

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2005 CA 1060

MELANIE CARGILL, WIFE OF / AND WAYNE M. POPLIN

VERSUS

RITA LEMAIRE, ET ALS

Judgment rendered AUG 16 2006

Appealed from the
17th Judicial District Court
in and for the Parish of Lafourche, Louisiana
Trial Court No. 91073
Honorable John E. LeBlanc, Judge

LEON C. VIAL, III
HAHNVILLE, LA
and
MATTHEW F. BLOCK
THIBODAUX, LA

TIMOTHY G. SCHAFER
NEW ORLEANS, LA

ATTORNEYS FOR
PLAINTIFFS-APPELLEES
MELANIE CARGILL, WIFE OF AND
WAYNE M. POPLIN

ATTORNEY FOR
DEFENDANTS-APPELLANT
UNITED SERVICES AUTOMOBILE
ASSOCIATION (USAA)

BEFORE: KUHN, GUIDRY, AND PETTIGREW, JJ.

J. 20
JEK
by J. 20
J.M.C.
by J. 20

PETTIGREW, J.

This is an action for personal injuries sustained by plaintiff when the vehicle in which he was riding was involved in a collision caused by the fault of another driver. The facts of the accident and resulting liability were not contested, and this matter proceeded to trial on issues limited to the causation of plaintiff's injuries and the extent of damages he sustained.

FACTS

The claims of Melanie Cargill, wife of/and Wayne M. Poplin arise as a result of injuries sustained by Mr. Poplin in a motor vehicle accident that occurred on April 7, 2000, at approximately 1:45 P.M. at the intersection of Louisiana Highway 3235 and West 107th Street, near Cut Off, Lafourche Parish, Louisiana. At the time of the accident, Mr. Poplin was a guest passenger in a 1980 GMC van operated by David J. Vial, MD. The van operated by Dr. Vial had been proceeding in a northerly direction along Highway 3235, when a 1993 Chevrolet Lumina operated by Rita T. Lemaire attempted to enter the highway and collided with Dr. Vial's van.

Immediately following the accident, Mr. Poplin was transported to Lady of the Sea Hospital where he was evaluated for a variety of complaints and discharged later that day.

On April 4, 2001, Mr. and Mrs. Poplin instituted this action against Mrs. Lemaire, her automobile liability insurer, Louisiana Farm Bureau Casualty Insurance Company ("Farm Bureau"), and United Services Automobile Association ("USAA"), the liability insurer of the van operated by Dr. Vial and his insurer under a personal umbrella policy. The petition set forth allegations of injuries to Mr. Poplin's jaw, left hip, shoulder, a "traumatic neurosis," as well as a claim for loss of consortium put forth by Mrs. Poplin. Mr. Poplin, who had previously undergone a total replacement of his right hip in 1985, later underwent a left hip replacement in December 2003.

ACTION OF THE TRIAL COURT

Prior to the trial of this matter, Farm Bureau tendered its policy limits in the amount of \$25,000.00 and stipulated to the liability of Mrs. Lemaire. The matter

proceeded to trial solely against USAA, on February 22-24, 2005. At the end of deliberations, the jury returned a verdict in favor of Mr. and Mrs. Poplin in the amount of \$263,000.00.¹ From this judgment, USAA has appealed, and Mr. and Mrs. Poplin have filed an answer to the appeal.

ISSUES PRESENTED FOR REVIEW

In connection with its appeal in this matter, USAA sets forth the following issues for review and consideration by this court:

1. Is the jury's factual finding, that the accident did not aggravate Mr. Poplin's pre-existing left hip condition, supported by the evidence presented at trial?
2. Did the jury abuse its discretion when, after rejecting Mr. Poplin's claim based on an aggravation of a pre-existing left hip condition, it awarded him \$250,000.00 for contusions and abrasions which resolved within one month and a post-traumatic stress disorder for which he was treated for six months?

Mr. and Mrs. Poplin, in connection with their answer to the appeal, pray that this court:

1. Make an award of damages to Mr. and Mrs. Poplin for a frivolous appeal by USAA, and
2. Determine that the trial court's jury instructions on medical expenses were erroneous and that Mr. and Mrs. Poplin be awarded all medical expenses proven at trial.

STANDARD OF REVIEW

In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the trier of fact. La. Civ. Code art. 2324.1. The standard for appellate review of general damage awards is set forth in **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), wherein the Louisiana Supreme Court stated that "the discretion vested in the trier of fact is 'great,' and even vast, so that the appellate court should rarely disturb an award of general damages." The appellate court's initial inquiry is whether the award for the particular injuries and their effects under the

¹ The amount awarded by the jury was reduced in the judgment by the amount of Mrs. Lemaire's policy limits.

particular circumstances on the particular injured person is a clear abuse of the "much discretion" of the trier of fact. Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then for the purpose of determining the highest or lowest point which is reasonably within that discretion. **Youn**, 623 So.2d at 1260. The role of the appellate court in reviewing general damage awards is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. **Millican v. Ponds**, 99-1052, p. 6 (La. App. 1 Cir. 6/23/00), 762 So.2d 1188, 1192. Each case is different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration. **Youn**, 623 So.2d at 1260.

DISCUSSION

The verdict returned by the jury found in favor of Mr. and Mrs. Poplin. The jury awarded Mr. Poplin damages in the following amounts:

Past medical expenses -----	\$6,000.00
Future medical expenses -----	\$2,000.00
Past physical and mental pain and suffering -----	\$100,000.00
Future physical and mental pain and suffering -----	\$50,000.00
Loss of enjoyment of life -----	\$100,000.00

The jury further awarded Mrs. Poplin the following sum as compensation for her loss of consortium:

Loss of consortium, services and society -----	\$5,000.00
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The primary issues presented for our review in connection with this appeal relate to the nature and extent of the injuries sustained by Mr. Poplin. The jury's award of \$5,000.00 to Mrs. Poplin is not an issue in this appeal. Pointing to the fact that the jury's award of \$6,000.00 for past medical expenses was far less than the \$75,893.56 claimed by Mr. Poplin, USAA surmises that the jury had rejected Mr. Poplin's claim for the aggravation of his preexisting degenerative hip condition. Accordingly, USAA contends that the general damage awards totaling \$250,000.00 were excessive for contusions, abrasions, and a post-traumatic stress disorder resulting from the accident.

A review of the testimony adduced at trial reveals that Mr. Poplin, while working at a chemical plant in the 1970s, was the victim of a chlorine spill and subsequently developed breathing problems and asthma. At that time, Mr. Poplin began taking Prednisone, a powerful steroid medication prescribed to help him breathe. Prednisone has also been known to cause or contribute to aseptic or avascular necrosis, a condition whereby an insufficient supply of blood to the bone marrow causes bones to die and crumble.

In 1980, Mr. Poplin began to experience pain in both of his hips. From 1980 until 1984, Mr. Poplin worked with his hips hurting. Dr. Vial, a friend of Mr. Poplin, supplied him with prescriptions for Anaprox, an anti-inflammatory medication, as well as Tylox that Mr. Poplin took periodically for pain. In 1985, the hip pain increased to the point that Mr. Poplin could no longer sleep at night, and he underwent a right hip replacement at the Veteran's Administration ("VA") Hospital in Asheville, North Carolina.

Following his hip replacement in 1985, until the wreck in 2000, Mr. Poplin testified that he purchased a Harley Davidson motorcycle that he rode extensively, as well as a camp on Lake Cataouatche that he visited nearly every weekend. Under cross-examination, Mr. Poplin conceded that although his doctors advised him that his use of Prednisone would eventually deteriorate his left hip, necessitating the need for a second hip replacement, Mr. Poplin claimed that it had been his intention to postpone surgery for as long as he could.

Mr. Poplin also admitted that in 1994, he returned to the VA Hospital in North Carolina where he underwent an x-ray examination of both hips to confirm that sufficient bone mass remained should he elect to undergo a left hip replacement in the future. An x-ray examination, taken of Mr. Poplin's left hip in 1995, revealed degeneration consistent with avascular necrosis. Following the April 7, 2000 accident, Mr. Poplin postponed surgery until December 2003.

Based upon our review of the evidence before us, we find no abuse of discretion in the damages awarded by the jury. It is the opinion of this court that inasmuch as the jury in this case awarded medical expenses for the treatment and analysis of Mr. Poplin's left

hip, the jury obviously concluded that Mr. Poplin's left hip complaints, although preexisting, were aggravated as a result of the wreck. While the general damages awarded to Mr. Poplin may be on the high side, said awards are not so high as to constitute an abuse of the vast discretion afforded the trier of fact. Given the "particular injuries and their effects under the particular circumstances" on Mr. Poplin, the general damage awards made by the jury are not beyond that which a reasonable trier of fact could assess. See Youn, 623 So.2d at 1260. We find the assignments of error relating to the excessiveness of the damages awarded to Mr. Poplin to be without merit.

In their answer to the appeal by USAA, Mr. and Mrs. Poplin have set forth a claim for damages for the filing of a frivolous appeal. The imposition of damages for a frivolous appeal is regulated by La. Code Civ. P. art. 2164. The courts have been very reluctant to grant damages pursuant to this article as it is penal in nature and therefore must be strictly construed. **Gaurantee Sys. Const. & Restoration, Inc. v. Anthony**, 97-1877, p. 13 (La. App. 1 Cir. 9/25/98), 728 So.2d 398, 405, writ denied, 98-2701 (La. 12/18/98), 734 So.2d 636. Furthermore, in order to assess damages for a frivolous appeal, it must appear that the appeal was taken solely for the purpose of delay or that appellate counsel does not sincerely believe in the view of law he advocates. **Cortes v. Lynch**, 2002-1498, p. 14 (La. App. 1 Cir. 5/9/03), 846 So.2d 945, 954.

In the instant case, there is no indication that counsel for USAA brought this appeal for purposes of delay or without a reasoned belief in the merits of the appeal. Accordingly, we conclude that damages based upon a frivolous appeal are not warranted under the facts of this case.²

Mr. and Mrs. Poplin further assert that the trial court overruled an objection by plaintiffs' counsel and improperly instructed the jury on the standard of proof for aggravation of a preexisting injury. Pointing out that the trial court rejected a charge

² We also note that while Mr. and Mrs. Poplin have filed a brief as appellees in this matter, our review of this brief reveals no argument in support of the assertions made by Mr. and Mrs. Poplin in their answer to the appeal. Therefore, according to the Uniform Rules – Courts of Appeal Rule 2-12.4, issues not briefed on appeal are deemed abandoned.

proposed by USAA, preferring instead its own charge selected from a legal treatise, Mr. and Mrs. Poplin claim that the charge given prevented the jury from awarding medical expenses incurred as a result of the aggravation of a preexisting condition. Mr. and Mrs. Poplin do not challenge the validity of the charge given, but claim that without further contextual instructions, the charge is improper and could produce absurd results.

Upon review of the record in this matter, we agree that viewed in isolation, the charge at issue might be misconstrued given the particular facts of the instant case. Nevertheless, we are mindful that in assessing a jury instruction that is alleged to be erroneous, it is the duty of the reviewing court to assess such impropriety in light of the entire jury charge to determine if they adequately provide the correct principles of law as applied to the issue framed in the pleadings and evidence and whether they adequately guided the jury in its deliberation. **Nicholas v. Allstate Ins. Co.**, 99-2522, p. 8 (La. 8/31/00), 765 So.2d 1017, 1023.

In the case *sub judice*, the trial court gave the instruction at issue as part of his charge regarding the aggravation of a preexisting condition. The judge also charged the jury with respect to causation. A review of the jury charges as a whole provides a correct statement of the law, and we must therefore conclude that the foregoing issue is without merit.

For the above and foregoing reasons, we affirm the judgment of the trial court and assess all costs associated with this appeal against defendant-appellant, USAA.

AFFIRMED.