

**NOT DESIGNATED FOR PUBLICATION**

**LIONEL ROCH** \* **NO. 2007-CA-0051**  
**VERSUS** \* **COURT OF APPEAL**  
**ACCENT CONSTRUCTION** \* **FOURTH CIRCUIT**  
**CO.** \* **STATE OF LOUISIANA**

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2000-10921, DIVISION "D-16"  
Honorable Lloyd J. Medley, Judge

\* \* \* \* \*

**Judge David S. Gorbaty**

\* \* \* \* \*

(Court composed of Judge Michael E. Kirby, Judge David S. Gorbaty, Judge Edwin A. Lombard,)

Frank M. Buck, Jr.  
757 St. Charles Avenue  
Suite 201  
New Orleans, LA 70130  
COUNSEL FOR PLAINTIFF/APPELLEE

Dennis J. Phayer  
BURGLASS & TANKERSLEY, L.L.C.  
5213 Airline Drive  
Metairie, LA 70001-5602  
COUNSEL FOR DEFENDANT/APPELLANT

**AFFIRMED**

This appeal arises out of an employment-related personal injury action. The trial court rendered judgment in favor of the plaintiff based on a jury verdict. For the reasons assigned below, we affirm the judgment of the trial court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

On September 20, 1999, the plaintiff, Lionel Roch (“Mr. Roch”), was injured while working as a general laborer for J. Calderera and Company General Contractors (“Calderera”) at the Ogden Museum construction site in New Orleans. On the date of the accident, an employee of Accent Construction Company (“Accent”), also working at the Ogden Museum site, was operating a large piece of hydraulic machinery with a long arm and bucket called an excavator. Mr. Roch was bending forward doing clean up work on a concrete slab, when the bucket of the excavator struck him from behind and pinned him against a rebar structure coming out of the slab. Mr. Roch lost consciousness and was transported by ambulance to Charity Hospital.

Mr. Roch was released from the hospital later that day, but continued to experience back pain. Thereafter, Mr. Roche treated with orthopedic surgeon, Dr. Courtney Russo from September 22, 1999, until June 14, 2005.

Mr. Roch filed the instant lawsuit against Accent and Accent's Insurer, Canal Indemnity Company ("Canal Indemnity"). Eagle Pacific Insurance Company ("Eagle Pacific"), Caldarera's workers' compensation insurer, intervened to recover amounts paid on behalf of Mr. Roch.

The matter proceeded to a jury trial on June 12, 13, and 14 of 2006. On the second morning of trial, before the jury was seated, the trial court took testimony from Eagle Pacific's adjuster, Ms. Gates, regarding the medical expenses paid by Eagle as workers' compensation. It appears that Mr. Roch disputed certain portions of Eagle Pacific's lien, making it necessary to review all of the medical expenses paid by Eagle Pacific. The record reflects that the court proceeded with the testimony of Ms. Gates in spite of the fact that Accent's attorney was not yet present in court. As indicated by the attorneys for Mr. Roch and Eagle Pacific, the testimony related to Eagle Pacific's intervention, and did not impact Accent's case. The record further reflects that Accent's attorney appeared in court during Ms. Gates' testimony, but did not take part in the questioning. Following Ms. Gates' testimony, the medical expenses were introduced into evidence, and the jury trial resumed.

After Mr. Roch rested his case, Accent moved for a partial directed verdict on the issues of past medical bills, future medical bills, and future lost wages.

Regarding past medical bills, Accent argued that Mr. Roch failed to offer any evidence of medical expenses during his case in chief for the jury to consider. The trial court granted the motion after determining the past medical bills were only admitted for the purpose of the intervention and were not presented to the jury. Regarding future medicals and future lost wages, Accent argued that Mr. Roch failed to introduce any evidence from Dr. Russo on future medical expenses, and failed to present expert testimony on the issue of future lost wages and lost earning capacity. The trial court granted the motion for partial directed verdict on all issues.

At the conclusion of trial, the jury awarded Mr. Roch \$250,000.00 in general damages and \$100,000.00 for past wages. Because the trial court granted Accent's motion for partial directed verdict, the jury did not receive evidence regarding medical bills or future lost earnings. Consequently, the jury did not award any amounts to Mr. Roch for those elements of damages. The jury allocated 80% fault to Accent, 15% fault to Caldarera, and 5% fault to Mr. Roch. On June 15, 2006, the trial court rendered judgment based on the jury verdict.

On July 28, 2006, post-trial motions were heard. In connection therewith, the trial court rendered an amended judgment on August 4, 2006, to include Canal Indemnity, Accent's insurer, as a defendant cast in judgment. On October 9, 2006, judgment was rendered denying motions for new trial brought on behalf of Mr. Roch and Accent. Both parties appealed.

## LAW AND ANALYSIS:

On appeal, Accent and Canal Indemnity argue that the jury's general damage award of \$250,000.00 was excessive. Mr. Roch assigns the following three errors: 1) the jury erred in allocating, 15% fault to Caldarera and 5% fault to Mr. Roch; 2) the jury should have been permitted to make an award of future lost earnings/lost earning capacity; and 3) the medical bills were properly in evidence and the jury should have been permitted to make an award for past and future medical bills.

### **Assignment of Error No. 1 (Accent and Canal Indemnity): Excessive General Damages Award.**

The standard for appellate review for abuse of discretion in the award of general damages is difficult to express and is necessarily non-specific. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La.1993). In *Youn*, the Louisiana Supreme Court recognized:

...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. Reasonable persons frequently disagree about the measure of general damages in a particular case. 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.

*Id.*

The initial inquiry, in reviewing an award of general damages, is whether the trier of fact abused its discretion in assessing the amount of damages. *Cone v. National Emergency Serv., Inc.*, 99-0934, p. 8 (La.10/29/99), 747 So.2d 1085, 1089; *Reck v. Stevens*, 373 So.2d 498, 501 (La.1979). Only after a determination

that the trier of fact has abused its "much discretion" is a resort to prior awards appropriate and then only for the purpose of determining the highest or lowest point which is reasonably within that discretion. *Coco v. Winston Indus., Inc.*, 341 So.2d 332, 335 (La.1976).

In the present case, Dr. Russo diagnosed Mr. Roch with sprain and contusion of the middle and lower back as a result of blunt trauma to the back. Dr. Russo saw Mr. Roch approximately 30 times from September 22, 1999, to June 14, 2005, before Mr. Roch relocated to Maine. Dr. Russo testified that he treated Mr. Russo with pain medications, muscle relaxers, arthritis medications, and tranquilizers. Dr. Russo also prescribed steroid injections and physical therapy. Dr. Russo determined that Mr. Roch had a pre-existing arthritic condition in his back, which was aggravated by the injury in question.

Finally, Dr. Russo testified that Mr. Roch reached maximum medical improvement in August of 2000, with a "guarded" prognosis for the future. He determined that Mr. Roch had a 10% physical impairment prior to the accident because of the arthritic condition, and a 15% physical impairment after the accident. Dr. Russo opined that due to his back injury, Mr. Roch could perform only part-time sedentary type work. As of the last visit to Dr. Russo on June 14, 2005, Mr. Roch was still complaining of lower back pain. When questioned, Dr. Russo stated that he did not consider Mr. Roch to be a malingerer.

Mr. Roch testified at trial that he continues to experience pain in his back and is unable to work. He stated that he cannot walk too long or sit down too long and cannot do the types of things around the house that he did prior to the accident.

Considering the injury sustained by Mr. Roch, the back pain he has suffered and will suffer in the future, and the impact the injury has had on his life, we

cannot conclude that the jury abused its vast discretion in awarding Mr. Roch \$250,000.00 in general damages. Accordingly, we find no merit in Accent's assignment of error.

**Assignment of Error No. 1 (Mr. Roch): Improper apportionment of Fault.**

Mr. Roch asserts that there is no evidence in this case to support an allocation of 15% fault to Caldarera and 5% fault to Mr. Roch. Mr. Roch submits that Accent was 100% at fault in the accident.

Accent counters that the allocation of fault to Caldarera is supported by the fact that as the general contractor in charge of the construction project, Caldarera had control over the construct site. Mr. Joseph Caldarera testified that his company maintained a job superintendent at the site to supervise its employees. Furthermore, Caldarera was the owner of the excavator involved in the accident. Regarding Mr. Roch's fault, Accent maintains that based on the evidence presented at trial, the jury could have reasonably concluded that Mr. Roch was not paying attention at the time of the accident and failed to use reasonable care under the circumstances.

Addressing the standard of appellate review on the issue of allocation of fault, the Louisiana Supreme Court stated in *Foley v. Entergy Louisiana, Inc.*, 06-0983, pp. 31-32 (La.11/29/06), 946 So.2d 144, 165-166:

In *Duncan v. Kansas City Southern Railway Co.*, 2000-0066 (La.10/30/00), 773 So.2d 670, we summarized the standard for reviewing allocation of fault determinations as follows:

This Court has previously addressed the allocation of fault and the standard of review to be applied by appellate courts reviewing such determinations. Finding the same considerations applicable to the fault allocation process as are applied in quantum assessments, we concluded "the trier of fact is owed some deference in allocating fault" since the finding of percentages of fault is also a factual determination. *Clement v. Frey*, 95-1119 (La.1/16/96); 666 So.2d 607,

609, 610. As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. *Id.* Therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award, and then only to the extent of lowering it or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. *Clement*, 666 So.2d at 611; *Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 (La.1977).

The appellate courts [sic] determination of whether the trial court was clearly wrong in its allocation of fault is guided by the factors set forth in *Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So.2d 967, 974 (La.1985). In *Watson*, we said "various factors may influence the degree of fault assigned, including:

(1) [W]hether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties.

*Watson*, 469 So.2d at 974. These same factors guide the appellate court's determination as to the highest or lowest percentage of fault that could reasonably be assessed. *Clement*, 666 So.2d at 611.

*Duncan*, 00-0066 at 10-11; 773 So.2d at 680-681.

After our review of the record in the present case, we find no error in the allocation of fault. Under the circumstances, it is entirely reasonable to conclude that Caldarera, given its role as general contractor on the construction site, failed in its duty to supervise its personnel and its equipment. Furthermore, it is also reasonable to conclude that Mr. Roch, as an experienced laborer, should have taken more care to protect himself when working in close proximity to heavy machinery.

**Assignment of Error No. 2 (Mr. Roch): *The jury should have been permitted to make an award for future lost earnings.***



In this assignment of error, Mr. Roch submits that the trial court erred in granting the directed verdict on the issue of future lost wages/lost earning capacity. In a jury trial, a party may move for directed verdict at the close of an opponent's evidence. La. C.C.P. art. 1810. A directed verdict is proper when, considering all of the evidence in the light most favorable to the non-mover, it is clear that the facts and inferences point so strongly and overwhelmingly in favor of the mover that reasonable jurors could not reach a contrary verdict. *Thomas v. A.P. Green Industries, Inc.*, 05-1064, p. 19 (La. App. 4 Cir. 5/31/06), 933 So.2d 843, 858. If there is substantial evidence opposed to the motion, i.e., evidence of such quality and weight that reasonable jurors in the exercise of impartial judgment might reach different conclusions, the motion should be denied and the case submitted to the jury. *Id.*

The standard of review on appeal of a directed verdict is whether reasonable persons could not reach a contrary verdict under the evidence. *Davis v. Board of Supervisors of Louisiana State University and Agricultural and Mechanical College*, 03-2219, pp. 7-8 (La. App. 4 Cir. 11/17/04), 887 So.2d 722, 727. The question to be asked by the appellate court is not whether plaintiff proved his case by a preponderance of the evidence, but rather, whether upon reviewing the evidence submitted, the court could conclude that reasonable persons could not have reached a verdict in favor of plaintiffs. *Id.* The appellate court also must determine if the record supports the granting of a directed verdict, based not on a credibility determination (a factual issue), but on a sufficiency of evidence determination (a question of law). *Id.*; *Lott v. Lebon*, 96-1328, p. 4 (La. App. 4 Cir. 1/15/97), 687 So.2d 612, 616. A directed verdict should be sustained on appeal where the reviewing court would find a jury verdict in favor of the party

opposing the motion to be manifestly erroneous had the trial judge allowed the case to go to the jury. *Wichser v. Trosclair*, 99-1929, p. 5 (La. App. 4 Cir. 2/28/01), 789 So.2d 24, 27.

In its motion for directed verdict on the issue of future lost wages, Accent argued that, according to Dr. Russo's testimony, Mr. Roch was able to perform part-time sedentary work, but Mr. Roch failed to introduce either an economist or vocational rehabilitation expert to assist in placing a value on the claim. In granting the directed verdict as to future lost wages, the trial judge recognized that because Mr. Roch was not totally disabled and could perform some type of work, Mr. Roch was required to quantify what kind of work he could do and then put a value on it. We agree.

In order to support an award for loss of earning capacity, a plaintiff must present sufficient evidence to allow the court to calculate the amount of the award with some measure of reasonable certainty. *Naman v. Schmidt*, 541 So.2d 265, 269 (La. App. 4 Cir. 1989). In *Jones v. Traylor*, 93-2144 (La. App. 4 Cir. 4/28/94), 636 So.2d 1112, the defendants argued that the trial court improperly awarded the plaintiff future lost wages in light of the fact that the plaintiff failed to present the testimony of either an economic expert or a vocational counselor. Ruling in favor of the defendants, this Court stated:

Nothing in the testimony detailed above provides a basis to allow either the trial court or this court to determine whether the plaintiff suffered a loss of future earning capacity because of the fall on the mat in the sheriff's office. Although the testimony of the physicians was sufficient to establish that the plaintiff would suffer some physical restrictions in her future activities, proof of those limitations is insufficient to show that the plaintiff is unable to engage in any employment, or to show the limitations on the plaintiff's ability to earn a salary in some type of occupation. Only the testimony of a vocational counselor would have been sufficient to prove the types of employment, if any, the plaintiff could undertake and the amount of

money she might earn in those types of employ. Even Dr. Vogel stated specifically that he would defer to a vocational counselor on this issue. The plaintiff failed to present the necessary testimony to meet her burden of proving loss of future wages.

Further, even if the plaintiff had presented evidence that she was unable to engage in any employment or that her salary would be limited to a certain amount because of her physical restrictions, her failure to present the testimony of an economic expert made it virtually impossible for the trial court or this court to estimate the proper recovery for the plaintiff. Only an economic expert would be able to explain the proper discount rate and thereby calculate the proper amount of damages to compensate the plaintiff for loss of future wages.

*Jones*, 93-2144 at p. 11, 636 So.2d at 1122.

In the instant case, the only evidence Mr. Roch presented as to his future lost wages was his own testimony that he was unable to work, and the testimony of Dr. Russo who opined that Mr. Roch could only perform part-time sedentary work. Mr. Roch presented no testimony from an expert in vocational rehabilitation as to what types of employment were available to him. Furthermore, he presented no testimony from an economist concerning future earnings or work life expectancy. In sum, Mr. Roch failed to prove his loss of future earnings with any degree of certainty. We are unable to say that the trial court erred in granting a directed verdict on this issue.

***Assignment of Error No. 3 (Mr. Roch): The jury should have been permitted to make an award for past and future medical bills.***

As previously explained, on the second morning of trial, before the jury was seated, the trial judge heard testimony from Ms. Gates regarding payments made by Eagle Pacific in connection with their workers' compensation lien. It is evident from the colloquy that transpired between the trial judge, Mr. Patrick, the attorney for Eagle Pacific, and Mr. Buck, the attorney for Mr. Roch, that the testimony of

Ms. Gates dealt solely with Eagle Pacific's intervention. An excerpt from the transcript reads as follows:

**MR. PATRICK:** Good morning Your Honor. Pat Patrick here for the intervener, Eagle Pacific Insurance Company.

**MR. BUCK:** Frank Buck on behalf of plaintiff, Lionel Roch.

**COURT:** Let the record reflect that Mr. Phayer [attorney for Accent and Canal Indemnity] is not here. It is my understanding that this portion of the case doesn't affect Mr. Phayer directly, and Mr. Phayer informed the Court that it wouldn't matter to him what the outcome would be.

**MR. BUCK:** That's correct, Your Honor. Mr. Phayer had indicated that he understands that there's a certain amount that has been paid by Comp, and the plaintiff contests certain portions that might not be subject to the subrogation/lien under the Workers' Comp statutes, and that he did not have any interest in participating here this morning.

**COURT:** Okay.

At the close of Mr. Roch's case, Accent moved for a directed verdict on the issue of past medical bills. In granting Accent's motion, the trial court determined that the medical bills were admitted solely for the purpose of the intervention. The trial court further acknowledged that Mr. Buck failed to introduce the medicals in his case before the jury.

This Court is well aware that evidence of workers' compensation payments shall not be presented to a jury pursuant to L.C.E. art. 414. However, we find, as did the trial court, that Mr. Roch's medical expenses were not properly offered to the jury. The introduction of the bills through a representative of the workers' compensation insurer, outside of the presence of the jury, was insufficient.

It is evident from the record that the parties did not stipulate to past medical expenses. It is also evident that Mr. Buck did not introduce the medical bills through any source other than through Eagle Pacific's representative. In fact, Mr. Buck made no attempt to identify Dr. Russo's medical bills when Dr. Russo was

on the witness stand. Based on the evidence presented, we conclude that the record supports the granting of a directed verdict for past medicals.

Finally, Mr. Roch contends that the trial judge erred in granting a directed verdict on the issue of future medical expenses. We disagree.

It is well established that when a need for future medical care is established by the evidence but the cost is uncertain, a reasonable award may be made. *Stiles v. K Mart Corporation*, 597 So.2d 1012, 1013 (La.1992). See also *Parker v. Delta Well Surveyors, Inc.*, 00-1121 (La. App. 4 Cir. 5/2/01); 791 So.2d 717, 725.

Mr. Roch did not introduce his past medical expenses in the presence of the jury. Consequently, the jury did not have the benefit of this evidence upon which to base an award of future medicals. Moreover, Mr. Roch failed to provide the jury with any evidence regarding future medical expenses. In fact, the record reveals that Dr. Russo was never questioned, and gave no opinion, on the nature and extent of Mr. Roch's likely future medical treatment. Therefore, we find no error on the part of the trial court in the granting a directed verdict on the issue of future medical expenses.

CONCLUSION:

For the foregoing reasons, the judgment of the trial court is affirmed.

**AFFIRMED**