NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1327

HARRY JOSEPH HAYNES

VERSUS

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, SAFEWAY INSURANCE COMPANY OF LOUISIANA, and JOHN CHRISTOPHER

On Rehearing:

AUG 15 2012

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On Appeal from the 18th Judicial District Court
In and For the Parish of Pointe Coupee
Trial Court No. 42,676 "D"

Honorable William C. Dupont, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J., on rehearing.

We granted rehearing in this case solely for the purpose of considering Safeway's third assignment of error, an issue which we did not address in the original appeal. Safeway appeals the trial court's $12,500 general damages award to Mr. Haynes, arguing that the award is so excessive that it constitutes an abuse of discretion.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money. **Boudreaux v. Farmer**, 604 So.2d 641, 654 (La. App. 1 Cir. 1992), writs denied, 605 So.2d 1373 and 1374 (La. 1992). The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. **Jenkins v. State ex rel. Dep't of Transp. and Dev.**, 06-1804 (La. App. 1 Cir. 8/19/08), 993 So.2d 749, 767, writ denied, 08-2471 (La. 12/19/08), 996 So.2d 1133.

On appellate review, damage awards will not be disturbed unless there has been a clear abuse of the factfinder's discretion. The discretion vested in the factfinder 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 factfinder 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. **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). And only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then solely

for the purpose of determining the highest or lowest point of an award within that discretion. **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1976).

As stated in our original opinion:

> Due to immediate complaints of pain, [Mr. Haynes] was transported by ambulance from the scene of the accident to Pointe Coupee General Hospital for evaluation and treatment. Thereafter, he was diagnosed with cervical and lumbar sprains with muscle spasms and was treated at New Roads Chiropractic, Pointe Coupee Physical Therapy, and Louisiana Orthopaedic and Spine Institute (Dr. Johnston's office.) And while Safeway contends that his symptoms had completely resolved in December, within two and a half months from the date of the accident, he did not complete his prescribed physical therapy until January of 2009 and was not released from the care of Dr. Johnston until February of 2009. The medical records further reflect that until his February discharge, he remained both on light duty work restrictions and on medication for muscle spasms due to the injuries he sustained in the accident.

At the trial, Mr. Haynes testified that he suffered neck and back pain as a result of this accident. He stated that due to the pain, he had difficulty walking and was placed on a light-duty work restriction. He underwent treatment including prescription medications and two extensive rounds of physical therapy.

Moreover, even accepting Safeway's argument that Mr. Haynes suffered an injury of only three and a half months in duration, Safeway admitted that the lowest reasonable value of that claim would have exceeded the underlying policy limits of $10,000:[1]

> Q. Okay. You just testified that, and I wrote it down this time so we're clear, you told your attorney "we need to tender nine hundred dollars, this is a tender situation," correct?

[1] It was established at the trial and is uncontested that the policy of insurance issued to the at-fault driver in the accident had liability limits of $10,000. Prior to the time of the trial, that insurer had exhausted its policy limits and Safeway was therefore entitled to a credit of $10,000 towards any damages sustained by Mr. Haynes.

A. Based on my three and a half month evaluation, yes.

* * * *

Q. When in your mind, okay, you assumed it was a three and a half month injury, okay, at that point you felt you needed to make a tender of at least $900.00?

A. Right.

Considering that we have already determined that the record supports the trial court's conclusion that Mr. Haynes suffered a four and a half month injury, and that Safeway admits that an award of $10,900 would be the lowest reasonable award for Mr. Haynes's injuries even under a shorter duration analysis, we cannot conclude that the trial court's award of an additional $1,600 to Mr. Haynes would be so excessive as to amount to an abuse of discretion.

While it is not necessary for this court to resort to a consideration of prior awards, such a review only provides additional support for the trial court's award in this case. See **Clayton v. Republic Vanguard Insurance Company**, 05-1615 (La. App. 3 Cir. 5/3/06), 929 So.2d 811 ($15,000 for soft-tissue injury resolved in one and a half months); **Collier v. Benedetto**, 04-1025 (La. App. 5 Cir. 2/15/05), 897 So.2d 775 ($28,000 in general damages for seven month cervical and lumbar strains, facial contusions); **Adler v. American National Property & Casualty Company**, 99-3182 (La. App. 4 Cir. 9/20/00), 769 So.2d 698 ($20,000 for soft tissue injuries treated for a period of six months.)

CONCLUSION

For the reasons assigned herein, and in the original opinion of this court, the judgment of the Eighteenth Judicial District Court is affirmed in

all respects. All costs of this appeal are assessed to defendant/appellant, Safeway Insurance Company of Louisiana.

AFFIRMED.