NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0130

JEREMIAH T. RITCHIE

VERSUS

TIMOTHY J. RICHARDS AND LIBERTY MUTUAL INSURANCE COMPANY

Judgment Rendered: FEB 11 2011

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2005-12861

Honorable Richard A. Swartz, Judge Presiding

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* * * * * *

BEFORE: WHIPPLE, PETTIGREW, McDONALD, McCLENDON, AND HUGHES, JJ.

Whipple, J. dissents & assigns reasons.
Pettigrew, J. (by TM) concurs.
Hughes, J. (by WHH) dissents & assigns reasons.

McCLENDON, J.

Plaintiff has appealed a judgment rendered in accordance with a jury verdict, asserting that the jury's allocation of fault was clearly wrong and the amount of damages awarded to the plaintiff was woefully inadequate. For the following reasons, we amend the district court's judgment to raise the amount awarded to plaintiff for past, present and future physical pain and suffering, mental anguish, emotional distress, and loss of enjoyment of life from $7,500 to $25,000.00, and to award plaintiff $15,000.00 for physical disability/impairment. We affirm the judgment in all other respects.

FACTS AND PROCEDURAL HISTORY

On June 22, 2004, Jeremiah T. Ritchie was installing metal fascia and vinyl siding on a home under construction on Lake Court in Mandeville, Louisiana. After Ritchie had completed his work for that day, he and a co-worker, Ricky Bolotte, loaded a walkboard (scaffold) onto their trailer which was parked on the street. While the parties were loading the scaffold, Timothy J. Richards, who was driving his Chevy Tahoe toward the men on Lake Court, stopped his vehicle prior to approaching the workers in the street. Ritchie was at the rear of the trailer, with his back facing the Richards' vehicle. After loading the scaffold, Ritchie stepped back from the trailer and was struck by Richards' vehicle.

On June 16, 2005, Ritchie (plaintiff) filed suit against Richards and his automobile liability insurer, Liberty Mutual Insurance Company. Plaintiff alleged that Richards was negligent in, among other things, failing to be attentive to his surroundings and failure to sound his horn or otherwise warn plaintiff of the approaching vehicle. Plaintiff sought damages for injuries to his right foot and back, as well as lost wages and loss of earning capacity.

The matter proceeded toward trial and a jury rendered a verdict on July 22, 2009, finding plaintiff 75% at fault and Richards 25% at fault for the injuries plaintiff sustained in the accident. The jury awarded the following damages:

Past, present and future physical pain and suffering	$7,500.00

Past, present and future [mental] anguish and emotional distress	$0.00
Past medical expenses	$10,180.20
Future medical expenses	$15,080.00
Past loss of earnings	$22,880.00
Future loss of earnings/loss of earning capacity	$0.00
Physical disability/impairment	$0.00
Loss of enjoyment of life	$0.00
TOTAL AMOUNT	$55,640.20

On August 4, 2009, plaintiff filed a Motion for Judgment Notwithstanding the Verdict (JNOV), Additur, or, in the Alternative, Motion for a New Trial. On August 11, 2009, the trial court denied plaintiff's motion. On August 21, 2009, the trial court signed a judgment rendered in accord with the jury's verdict. Plaintiff has filed the instant appeal to seek review of the August 21, 2009 judgment.

ASSIGNMENTS OF ERROR

1) The jury's apportionment of fault was contrary to [the] overwhelming weight of credible evidence and was clearly wrong and manifestly erroneous.

2) The jury's award of general and special damages was woefully inadequate due to [the] severity and permanency of appellant[']s injury, and it shocks the conscience and was disproportionate to previous awards.

3) There was no factual basis for the jury's denial of an award for loss of future wages/wage earning capacity, disability/impairment and loss of enjoyment of life, and such denial constituted an abuse of discretion.

Richards and Liberty Mutual Insurance Company (hereinafter collectively referred to as "defendants") have timely answered the appeal, asserting that the trial court erred in ordering them to pay all costs, as opposed to allocating those costs in accord with the parties' percentages of fault as assigned by the jury.

DISCUSSION

Apportionment of Fault

In his initial assignment of error, plaintiff challenges the jury's allocation of 75% of the fault to him. A trier of fact's allocation of fault is subject to the manifestly erroneous or clearly wrong standard of review. **Hebert v. Rapides Parish Police Jury**, 06-2001, 06-2164, p. 24 (La. 4/11/07), 974 So.2d 635, 654. In order to reverse a factfinder's determinations, the appellate court must find that no reasonable factual basis exists in the record to support the trial court's finding and that the finding is clearly wrong. **Stobart v. State through Dep't of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993). The issue to be resolved is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Id.** Reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. **Id.** If the jury's findings are reasonable in light of the record viewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. **Id.** at 882-83.

Plaintiff notes that the testimony adduced at trial indicated that nothing blocked Richards' view of the two workers and that Richards had stopped his vehicle to allow the plaintiff and Bolotte to place the scaffold onto their trailer. Plaintiff points out that although Richards acknowledged that plaintiff's back was facing him, Richards did not sound his horn or give any audible warning before proceeding forward. Plaintiff contends that Richards was distracted, noting that Richards testified that he was "doing a drive-through, driving through my subdivision, looking at the ditches as I [drove]" to ensure that the ditches were clear prior to an anticipated rain event.

Richards testified that after the workers loaded the scaffold, he proceeded forward when the workers were no longer moving. Richards indicated that when he began to move his vehicle there was about a five-foot clearance between his vehicle and the workers. Gary Calico, who was the driver of the vehicle following

the Richards vehicle, testified that the Richards vehicle was proceeding within its lane of travel when he saw plaintiff take "kind of a long step back" and "run into the side of Mr. Richards' vehicle." Moreover, Bolotte testified that plaintiff knew that the Richards vehicle was there, but plaintiff failed "to turn back around to see where he was" before taking "a couple steps back from the trailer."

A motorist is statutorily obligated to exercise due care to avoid colliding with any pedestrian upon the roadway and must give warning to the pedestrian by sounding the horn when necessary. See LSA-R.S. 32:214 and 32:351(A)(1). The operator of a motor vehicle has a constant duty to watch out for the possible negligent acts of pedestrians and avoid injuring them. **Baumgartner v. State Farm Mut. Auto. Ins. Co.**, 356 So.2d 400, 406 (La. 1978). A higher standard of care than that required of pedestrians is imposed upon the motorist commensurate with the hazards his conduct inflicts upon the public safety. **Id.**

The correlative duties of a pedestrian are set forth in LSA-R.S. 32:212(B) and LSA-R.S. 32:213. See **Rideau v. State Farm Mut. Auto. Ins. Co.**, 06-0894, p. 7 (La.App. 1 Cir. 8/29/07), 970 So.2d 564, 573, writ denied, 07-2228 (La. 1/11/08), 972 So.2d 1168. Louisiana Revised Statutes 32:212(B) provides that "[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield." Louisiana Revised Statutes 32:213 requires every pedestrian crossing a roadway at a point not within a marked crosswalk or within an unmarked crosswalk at an intersection to yield the right of way to all vehicles on the roadway.

The fact that an accident occurs does not create a presumption of negligence in favor of either the pedestrian or motorist. **Guidry v. City of Rayne Police Dept.**, 09-0664, p. 3 (La.App. 3 Cir. 12/9/09), 26 So.3d 900, 903. Rather, accidents occurring between a pedestrian and a motorist are governed by the principles of comparative fault. LSA-C.C. art. 2323; **Turner v. New Orleans Pub. Serv. Inc.**, 476 So.2d 800, 803-05 (La. 1985). Therefore, a determination of negligence in motorist/pedestrian accidents rests upon the

particular facts and circumstances of each case. **Guidry**, 09-0664, p. 3, 26 So.3d at 903. Moreover, although a motorist commands a greater instrumentality of harm, a pedestrian still bears the burden of proving that the motorist was negligent before he can recover damages. **Puearry v. State Through Dep't of Pub. Safety**, 496 So.2d 1372, 1374 (La.App. 3 Cir.1986).

In **Watson v. State Farm Fire and Cas. Ins. Co.**, 469 So.2d 967, 974 (La. 1985), the Louisiana Supreme Court addressed the factors to consider when reviewing an allocation of fault. Various factors may influence the degree of fault assigned, including: (1) whether 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. **Id.** These factors also guide an appellate court's determination as to the highest or lowest percentage of fault that could reasonably be assessed to each party. **Clement v. Frey**, 95-1119, 95-1163, p. 8 (La. 1/16/96), 666 So.2d 607, 611. The allocation of fault is not an exact science, or the search for one precise ratio, but rather an acceptable range, and any allocation by the factfinder within that range cannot be "clearly wrong." **Hebert**, 06-2001 at p. 24, 974 So.2d at 655.

After reviewing the entirety of the record, we cannot conclude that the jury's allocation of fault was clearly wrong. There was a rational basis in the record for the jury to find that the plaintiff was aware of the presence of Richards' vehicle prior to stepping back from the trailer. Moreover, plaintiff entered the roadway without ensuring that it was safe to do so. Accordingly, the jury believed that plaintiff's failure to exercise reasonable care was the primary cause of the accident. Although we may have allocated fault differently, we cannot substitute our judgment for the judgment of the trial court. **Ryan v. Zurich American Ins. Co.**, 07-2312, p. 1 (La. 7/1/08), 988 So.2d 214, 215. Because we agree that the jury's allocation of fault is reasonable after a

thorough review of the record, we cannot reverse its finding. See **Guillory v. Lee**, 09-0075, pp. 38-39 (La. 6/ 26/09), 16 So.3d 1104, 1131. Accordingly, plaintiff's first assignment of error has no merit.

Damages

In his two remaining assignments of error, plaintiff contends that the jury's award for his pain and suffering, mental anguish, and emotional distress was insufficient and that the jury's failure to award damages for loss of wages/wage earning capacity, disability and impairment, and loss of enjoyment of life was an abuse of discretion.

Physical & Mental Pain and Suffering and Loss of Enjoyment of Life

Immediately following the accident, plaintiff was treated in the emergency room at Northshore Regional Medical Center, where his chief complaints were of pain in his right knee and ankle. On June 25, 2004, plaintiff followed up with Dr. Frank Schiavi, an orthopaedic surgeon, who opined that plaintiff sustained a "crush injury," which generally heals but also leaves behind scar tissue that can decrease mobility and cause pain.[1] Dr. Schiavi instructed plaintiff to wear a splint on his right foot, ankle, and knee, and not to bear any weight on his right leg. Moreover, Dr. Schiavi opined that plaintiff could not return to his employment as a siding installer at that time.

A July 9, 2004 MRI of the right ankle revealed contusions in three bones in plaintiff's foot, and a January 18, 2005 MRI of the right knee showed degenerative changes in the medial cartilage. Dr. Schiavi noted that both of these findings were consistent with a crush injury. After obtaining the MRI results on the right knee, Dr. Schiavi ordered a course of physical therapy, and plaintiff attended twelve sessions of physical therapy at Coastal Rehabilitation of Southern Mississippi between February 2 and March 11, 2005.

On March 22, 2005, James Pullman, a physical therapist at Coastal Rehabilitation, performed a functional capacity evaluation. Pullman found that

[1] Dr. Schiavi also noted that plaintiff presented complaints of lower back pain. Dr. Schiavi indicated that plaintiff had a prior history of lower back pain, but noted that the accident could have aggravated this condition.

although plaintiff can perform work in a medium to heavy category, his "current physical capabilities DO NOT meet the minimum physical requirements" for his employment as a siding installer. Moreover, Pullman noted that plaintiff's right leg had some atrophy, or decrease in muscle mass, due to the fact that he was bearing most of his weight on his left leg.

After plaintiff's last visit with Dr. Schiavi on October 18, 2005, he next sought treatment with Dr. James R. Gosey, an orthopaedic surgeon, on June 6, 2008 and on April 20, 2009. Dr. Gosey noted that plaintiff was still experiencing problems with his right knee and ankle. Dr. Gosey indicated that he believed plaintiff sustained an osteochondritis desiccans lesion of the lateral dome of the talus[2] as well as a meniscus tear of the right knee. Dr. Gosey recommended that both the ankle and knee be arthroscoped and cleaned. Dr. Gosey opined that plaintiff's injuries were permanent barring an operation, but indicated that the operation might only improve it to some degree.

Dr. Paul Van Deventer, an orthopaedic surgeon, performed an independent medical exam on behalf of the defendants on June 30, 2009. Dr. Van Deventer indicated that plaintiff "did sustain a significant injury to his right foot and ankle with noted ongoing pathology." Dr. Van Deventer noted that he "would like an updated MRI study on the ankle although [he does] feel that if it does, in fact, confirm an osteochondral lesion of the talar dome that proceeding with arthroscopy is warranted." However, with regard to plaintiff's right knee, Dr. Van Deventer opined that there was no clear evidence of internal derangement. Further, he noted that the MRI did not show findings of an obvious meniscal tear. Dr. Van Deventer indicated that he would personally prefer to see an updated MRI study prior to recommending any surgical intervention.

Additionally, at trial, defendants called Dr. James Butler, an orthopaedic surgeon who had performed an independent medical evaluation on plaintiff on April 27, 2005. At the time of the visit, Dr. Butler noted that plaintiff walked with

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[2] Osteochondrotic desiccans can occur when the blood supply to the area at the end of the bone is disrupted. The affected bone and its covering of cartilage may stay in place and cause no symptoms or a fragment may gradually loosen, separate, and cause pain.

an antalgic gait, or slight limp, and utilized a cane for assistance. Dr. Butler opined that the January 18, 2005 MRI of the knee did not reveal any objective findings of a meniscal tear nor of a osteochondritis dessicans lesion, while the July 9, 2004 MRI of the ankle revealed only contusions to plaintiff's foot and ankle. Following examination, Dr. Butler found that no further diagnostic tests were needed, nor was there a need for surgeries or additional treatment. Dr. Butler believed plaintiff had reached maximum medical improvement and that plaintiff would continue to have subjective complaints of pain.[3] When questioned about the subsequent functional capacity exam, Dr. Butler agreed that it revealed plaintiff had permanent limitations and that plaintiff may continue to have an antalgic gait. Dr. Butler also conceded that the MRI report of the left ankle was "suggestive" of an osteochondritis lesion, although not definitive.

Plaintiff's mother, Elva Lee Ritchie, testified that following the accident "[y]ou could look at [plaintiff] and tell that he was in pain." She noted that his right knee and foot were wrapped and swollen, and that his right foot was "twice the size...than his other foot." She noted that his toes, foot, and ankle were "purple and black." Plaintiff's father, Herbert Ray Ritchie, and mother both testified that plaintiff had to use crutches for about eight months after the accident, and he used a cane to walk for over a year thereafter. Mrs. Ritchie testified that her son continues to experience problems, noting that his right "ankle is always bigger than the other one...the longer he's on it, the larger it gets." Plaintiff indicated that in the six months prior to trial, his foot's "gotten worse" and it is discolored and swollen when he wakes up in the morning.

Plaintiff testified that prior to the accident, he was a fit, athletic person who enjoyed martial arts and weighed 170 pounds. His father and mother both testified that prior to the accident, their son would run every evening when he got home from work and that he enjoyed working out. Plaintiff's father testified that since the accident, however, plaintiff "can't do anything" and his active

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[3] Dr. Butler found that plaintiff had a contusion to the talus, but opined that there was no specific treatment other than symptomatic treatment, including heat or ice medication when needed and limited weight-bearing on the ankle.

lifestyle has "been over ever since that." At trial, plaintiff indicated that he weighed 240 pounds. Plaintiff's father also testified that before the accident plaintiff focused on sports with his three children, and participated in physical activities with them.[4] However, plaintiff noted that now when he leaves his job in the evening, his foot is swollen and he is "in pain" such that he is unable to "go home and do things with my kids I would like to do."

Our jurisprudence has consistently held that in the assessment of general damages, much discretion is left to the jury, and upon appellate review such awards will be disturbed only when there has been a clear abuse of that discretion. **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1976). The discretion vested in the jury 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).

The role of an appellate court in reviewing general damages 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. **Wainwright v. Fontenot**, 00-0492, p. 6 (La. 10/17/00), 774 So.2d 70, 74; **Youn**, 623 So.2d at 1261. 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. **Youn**, 623 So.2d at 1260. Reasonable persons frequently disagree about the measure of general damages in a particular case. **Id.** at 1261. 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 decrease the award. **Id.** Only after such a determination of an abuse of discretion is a resort to prior awards appropriate

[4] Plaintiff testified that his twelve-year-old daughter is a basketball player, his ten-year-old son is a football player, and his eight-year-old daughter is a cheerleader.

and then for the purpose of determining the highest or lowest point which is reasonably within that discretion. **Id.** at 1260.

After reviewing the record we find the jury's total general damage award of $7,500.00 to be an abuse of discretion. Although Dr. Butler opined that plaintiff did not need any further medical treatment, the jury apparently disagreed as is evidenced by the award of future medical expenses. Also, none of his treating physicians believed plaintiff to be a malingerer, nor that his complaints of pain were exaggerated.

"Pain and suffering, both physical and mental, refers to the pain, discomfort, inconvenience, anguish, and emotional trauma that accompan[y] an injury." **McGee v. A C and S, Inc.**, 05-1036, p. 5 (La. 7/10/06), 933 So.2d 770, 775. The elements of physical pain and suffering and associated mental anguish are conceptually related and to a large extent overlapping, and therefore difficult to precisely distinguish. See **Oden v. Gales**, 06-0946, p. 13 (La.App. 1 Cir. 3/23/07), 960 So.2d 114, 122. We also recognize that loss of enjoyment of life can properly be categorized as a separate compensable item of general damages. See **McGee**, 05-1036 at p.12, 933 So.2d at 779, Nevertheless, we choose to make one undifferentiated award of general damages for the categories referenced. See **Harris v. Delta Dev. Partnership**, 07-2418, p. 22 (La.App. 1 Cir. 8/21/08), 994 So.2d 69, 84.

In light of the foregoing, we have conducted a review of prior awards for pain, suffering, mental anguish, and loss of enjoyment of life in similar cases and find that $25,000.00 is the lowest point which is reasonably within the factfinder's discretion.

Physical Disability/Impairment

Plaintiff also contends that the jury abused its discretion in failing to award any sums for disability/impairment. Disability damages are recognized as those general damages constituting any permanent disability or impairment that is secondary to the injuries sustained in the accident. **Brosset v. Howard**, 08-535, p. 19 (La.App. 3 Cir. 12/10/08), 998 So.2d 916, 931, writ denied, 09-0077

(La. 3/6/09), 3 So.3d 492. Disability/impairment may be listed as a separate item of general damages. See **Matos v. Clarendon Nat. Ins. Co.**, 00-2814, p. 11 (La.App. 1 Cir. 2/15/02), 808 So.2d 841, 848-49.

Although Dr. Gosey indicated that plaintiff had a 40% impairment of the right leg, Dr. Butler opined that even if he agreed with Dr. Gosey's findings, the disability rating according to the American Medical Association guidelines would be much lower. Dr. Butler opined that if plaintiff did sustain a meniscus injury, the appropriate disability rating would range from 3 to 5% for the affected leg. Similarly, Dr. Butler testified that had plaintiff sustained a symptomatic osteochondritis dissecans in his ankle, then the disability rating would be between 5 to 10% of the extremity.

The jury, by awarding over $15,000.00 of future medical expenses, certainly believed that plaintiff sustained either a meniscus injury of the left knee or a symptomatic osteochondritis dissecans lesion of the left ankle, or both, which required treatment, including possible surgery. After considering the entirety of the record, we find that the jury abused its discretion in failing to award damages for disability/impairment and find that $15,000.00 is the lowest point which was reasonably within the factfinder's discretion.

Loss of Future Wages/Earning Capacity

Plaintiff also contends that the jury abused its discretion in denying him an award for loss of future wages/wage earning capacity. The jury's determination of the amount, if any, of an award of damages, including lost earning capacity, is a finding of fact. **Ryan v. Zurich American Ins. Co.**, 07-2312, p. 7 (La. 7/1/08), 988 So.2d 214, 219. As such, the manifest error standard of review is appropriate here to determine whether the jury was clearly wrong in awarding no damages for loss of future earning capacity. **Id.**

Prior to the accident, plaintiff was making approximately $11.00 per hour installing siding. Although the plaintiff was unable to return to his employment as a siding installer, the functional capacity evaluation revealed that plaintiff

could return to work in the "medium to heavy category." [5] After the accident, plaintiff obtained his Commercial Driver's License certification and gained employment in that field. At the time of trial, plaintiff was making $10.00 per hour as a truck driver for St. Joe Brick Works, Inc. The hourly wage did not take into account the additional sums plaintiff receives for deliveries.[6] Moreover, plaintiff's economist, Shael Wolfson, noted the difference in hourly wage between his former and current job, but indicated that he had not taken the additional delivery sums into account. Further, Mr. Wolfson did not indicate whether plaintiff sustained a loss of earning capacity when the additional sums were considered. Accordingly, we cannot conclude that the jury was clearly wrong in failing to award any damages for loss of future wages/wage earning capacity.

ANSWER TO THE APPEAL

Defendants have answered the appeal, contending that the trial court abused its discretion in taxing the entirety of costs for trial to them rather than allocating the costs in accord with the percentages of fault. Defendants also challenge four specific costs assessed against them. However, we note that plaintiff's appeal only seeks review of the August 21, 2009 judgment rendered in conformity with the jury's verdict.[7] The referenced judgment does not address or assess costs. Rather, costs were assessed in a later judgment apparently signed by the trial court on October 23, 2009.[8] To seek review of this latter judgment, defendants are required to obtain an order of appeal from the district court. LSA-C.C.P. art. 2121. Accordingly, the issues raised in defendants'

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[5] The jury awarded plaintiff $22,880.00 for past loss of earnings, and this award has not been challenged by either party on appeal.

[6] Plaintiff receives $1.20 per thousand bricks he delivers, $1.20 for every pallet of mortar delivered, and twenty percent of every delivery fee.

[7] On September 10, 2009, plaintiff filed a motion for devolutive appeal to seek review of the judgment rendered in conformity with the jury's verdict. On September 11, 2009, the trial court granted plaintiff's motion for devolutive appeal. Although the trial court was divested of jurisdiction on the granting of the order of appeal, it retained jurisdiction to set and tax costs and expert witness fees. LSA-C.C.P. art. 2088(A)(10).

[8] The record does not contain the alleged October 23, 2009 judgment, nor any transcripts or pleadings addressing the cost issue.

purported answer are not properly before us and we cannot address the merits of those issues. See **Hoyt v. State Farm Mut. Auto. Ins. Co.**, 623 So.2d 651, 663-64 (La.App. 1 Cir.), writ denied, 629 So.2d 1179 (La. 1993).

CONCLUSION

For the foregoing reasons, we amend the judgment of the district court to raise the amount awarded for past, present and future physical pain and suffering, mental anguish, emotional distress, and loss of enjoyment of life from $7,500.00 to $25,000.00, and to award plaintiff $15,000.00 for physical disability/impairment, which awards are to be reduced in accord with plaintiff's percentage of fault. We affirm the district court judgment in all other respects. Costs of this appeal are assessed against the defendants, Liberty Mutual Insurance Company and Timothy J. Richards.

AMENDED, AND AS AMENDED, AFFIRMED.

JEREMIAH T. RITCHIE

VERSUS

TIMOTHY J. RICHARDS AND LIBERTY MUTUAL INSURANCE COMPANY

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0130

WHIPPLE, J., dissenting.

I respectfully dissent, in part, from the majority opinion herein.

On review of this matter, the majority has determined that the jury abused its discretion and erred in failing to award plaintiff any damages for physical disability/impairment, where both Drs. Gosey and Butler opined that plaintiff had a permanent disability rating and impairment of the right leg and ankle. As set forth in the majority opinion, the jury awarded plaintiff over $15,000.00 for future medical expenses evidencing its belief that plaintiff did, in fact, sustain an injury that required future treatment and possibly surgery. Thus, the majority concludes that the jury abused its discretion and erred in only awarding $7,500.00 to plaintiff for general damages. However, the majority then finds that the award for pain, suffering, mental anguish, and loss of enjoyment of life should be increased, but only to $25,000.00, an award I find to be abusively low, given the record herein.

The medical and lay testimony in this case establish that plaintiff suffered severe and permanent injuries. Dr. James Gosey, an orthopaedic surgeon, testified that the injuries sustained by plaintiff will require that he undergo future knee surgery and ankle surgery. Dr. Gosey further testified that plaintiff sustained a 20% partial permanent anatomical impairment to his knee and a 20% partial permanent impairment of his foot/ankle.

Plaintiff's physical therapist, James Pullman, testified that based on the results of the functional capacity evaluation performed on plaintiff, plaintiff

would not be able to return to the same type of work he performed prior to this accident. Moreover, Pullman testified that the typical prognosis of a thirty-year-old male such as plaintiff, with these injuries, is such that the injuries do not get better and "probably accelerates the degenerative changes that the patient would have ... so he -- we would expect him to break down faster physically." Pullman further opined that if plaintiff "followed all normal aging processes with injury, absolutely, he'd get worse."

Dr. Frank Schiavi, an orthopaedic surgeon, reviewed plaintiff's functional capacity evaluation and also opined that plaintiff would not be able to return to the type of work that he performed prior to the accident.

Dr. Paul Van Deventer, the doctor chosen by the defense to conduct an independent medical evaluation of plaintiff's condition, determined that plaintiff's symptomalogy was absolutely consistent with his complaints and his internal derangement of the right ankle. Dr. Van Deventer further testified that plaintiff's persistent dysesthesia at the ankle and the foot was **permanent** in nature. Notably, Dr. Van Deventer candidly admitted that plaintiff sustained "significant injury to his right foot and ankle with noted ongoing pathology."

Further, the testimony set forth by the physicians who saw plaintiff reflects that all of the experts agreed that plaintiff was not a malingerer, and that they had no reason whatsoever to disbelieve plaintiff.

Plaintiff, who was forced to continue to use crutches and a cane after the accident, was unable to work for **four years** after this accident due to his injuries and acute physical disability. The record is replete with testimony that as a result of this accident, plaintiff's quality of life, particularly his involvement with his three children, changed significantly. The record overwhelmingly demonstrates that plaintiff is no longer able to enjoy activities with his children that he was able

to perform before the accident, and that this accident and his resulting financial losses contributed to the break-up of his marriage and eventually caused him to lose their family home. When plaintiff was unable to make the payments on his family home, he and his children were forced to move into a trailer owned by his parents and depend upon his parents for assistance.

Plaintiff, who was previously a fit and athletic person, gained seventy pounds as a result of the continuing physical limitations imposed by his injuries as he is no longer able to run or play basketball as he did before. As of the date of trial, his right foot remains swollen, is a constant source of pain for him, and causes him to walk with a permanent limp. As a result of plaintiff's permanent condition and the limitations he is forced to live with every day, plaintiff understandably suffers from depression.

Thus, although I agree with the majority's holding that the jury erred as noted above, in my view, considering the record herein, the debilitating injuries sustained by plaintiff, and the documented effect of these permanent injuries on his life, his involvement with his children and his ability to work, the amended amounts rendered by the majority is inadequate.

Thus, because I find the majority's awards are not commensurate with the injuries sustained and proven by plaintiff herein, I respectfully dissent, in part.

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TIMOTHY J. RICHARDS AND LIBERTY MUTUAL INSURANCE COMPANY

HUGHES, J.,dissenting.

I respectfully dissent. I believe that $25,000 for disability and $50,000 for general damages are the lowest reasonable amounts that could be awarded.