damages are intended to compensate an injured plaintiff for mental or physical pain and suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle.[4] **Mitchell v. Access Med. Supplies, Inc.**, 15-0305 (La.App. 1 Cir. 11/9/15), 184 So.3d 118, 120. The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. **Howard**, 180 So.3d at 394, citing **Ketchum v. Roberts,** 12-1885 (La.App. 1 Cir. 5/29/14), 2014 WL 3510694, *8 (unpublished). Considering the record as a whole, we conclude that the jury could have reasonably found that Ms. Jones lacked credibility and rejected her testimony concerning both the severity and duration of her injuries. The jury was presented with competing testimony and was forced to make a credibility determination, a determination that can "virtually never be manifestly erroneous." **Adams**, 983 So.2d at 807, citing **Rosell**, 549 So.2d at 845. The jury is not bound to accept a plaintiff's perception of the nature and extent of her injuries. **McInnis v. Bonton**, 17-0088 (La.App. 1 Cir. 9/21/17), 232 So.3d 22, 27, citing **Stevenson v. Serth**, 14-846 (La.App. 5 Cir. 3/25/15), 169 So.3d 612, 616. Constrained by the vast

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[4] General damages are inherently speculative in nature and cannot be fixed with mathematical certainty. **Mitchell**, 184 So.3d at 120, citing **Miller v. LAMMICO**, 07-1352 (La.1/16/08), 973 So.2d 693, 711. Since the jury is in the best position to evaluate witness credibility and see the evidence firsthand, it is afforded much discretion in independently assessing the facts and rendering an award. **Mitchell**, 184 So.3d at 120.

discretion afforded to the jury, we find no error in its credibility determinations and factual conclusions.

We also find that the jury could have reasonably concluded that Ms. Jones's accident-related injuries were limited to a short-term aggravation of her pre-existing back condition and an injury to her neck which caused intermittent pain.

The evidence in the record established that, prior to the accident, Ms. Jones had a history of back pain and associated left lower extremity pain, dating back twenty years. She had a series of epidural steroid injections in 2006, then began treating with Dr. Kyle Girod in August 2009. At the time, she reported experiencing right-sided low back pain for ten to twenty years and left-sided lower extremity pain for several months. Dr. Girod ordered a series of three epidural steroid injections, the last of which was administered in October 2009, approximately five months before the accident at issue. Ms. Jones testified that the injections relieved most of her pain and that she felt "great" prior to the accident.

Dr. Girod did not treat Ms. Jones following the accident. Instead, he was retained by the defendants to review selected excerpts from Ms. Jones's medical records and to offer an opinion regarding medical causation. He testified at trial that Ms. Jones sustained an aggravation of her pre-existing degenerative back condition and that most aggravations are resolved in six to nine months. Dr. Girod expressed the opinion that Ms. Jones may have had pain related to her underlying degenerative disc disease, even if she had not been involved in the March 2010 accident.

Ms. Jones testified that her back pain returned in 2009 because she had been caring for her ailing grandparents for the previous five years, which included lifting them. Evidence further established that Ms. Jones rode amusement park-style rides at a state fair in the fall of 2009, after receiving the last of three epidural steroid injections ordered by Dr. Girod. Dr. Girod testified that it is not prudent for someone with Ms. Jones's back condition to engage in this type of activity and that this may have aggravated her symptoms. He also testified that it was not unreasonable to expect that Ms. Jones's back pain would return once the effects of the October 2009 epidural steroid injection wore off, regardless of whether Ms. Jones was involved in an accident.

Dr. Girod testified that the pain relief from an epidural steroid injection does not "last forever," and Dr. Scrantz explained that the benefits of an injection may last for days, weeks, or months – "[i]t's really hard to know." Dr. Girod was unable to state, in his expert medical opinion, that Ms. Jones would be pain-free but for the accident. This opinion was based on the fact that Ms. Jones had chronic back pain for twenty years prior to the accident.

Similarly, Dr. McCarthy admitted that "it's difficult to say" whether Ms. Jones would have continued to have back pain if she had not been involved in the March 5, 2010 accident. He testified, "She does have a pattern of chronic pain, so I would certainly not expect her to be pain-free going forward. I wouldn't necessarily expect her to not require any treatment, but would she require the frequency and extent of the treatment that she's had, I think that's very difficult to say."

Dr. Girod further confirmed that Ms. Jones's complaints of right-sided low back pain and radiating left leg pain were the same both before and after the accident, and no evidence or testimony was introduced to clearly establish that Ms. Jones's lumbar spine was objectively worse following the accident.[5] Dr. Girod explained that the August 2009 MRI of Ms. Jones's lumbar spine showed disc bulges at L1-2, L2-3, and L4-5 and a herniation at L3-4. Dr. Girod explained that a herniation is larger than a bulge.

Dr. Scrantz testified that the post-accident discogram he performed in March 2011 indicated that Ms. Jones's pain was emanating from the L5-S1 level. Dr. Girod confirmed that he made no diagnosis regarding Ms. Jones's spine at the L5-S1 level in 2009; however, he explained that, in his opinion, the results of the three discograms performed on Ms. Jones's spine were invalid because each had a different result. Dr. Scrantz also acknowledged that the March 2011 discogram produced conflicting results. Although Ms. Jones reported pain at the L5-S1 level during the procedure, this disc was more intact than the disc at L3-4, which, according to Dr. Scrantz, was "leaking profusely," was "very disrupted," and "very abnormal." As a result, Dr. Scrantz believed

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[5] Dr. McCarthy agreed with Ms. Jones's counsel that the pathology noted on Ms. Jones's multiple MRIs was much greater than "just basic degenerative disc disease." He did not elaborate, but testified that the annular tears, bulges, and herniations in Ms. Jones's lumbar discs are part of the degenerative process that "can be made worse by a traumatic event."

the disc at L3-4 was the source of most of Ms. Jones's pain – the disc that had a confirmed herniation prior to the accident – and recommended a fusion surgery at this level, not L5-S1.

Considering this testimony, coupled with the jury's possible conclusion that Ms. Jones exaggerated the severity and duration her symptoms, the jury could have reached the reasonable factual conclusion that Ms. Jones sustained a neck injury and an aggravation of her pre-existing back condition, which was of a limited duration, perhaps six to nine months as indicated by Dr. Girod. Furthermore, the evidence at trial established that Ms. Jones's neck pain was intermittent and was consistently less significant than her back complaints. For these reasons, we cannot that say the award of $15,000 in general damages was an abuse of discretion.

Past Medical Expenses

Ms. Jones established at trial that she has incurred $546,005.78 in medical expenses since the March 5, 2010 accident to address complaints of neck and back pain. Dr. Scrantz, Dr. Bereczki, and Dr. McCarthy opined that all of Ms. Jones's post-accident medical treatment was related to the subject accident.[6]

Had this been the only testimony the jury heard on the issue, perhaps we could conclude that the jury abused its discretion in failing to award $546,005.78 in past medical expenses to Ms. Jones. However, such is not the case. In light of the medical evidence which established that Ms. Jones may have had back pain regardless of whether she was involved in the March 2010 accident, we cannot say that the jury erred in awarding only a portion of Ms. Jones's prior medical expenses. Further, the jury was instructed that the plaintiff must prove the extent of an alleged aggravation of a pre-existing condition and, "if you find that the plaintiff would have faced this aggravation of her condition whether this accident happened or not, the plaintiff is not entitled to damages for that portion of her claim, since the defendants are not

[6] We note that Dr. Girod agreed that the subject accident was the cause of Ms. Jones's neck injury and related treatment and further opined that the accident aggravated Ms. Jones's pre-existing back condition to the point where she needed treatment for seven-and-a-half years. However, this testimony, elicited by Ms. Jones's counsel, must be contrasted with Dr. Girod's testimony that most aggravations are resolved within six to nine months, and that Ms. Jones may have experienced long-term back pain regardless of whether she was involved in the subject accident.

responsible for the normal and natural results of the plaintiff's prior condition." Ms. Jones did not object to this instruction.

When medical expenses have been incurred for the treatment of multiple injuries or conditions, and a jury finds that some, though not all, of those injuries or conditions were caused by the event in question, the jury's great discretion permits it to award something less than the full amount of medical expenses.[7] **Kelley v. General Insurance Co. of America**, 14-0180 (La.App. 1 Cir. 12/23/14), 168 So.3d 528, 544, writ denied, 15-0157 (La. 4/10/15), 163 So.3d 814, writ denied, 15-0165 (La. 4/10/15), 163 So.3d 816, citing **Kaiser**, 953 So.2d at 810-811.

After examining the record as a whole, it is evident that the jury was required to weigh evidence. Medical testimony must be weighed the same as other evidence. See **Goza v. Parish of W. Baton Rouge**, 08-0086 (La.App. 1 Cir. 5/5/09), 21 So.3d 320, 333, writ denied, 09-2146 (La. 12/11/09), 23 So.3d 919, cert. denied, 560 U.S. 904, 130 S.Ct. 3277, 176 L.Ed.2d 1184 (2010), citing **Harris v. State ex rel. Department of Transportation and Development**, 07-566 (La.App. 1 Cir. 11/10/08), 997 So.2d 849, 866, writ denied, 08-2886 (La. 2/6/09), 999 So.2d 785. The jury may accept or reject an expert's opinion and conclusions after weighing and evaluating medical testimony and is free to accept any part of a witness's testimony and reject any other part. **McInnis**, 232 So.3d at 27, citing **Stevenson**, 169 So.3d at 616. Therefore, the jury acted within its discretion by accepting some, though not all, of the medical experts' opinions and testimony concerning Ms. Jones's injuries.

During deliberations, the jury asked to view plaintiff's exhibit 24, Ms. Jones's medical expense chart and medical billing reports for each provider.[8] The expense chart provides a lump-sum total of the expenses billed by each post-accident medical

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[7] In support of her argument that this court should reverse the jury's award of past medical expenses, Ms. Jones cites **Mack v. Wiley**, 07-2344 (La.App. 1 Cir. 5/2/08), 991 So.2d 479, 488-489, writ denied, 08-1181 (La. 9/19/08), 992 So.2d 932; however, we find **Mack** to be distinguishable. In **Mack**, the evidence established that the plaintiff's total medical expenses, including those for a knee surgery, were $37,000; nevertheless, the jury awarded $32,000. This court found that, by awarding $32,000, the jury accounted for the surgery which they found to be related to the accident and, therefore, erred by failing to award the total expenses proven at trial. Here, the jury's award of $150,000 of Ms. Jones's $546,005.78 past medical expenses demonstrates that the jury reached the opposite conclusion, that less than one-third of the post-accident treatment received by Ms. Jones was related to the accident.

[8] The jury also asked to see exhibit 26 (post-accident vehicle photos) and exhibit 33 (Ms. Jones's "personal loss" photos).

provider as well as the total sum of all medical expenses incurred. The chart does not break down the expenses by date or the injury treated. The billing records for each provider generally identify the date of service and generically describe what the charges were for, *i.e.*, office exam, injection, interpretation of x-ray, etc. Based on this evidence, the jury could not readily determine an exact amount of medical expenses incurred to treat Ms. Jones's neck injury and a limited-duration aggravation of her back condition. It was not unreasonable, then, for the jury to award a sum which it believed would adequately compensate Ms. Jones for her *accident-related* medical expenses.[9]

Ms. Jones also argues that the jury awarded $150,000 in past medical expenses, rather than $546,005.78, because defense counsel, in her closing argument, improperly suggested that $150,000 should be awarded for this element of damages.

In her closing remarks to the jury, defense counsel asserted that the treatment Ms. Jones received at the Laser Spine Institute was "an obvious case of overtreating" and argued that the jury should "knock...out" $300,000 of expenses incurred at the Laser Spine Institute since Ms. Jones underwent this treatment rather than the fusion surgery recommended by Dr. Scrantz.

Ms. Jones further contends that defense counsel erroneously encouraged the jury to award less than the full amount of medical expenses based on Ms. Jones's failure to mitigate her damages. In this regard, defense counsel argued that, by not having the recommended back surgery, Ms. Jones was guilty of a failure to mitigate. However, at Ms. Jones's request, the trial court declined to charge the jury regarding mitigation of damages because the defendants did not assert failure to mitigate as an affirmative defense in their pleadings. The trial court further noted the lack of jurisprudence requiring a plaintiff to undergo a major surgery to mitigate her damages.

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[9] See **Travis v. Spitale's Bar, Inc.,** 12-1366 (La.App. 1 Cir. 8/14/13), 122 So.3d 1118, 1130, writ denied, 13-2409 (La. 1/10/14), 130 So.3d 327, writ denied,13-2447 (La. 1/10/14), 130 So.3d 329,

> Upon the evidence presented, an item-by-item allocation of medical expenses was not, and is not, possible, nor would justice be served by awarding all of the expenses to [the plaintiff] or refusing to award any of the expenses to [the plaintiff]. Under the circumstances, the jury's award of a portion of the medical expenses was not an abuse of its discretion, and illustrates the jury's discretion to arrive at a verdict that is just. Applying the two-step process enumerated in *Kaiser, id.,* and considering the record in its entirety, we are unable to say the jury abused its discretion in rendering awards for past and future medical expenses.

As an initial matter, we note that Ms. Jones's attorney did not object to these comments made during defense counsel's closing argument. Failure to object constitutes a waiver of the right to complain regarding the argument on appeal. **Breitenbach v. Stroud**, 06-0918 (La.App. 1 Cir. 2/9/07), 959 So.2d 926, 931, citing **Sims v. Ward**, 05-0278 (La.App. 1 Cir. 6/9/06), 938 So.2d 702, 709, writ denied, 06-2104 (La. 11/17/06), 942 So.2d 535. See also **Cooper v. United Southern Assurance Company**, 97-0250 (La.App. 1 Cir. 9/9/98), 718 So.2d 1029, 1038.

Furthermore, we find no merit in Ms. Jones's argument that defense counsel's comments warrant reversal of the jury's verdict. The test of whether argument of counsel is prejudicial or inflammatory is whether such comment is unreasonable or unfair in the eyes of the law. **Breitenbach**, 959 So.2d at 931, citing **Cooper**, 718 So.2d at 1038. This test is balanced against the well-settled jurisprudence that counsel has great latitude in argument before a jury. Moreover, the trial judge is vested with broad discretion in conducting trials in a manner that he determines will be conducive to justice. **Breitenbach**, 959 So.2d at 931, citing **Jordan v. Intercontinental Bulktank Corporation**, 621 So.2d 1141, 1150-1151 (La.App. 1 Cir.), writs denied, 623 So.2d 1335, 1336 (La. 1993), reconsideration denied, 625 So.2d 1026 (La. 1993), cert. denied, 510 U.S. 1094, 114 S.Ct. 926, 127 L.Ed.2d 219 (1994). Finally, an allegedly objectionable statement is subject to corrective measures. **Breitenbach**, 959 So.2d at 931, citing **Sims**, 938 So.2d at 709.

Although defense counsel's argument to the jury was contrary to the trial court's instruction regarding mitigation of damages, we cannot say that counsel's comments were so prejudicial or inflammatory as to be unreasonable or unfair in the eyes of the law. We note that the trial court properly advised the jury that its role was to achieve justice by seeking the truth from the evidence presented and to reach a verdict using the rules of law which he provided to them. The jury was further advised: "The determination of damages is solely a function of the jury and must be based on competent evidence and not upon figures suggested by the attorneys."

Considering that no objections were raised at the time defense counsel made the complained of comments, the nature of defense counsel's argument, and the trial court's instructions, which served as a corrective measure, we find no reversible error.

Future Medical Expenses

Finally, Ms. Jones argues that the jury erred in awarding $35,000 for future medical expenses where the uncontroverted evidence established that she will, more likely than not, incur $232,000 in future medical expenses.[10]

The evidence presented at trial established that the majority of Ms. Jones's anticipated medical expenses were to treat Ms. Jones's back pain. Considering the jury's apparent factual conclusion that the aggravation of Ms. Jones's pre-existing back condition was short-lived, Ms. Jones was not entitled to the full amount of anticipated medical expenses since the jury could have found that the majority of the recommended future treatment was unrelated to the accident.

Dr. McCarthy expected that Ms. Jones may need follow-up treatments on an "as needed" basis to address her neck pain, possibly including a cervical medial branch block and rhizotomy, at a cost of $5,996 each. Therefore, the jury could have reasonably awarded conservative future medical expenses to treat Ms. Jones's intermittent complaints of neck pain. In order to recover future medical expenses, the plaintiff must prove that these expenses will be necessary and inevitable. **Bass v. State**, 14-0441 (La.App. 1 Cir. 11/7/14), 167 So.3d 711, 716, citing **Jenkins v. State ex rel. Department of Transportation and Development**, 06-1804 (La.App. 1 Cir. 8/19/08), 993 So.2d 749, 776, writ denied, 08-2471 (La. 12/19/08), 996 So.2d 1133.

On appeal, Ms. Jones reasons that the jury's award for future medical expenses was abusively low because it misinterpreted her testimony. Specifically, Ms. Jones explains that, at trial, she used the word "improvement" to describe a temporary lessening of pain and used the word "relief" when referring to a permanent resolution of her symptoms. Ms. Jones points to testimony wherein she explained that she

[10] Stephanie Chalfin, Ms. Jones's expert in life care planning, and Dr. William Culbertson, Ms. Jones's expert economist, testified that Ms. Jones's estimated future expenses totaled $312,549. However, in closing argument and in brief to this court, Ms. Jones suggested that $80,481 in anticipated expenses for housekeeping costs should be subtracted from this total. Thus, Ms. Jones requested that the jury award $232,000 in future medical expenses and likewise asks this court to increase the award to this amount.

experienced "improvement" following some procedures but not "relief" (*i.e.*, no permanent resolution), because her symptoms continued to return. Ms. Jones contends that, if the jury had the misconception that she did not benefit from the prior procedures because it misinterpreted her testimony and use of the term "relief," it may have erroneously concluded that the full extent of the recommended future medical treatment was unnecessary.[11]

We are not persuaded that the jury was led astray by this purported misinterpretation. Notably, the jury heard Ms. Jones's testimony wherein she clearly explained, "I didn't get any permanent relief, so I don't call that relief." She also stated, "...I mean, I've had slight improvement but not relief." When questioned whether she obtained "relief" in her neck pain following the first cervical procedure at the Laser Spine Institute in August 2011, Ms. Jones responded, "Once again, nothing permanent, nothing really, no serious relief. I mean there was some slight improvement." Defense counsel asked Mr. Jones if he would be surprised to learn that Ms. Jones testified that she did not get relief from the medical procedures. He responded, no, because she had no permanent relief. In response to the same question, Dr. McCarthy stated, "A little bit, because we specifically see the patient for a follow-up, and have the patient describe whether they have improvement or not. I guess, maybe, what she's referred to is long-term relief because it is something where we treat the pain and it reoccurs every 12 to 18 [sic] months." Therefore, the jury had the opportunity to consider the explanation now presented on appeal and, in its discretion, reasonably rejected it. This argument does not present a basis for this court to reverse the jury's verdict.

Again, we are mindful of the great restraint we must exercise in reviewing the jury's verdict. Although we may have weighed the evidence and awarded damages differently, we are constrained to find that, based on the record as a whole, the jury did

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[11] Ms. Jones argues that defense counsel mischaracterized her testimony when questioning Ms. Chalfin and other witnesses. Particularly, during her cross-examination of Ms. Chalfin, defense counsel stated that Ms. Jones testified that none of the procedures "worked." Ms. Jones also criticizes comments made during defense counsel's closing argument which she argues may have given the jury the impression that future medical care was not warranted. However, we note that Ms. Jones's counsel waived any challenge to defense counsel's questions and closing argument by failing to timely object. **Breitenbach**, 959 So.2d at 931. Furthermore, the jury heard Ms. Jones's testimony and was instructed to reach a result based on the evidence, not arguments of counsel.

not abuse its discretion in reaching its verdict. We further recognize that the jury's award for past medical expenses is considerably larger than its award for general damages. However, we cannot say that the awards are so inconsistent, in light of the evidence presented, as to be an abuse of the jury's vast discretion.

CONCLUSION

For the foregoing reasons, the December 26, 2017 judgment is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Ricki Jones.

AFFIRMED.