NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1454

JOHANNA FURDEN BOSELY INDIVIDUALLY AND ON BEHALF OF HER MINOR DAUGHTER, CHRISTA FURDEN

VERSUS

ST. TAMMANY PARISH SHERIFF'S OFFICE, COREGIS INSURANCE COMPANY AND MODRICK "FRED" FRANKLIN

DATE OF JUDGMENT: FEB 11 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2002-11593, DIV. G, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. CRAIN, JUDGE

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and on behalf of her minor daughter,
Christa Furden

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Rodney J. Strain, Jr. as Sheriff of
St. Tammany Parish Sheriff's Office,
Coregis Insurance Company, and
Modrick "Fred" Franklin

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Disposition: AMENDED AND, AS AMENDED, AFFIRMED.

KUHN, J.

Plaintiff-appellant, Johanna Furden Bosely, individually and on behalf of her minor daughter, Christa Furden, appeals the trial court's judgment, which awarded her $15,000 in general damages against the St. Tammany Parish Sheriff's Office (STPSO) as a result of the negligence of its employee, Deputy Moderick "Fred" Franklin, while he was in the course and scope of his employment. We amend the judgment to include legal interest from the date of demand and to cast in judgment defendants-appellees, Rodney J. Strain, Jr., as Sheriff of STPSO, Coregis Insurance Company, and Moderick "Fred" Franklin. As amended, the trial court's judgment is affirmed.

After Deputy Franklin's vehicle impacted the vehicle driven by Bosely while she was stopped at a red light on April 3, 2001, she filed this lawsuit. After a trial on the merits in which defendants' liability was stipulated, the trial court concluded that she was entitled to $15,000 in general damages for the cervical and low back strains to her spine that she suffered as a result of the accident.[1] The trial court specifically concluded that the TMJ dysfunction from which she suffered was not related to the accident. A judgment in accordance with the trial court's determinations was signed on March 12, 2010.

Bosely appeals urging the trial court erred in: assessing the quantum of its general damage award for the cervical and low back strains to her spine; rejecting her claims for damages as a result of the TMJ dysfunction; and failing to award

[1] The award of Bosely's medical expenses as well as the general damages and medical expenses awards for her daughter were not appealed.

legal interest and expert witness fees.

General damages involve mental or physical pain and suffering, inconvenience, or other losses of lifestyle that cannot be measured definitively in terms of money. ***Boudreaux v. Farmer***, 604 So.2d 641, 654 (La. App. 1st Cir.), ***writs denied***, 605 So.2d 1373 and 1374 (La. 1992). The factors to be considered in assessing the quantum of damages for pain and suffering are severity and duration. ***Jenkins v. State ex rel. Dep't of Transp. and Dev.***, 06-1804, p. 26 (La. App. 1st Cir. 8/19/08), 993 So.2d 749, 767, ***writ denied***, 08-2471 (La. 12/19/08), 996 So.2d 1133. Much discretion is left to the judge in the assessment of general damages. La. C.C. art. 2324.1. The discretion vested in the trier of fact is "great," even vast, so that an appellate court should rarely disturb an award of general damages. ***Youn v. Maritime Overseas Corp.***, 623 So.2d 1257, 1261 (La. 1993), ***cert. denied***, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

In its reasons for judgment the trial court stated, "While the Court finds that the treatment through October, 2001 was solely caused by the accident, the need for treatment from March 2002 through November 2002 was significantly contributed to by exacerbations and stressors unrelated to the accident." It then awarded $15,000 in general damages and medical expenses, which apparently included the chiropractic treatment of Dr. James McCue through November 2002. Thus, despite its notation that the exacerbations and stressors were not solely related to the accident, the trial court's award of general damages was for the entire period Dr. McCue treated Bosely for the pain related to the strains to her spine. Additionally, we note that an appellant appeals the judgment, not the written reasons for judgment. ***See Greater New Orleans Expressway Comm'n v.***

Olivier, 2002-2795, p. 3 (La.11/18/03), 860 So.2d 22, 24. Because the judgment awarded $15,000 in general damages, that is the amount we review for an abuse of discretion.

Although Bosely stated that her treating chiropractor told her that hers was one of the worse, severe whiplashes he had ever seen, Dr. McCue described her injury as "moderate," and did not recall having advised Bosely in the manner she described. Additionally, Dr. McCue testified that Bosely initially indicated that her pain level for her cervical strain was five on a five-point scale and that her low back strain rated a four on a five-point scale. An MRI test showed mild dehydration of all Bosely's cervical disks but an otherwise unremarkable reading of her cervical spine. In October 2001, Dr. McCue believed Bosely had reached the permanent stationary level and released her to home care and strengthening exercises. At that time, Bosely rated her pain as a one out of five. In accordance with Dr. McCue's release instructions, Bosely returned for treatment in March 2002, when her pain in both her cervical and low back increased from one to two on a five-point scale. Dr. McCue treated her conservatively until Bosely again reached permanent stationary status. After her release in November 2002, Bosely did not treat any further with Dr. McCue.

Bosely testified that before the accident she was in good health, stating that she had been able to work out five days a week. She explained that the chiropractic treatments she received gave her temporary relief and that with each visit, she improved. After the accident, she was able to secure employment and was able to perform her job functions at a teak and interior furniture store. By August 2002, Bosely indicated she was able to return to exercising, although she

stated that she had gained weight and noted that her work-outs were not as often or intense as she had been able to perform before the accident.

The Emergency Room (ER) report from Columbia Lakeview Regional Medical Center showed that immediately after the accident, Bosely had a full range of motion. She showed no deformity and indicated to medical personnel that she was not in pain. There were no objective signs of swelling and her sensation was intact. An x-ray taken at the ER showed no abnormality although minimal rotary scoliosis was indicated in the lower lumbar spine.

Based on the testimonial and documentary evidence contained in this record, we cannot say the trial court abused its vast discretion in awarding $15,000 to Bosely for an approximately 20-month soft tissue injury.

Bosely next challenges the trial court's conclusion that the TMJ dysfunction from which she suffers is not related to the accident. She urges that because she was in good health before the accident and, commencing with the accident, she had continuous symptoms of neck pain, headaches, and a report of "medial scapular pain" in 2003, the TMJ dysfunction was related to the accident.

Whether an accident caused a person's injuries is a question of fact that should not be reversed on appeal absent manifest error. ***Poland v. State Farm Mut. Auto. Ins. Co.***, 03-1417, p. 5 (La. App. 1st Cir. 6/25/03), 885 So.2d 1144, 1147. The record supports the trial court's rejection of Bosely's claim for damages related to TMJ dysfunction.

Dr. Andrew Voelkel diagnosed and treated Bosely for TMJ dysfunction commencing in August 2007, when she complained of pain in the right lower mandible caused by biting pressure. Based on his examination and the past history

she provided him, Dr. Voelkel related the TMJ dysfunction to the April 3, 2001 accident. But Dr. Voelkel admitted that he did not have Bosely's dental records. Although he believed that more likely than not trauma would cause TMJ dysfunction, Dr. Voelkel testified that stress could cause TMJ dysfunction symptoms. The record is replete with references to domestic and other stress from which Bosely suffered between 2002 and 2005. And while Bosely apparently had a limited ability to open her mouth in 2007 when she was examined by Dr. Voelkel, the trial judge saw a video recording of Bosely eating a hamburger in April 2001 with no apparent pain and the ability to fully open her mouth. As the trier of fact, the trial judge was permitted to accept or reject, in whole or in part, the testimony of any witness deemed lacking in credibility. ***See Verges v. Verges***, 01-0208, p. 10 (La. App. 1st Cir. 3/28/02), 815 So.2d 356, 363, ***writ denied***, 02-1528 (La. 9/20/02), 825 So.2d 1179. We cannot say the trial court was manifestly erroneous in finding that Bosely's TMJ symptoms were not caused by the April 2001 accident.

Bosely challenges the trial court's failure to award legal interest and expert witness fees in the signed judgment. On appeal, defendants-appellees "recognize that the language of the [j]udgment does not expressly state an award of 'legal interest' ... and have advised [Bosely] that they agree interest should be paid." Accordingly, we will modify the trial court's judgment to provide legal interest. ***See*** La. R.S. 13:4203.

Generally, an assessment of expert witness fees must be based on the value of time employed and the degree of learning or skill required. La. R.S. 13:3666A; ***Riche v. City of Baton Rouge***, 541 So.2d 905, 908 (La. App. 1st Cir. 1988).

Factors to be considered by the trial court in setting an expert witness fee include: the time spent testifying at trial, time spent in preparatory work for trial, time spent away from regular duties while waiting to testify, the extent and nature of work performed, and the knowledge, attainments, and skill of the expert. Additional considerations include the helpfulness of the expert's testimony to the trial court, the amount in controversy, the complexity of the problem addressed by the expert, and awards to experts in similar cases. ***Samuel v. Baton Rouge Gen. Med. Center***, 99-1148, p. 8 (La. App. 1st Cir. 10/2/00), 798 So.2d 126, 132.

At trial, the trial court accepted both Dr. McCue and Dr. Voelkel as expert witnesses. Although Dr. Voelkel testified that his customary expert witness fee was $500, Dr. McCue was not asked and did not provide any evidence as to his customary expert witness fee. The record contains no evidence of what either expert did in preparation for trial.

Insofar as Dr. Voelkel's fee, defendants-appellees assert that because the trial court concluded that Bosely did not meet her burden of proof insofar as the causation of her TMJ dysfunction to the accident, the trial court could correctly determine not to assess any amount of expert fee to Dr. Voelkel. And this court has affirmed as no abuse of discretion a trial court's determination that an expert was entitled to no fee where the jury had disregarded his testimony. ***See Strain v. Indiana Lumberman's Mut. Ins. Co.***, 00-2720, p. 10 (La. App. 1st Cir. 2/20/02), 818 So.2d 144, 151.

Because the judgment does not award any fee to either expert, and in light of the discretion the trial court has to set a fee, we believe the trial court is in a better position to determine the value of the expert fees than an appellate court,

and it can be decided on a rule to tax such fees as costs. ***Meyers v. Alexandria Coca-Cola Bottling Co., Ltd.***, 8 So.2d 737, 739 (La. App. 1st Cir. 1942) (and cited in ***Riche***, 541 So.2d at 909, Lanier, J., dissenting). Accordingly, we do not rule on this issue.

Finally, we note that on May 8, 2009, the trial court signed a judgment sustaining a declinatory exception raising the objection of lack of procedural capacity and a peremptory exception raising the objection of no cause of action raised by defendants, Rodney J. Strain, Jr., as Sheriff of STPSO, Coregis Insurance Company, and Moderick "Fred" Franklin, asserting that the STPSO as a parish sheriff's department was an entity that could not be sued. The May 8, 2009 judgment expressly dismissed "with prejudice, all claims against the [STPSO]." That judgment was not appealed.[2]

Mindful that at the trial on the merits, all named defendants were represented by the same attorney and that on appeal, appellees identify themselves as Rodney J. Strain, Jr., as Sheriff of STPSO, Coregis Insurance Company, and Moderick "Fred" Franklin, we will amend the judgment to include these appellees as expressly-casted defendants. ***See*** La. C.C.P. art. 2164.

DECREE

For these reasons, the trial court's March 12, 2010 judgment is amended to expressly: (1) include legal interest from the date of demand in accordance with La. R.S. 13:4203; and (2) cast as liable for Bosely's damages "Rodney J. Strain, Jr., as Sheriff of STPSO, Coregis Insurance Company, and Moderick "Fred"

[2] ***See*** La. C.C.P. art. 1915A(1); ***Motorola, Inc. v. Associated Indem. Corp.***, 02-0716, p. 7 (La. App. 1st Cir. 4/30/03), 867 So.2d 715, 719.

Franklin." With these amendments, the judgment is affirmed. Appeal costs are assessed against plaintiff-appellant, Johanna Furden Bosely.

AMENDED AND, AS AMENDED, AFFIRMED.