NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2014 CA 1207

KENT J. KINCHEN AND BARRY J. KINCHEN

VERSUS

TROY AND NANCY MILLER AND THE TANGIPAHOA PARISH SCHOOL BOARD

Judgment rendered: JUN 05 2015

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On appeal from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Suit Number 2007-0001379

Honorable Jeffery T. Oglesbee, Judge

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BEFORE: GUIDRY, PETTIGREW, AND THERIOT, JJ.

GUIDRY, J.

In this cross appeal of a tort judgment rendered in favor of a former high school student who sustained an eye injury while on a school-sponsored band trip, the school board appeals the finding of liability and allocation of fault, and the tort victim and his father appeal the amount of damages awarded by the trial court.

FACTS AND PROCEDURAL HISTORY

In May 2006, Kent Kinchen, while a junior at Ponchatoula High School, participated in a school-sponsored band trip to the Smokey Mountain Music Festival in Gatlinburg, Tennessee. During the school-sponsored trip, some band members went to local souvenir shops and purchased Airsoft novelty guns. Sometime during the late evening of May 4 and early morning of May 5, 2006, while at their motel, several band members engaged in a game wherein they would shoot plastic pellets from the guns at each other. Unfortunately, during the game, Kent was shot in his left eye.

On May 3, 2007, Kent and his father, Barry Kinchen, filed a petition for damages against the Tangipahoa Parish School Board regarding the incident. They also filed suit against Troy and Nancy Miller, as the parents and legal guardians of Mason Miller, the band student who was alleged to have negligently shot Kent in the eye. The Kinchens later amended their petition to additionally name Allstate Insurance Company, as the Millers' homeowner's insurer, and Louisiana Self Insured Group (incorrectly named Louisiana Schools Self-Insured Group in the amended petition), as the liability insurer for the school board. The matter eventually proceeded to a bench trial solely against the school board.[1] After taking the matter under advisement, the trial court found that "allowing the students the

[1] Although the record does not contain any judgment or order dismissing the Kinchens' claims against the Millers and Allstate, in the Kinchens' post-trial memorandum, they assert that "the Millers' insurer asserted a coverage defense for the alleged intentional act and settled with the plaintiffs, leaving only the plaintiffs' claims against the school board for trial."

opportunity to purchase various weapons while on the school sponsored trip created an atmosphere that did not provide all of the students with reasonable supervision which, in part, led to the accident which caused Kent J. Kinchen to suffer the injury to his left eye." Accordingly, the trial court found the school board liable for the injury suffered by Kent and awarded Kent $20,000.00 in general damages and $14,329.34 in special damages. The trial court also awarded Mr. Kinchen $1,000.00 for his loss of consortium claim. The school board and the Kinchens have appealed the February 28, 2014 judgment incorporating those rulings.

ASSIGNMENTS OF ERROR

In its appeal of the February 28, 2014 judgment, the school board asserts the following as errors committed by the trial court:

1. The trial court committed reversible error in finding any fault on the part of appellant Tangipahoa Parish School Board for the accident and damages in question.
2. Alternatively, the trial court committed reversible error in rendering judgment solely against the Tangipahoa Parish School Board when, in his judgment, the trial judge specifically held that appellant Tangipahoa Parish School Board was liable only "in part" for appellees' damages.
3. The trial court committed reversible error in failing to reduce any judgment against appellant Tangipahoa Parish School Board proportionate to: a.) the percentage of comparative fault of Kent Kinchen which also "in part" caused appellees' damages; and/or b.) the percentage of comparative fault of the young man who "shot" Kent Kinchen which also "in part" caused appellees' damages.

In their cross appeal of the judgment, the Kinchens contest the quantum of the damages awarded as abusively low and assert that the trial court failed to address several categories of damages.

DISCUSSION

Schools and school boards, through their employees or teachers, owe a duty of reasonable supervision over students. La. C.C. art. 2320; Doe v. East Baton

Rouge Parish School Board, 06-1966, p. 6 (La. App. 1st Cir. 12/21/07), 978 So. 2d 426, 433, writ denied, 08-0189 (La. 3/28/08), 978 So. 2d 306. The supervision required is reasonable, competent supervision appropriate to the age of the children and the attendant circumstances. This duty does not make the school board the insurer of the safety of the children. Moreover, constant supervision of all students is not possible nor required for educators to discharge their duty to provide adequate supervision. Wallmuth v. Rapides Parish School Board, 01-1779, p. 8 (La. 4/3/02), 813 So. 2d 341, 346.

To establish a claim against a school board for failure to adequately supervise the safety of its students, a plaintiff must prove: (1) negligence on the part of the school board, its agents, or teachers in providing supervision; (2) a causal connection between the lack of supervision and the accident; and (3) that the risk of unreasonable injury was foreseeable, constructively or actually known, and preventable if a requisite degree of supervision had been exercised. Pugh v. St. Tammany Parish School Board, 07-1856, pp. 2-3 (La. App. 1st Cir. 8/21/08), 994 So. 2d 95, 98, writ denied, 08-2316 (La. 11/21/08), 996 So. 2d 1113.

In support of its first assignment of error, the school board argues that the trial court manifestly erred in finding that it breached its duty to provide reasonable, competent supervision appropriate to the age of the children and attendant circumstances. Citing the principle that injuries resulting from play or horseplay between discerning students, which at some stage may pose an unreasonable risk of harm to the participants, does not automatically render a school board liable,[2] the school board asserts that it acted reasonably under the circumstances based on the specific rules in place, the presence of chaperones to see the rules were enforced, and the fact that there was no history of students

[2] See Henix v. George, 465 So. 2d 906, 910 (La. App. 2d Cir. 1985).

engaging in Airsoft novelty gun "battles." While we agree that our review of whether the school board breached its duty of reasonable supervision is subject to the manifest error standard, see S.J. v. Lafayette Parish School Board, 09-2195, p. 14 (La. 7/6/10), 41 So. 3d 1119, 1128, we disagree with the school board's assertion that the trial court manifestly erred in finding that the school board breached the duty owed.

Theodore Forrest, the band director for Ponchatoula High School at the time of the incident, testified that he was aware of the tendency of students to purchase weapons based on the school band's prior participation in the Smokey Mountain Music Festival.[3] Recognizing the danger posed by the students' possession of weapons, Mr. Forrest established the rule that any student who purchased a weapon had to deliver the weapon to him or a chaperone. Although the prior band trips involved the purchase of knives and swords, and no one was hurt as a result of those items purchased, Mr. Forrest's surrender rule was not limited to knives and weapons, but broadly encompassed all "weapons." Moreover, the record undisputedly shows that all of the participants in the band trip – school personnel,[4] chaperones, and student band members -- considered and recognized the Airsoft novelty guns to be weapons.

Considering that the established rule was to knowingly allow students to purchase weapons, we cannot say the trial court was manifestly erroneous in finding that the school board breached the duty of reasonable supervision under the circumstances. Allowing students to purchase weapons manifested knowledge that

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[3] According to the testimony presented at trial, the Smokey Mountain Music Festival is a high school band competition held in Gatlinburg, Tennessee every two years. Mr. Forrest served as band director from 1990 until his retirement in 2011.

[4] According to the record, the only school personnel present for the trip were Mr. Forrest, the band director, and Daniel Strickland, who was assistant principal of Ponchatoula High School in 2006. Also present was Mr. Forrest's wife, who taught fifth or sixth grade. Approximately fifty-five chaperones were present for the band trip.

students might desire such items, and in desiring such items, it is more than reasonably foreseeable that such students would choose to keep and use such weapons as opposed to turn them in as instructed. Commensurate with allowing students to purchase weapons was the need to insure compliance with the rule that the weapons be turned over to school personnel or a chaperone, such as requiring students to be chaperoned while on shopping excursions or actively questioning and inspecting students in regard to purchases. There was some testimony that a few Airsoft novelty guns were turned in prior to the incident in which Kent was injured and that a night-time room check was performed prior to Kent's injury, but there was also testimony to the contrary. Moreover, the witnesses who testified that prior to Kent's injury, weapons were turned in and room checks were conducted admitted that they did not personally observe or participate in the turning in of any weapons and did not perform or remember who performed room checks.

Under the manifest error standard of review, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous. S.J., 09-2195 at p. 13, 41 So. 3d at 1127. Hence, considering the record before us under the applicable standard of review, we cannot say that the trial court was clearly wrong in concluding that the school board breached its duty of reasonable supervision.

Having therefore found no error in the trial court's determination of liability against the school board, we will now consider the school board's alternative assignments of error regarding the allocation of fault. We find merit in these assignments of error.

Louisiana Civil Code article 2323 provides:

> A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or

> contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.
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> B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.
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> C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

Like all factual findings, the standard of review of comparative fault allocations is that of manifest error. Leonard v. Ryan's Family Steak Houses, Inc., 05-0775, p. 13 (La. App. 1st Cir. 6/21/06), 939 So. 2d 401, 410.

In its reasons for judgment, the trial court expressly stated that it found the school board liable "in part" for the injury suffered by Kent; however, in its judgment, the trial court decreed that the school board pay all of the damages assessed. We have previously concluded that the trial court did not err in finding the school board liable; thus, the school board must be assessed with some fault. Yet, based on the governing law and facts in this matter, it is equally evident that fault should have also been allocated to the students involved in the game of shooting, including Kent.

According to Watson v. State Farm Fire and Casualty Insurance Company, 469 So. 2d 967, 974 (La. 1985), both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed should be considered. In the assessment of the nature of the conduct of the parties, 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.

Thus, considering the aforementioned factors, it is clear that while the school board bore some fault for Kent's injury, it was error to assess it with sole fault for the accident. The school board allowed the weapons to be purchased and failed to enforce its rule to turn in the weapons, while the actions of the students were deliberate, willful, and done in complete violation of the established rules and with full knowledge of the danger presented by their horseplay.

The students involved were all high school age students. They acknowledged knowing the rule that if a weapon was purchased, it must be turned in to Mr. Forrest or a chaperone. And while there was testimony that Airsoft novelty guns were openly purchased and carried in shopping bags back to the motel, students also admitted that upon purchasing the guns, they immediately returned to the motel to put the guns away to avoid detection. None of the students involved reported any of the students whom they knew had not turned in Airsoft novelty guns they had purchased nor did they alert school personnel or chaperones about the game of shooting that took place prior to Kent being injured. And although the game of shooting in which Kent was injured may have been spontaneous in the sense that it was not specifically planned or organized, it nevertheless lasted for a sufficient duration that school personnel or chaperones could have and should have been alerted to the activity.[5]

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[5] Although the students involved stated that the lights were turned out and that they tried to remain quiet to avoid detection while playing, it was also stated that a strobe light was used during the game.

Under such circumstances, we find the school board should have only been allocated with sixty percent fault, with the remaining forty percent being allocated ten percent to Kent and thirty percent to the student who shot him in the eye.[6] We will amend the judgment accordingly.

Therefore, having fully addressed the arguments raised by the school board, we will now address the Kinchens' arguments regarding the amount of damages awarded. The Kinchens assert that not only is the amount of general damages awarded Kent abusively low, they further contend that the award fails to cover any claim for future medical costs or loss of vocational opportunities. Additionally, the Kinchens argue that the award for Mr. Kinchen's loss of consortium claim was likewise abusively low. We will first address Mr. Kinchen's loss of consortium claim.

The compensable elements of a parent's claim for loss of consortium of a child include loss of love and affection, loss of companionship, loss of material services, loss of support, loss of aid and assistance, and loss of felicity. Rhodes v. State Through Department of Transportation and Development, 94-1758, p. 17 (La. App. 1st Cir. 12/20/96), 684 So. 2d 1134, 1146, writ not considered, 97-0242 (La. 2/7/97), 688 So. 2d 487. A child may sustain physical injury without necessarily causing his parents a loss of consortium. Bell v. USAA Casualty Insurance Company, 30,172, p. 13 (La. App. 2d Cir. 1/21/98), 707 So. 2d 102, 110, writs denied, 98-0712, 98-0766 (La. 5/8/98), 718 So. 2d 433,434. Mental anguish suffered by the parents because of an injury to their child is not compensable in a loss of consortium claim. Jones v. Centerpoint Energy Entex, 11-0002, p. 20 (La.

[6] Although Mason Miller was identified as the person who fired the shot that injured Kent, the students present at the time of the injury all admitted that they did not actually see Mason shoot Kent. Based on the timing, the arrangement of the people in the room, and the direction in which Mason shot, it was construed that Mason shot Kent. Mason denied having shot Kent in the eye, but he did not identify who was responsible. (R. 131, 270, 273, 283)

App. 3d Cir. 5/25/11), 66 So. 3d 539, 554, writ denied, 11-1964 (La. 11/14/11), 75 So. 3d 946. A loss of consortium award is a fact-specific determination to be decided on a case-by-case basis and is disturbed only if there is a clear abuse of discretion. Lemoine v. Mike Munna, L.L.C., 13-2187, p. 11 (La. App. 1st Cir. 6/6/14), 148 So. 3d 205, 214.

The evidence presented regarding Mr. Kinchen's loss of consortium claim is the following testimony that he gave at trial:

> It's been a difficult experience for me as a parent. There's been a lot of uncertainty as to knowing, you know, what career path that my son might take because of the – the accident, the loss of vision. Also, the fact that he's suffered a great – he's been down and out quite a bit, actually for years. I call it depression myself. And I've also been depressed to a certain degree because my one and only child, who would have otherwise had a bright future ahead of him, that he – he had an obstacle before him there that would prevent him from doing some of the things that he had talked about doing later in life. (R. 656)

Based on this evidence, we cannot say the trial court abused its discretion by awarding Mr. Kinchen $1,000.00 for his loss of consortium claim. That leaves us to review the sufficiency of the damages awarded Kent.

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. The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. Granger v. United Home Health Care, 13-0910, pp. 24-25 (La. App. 1st Cir. 6/19/14), 145 So. 3d 1071, 1089, writ denied, 14-1665 (La. 10/31/14), 152 So. 3d 158. Much discretion is left to the trier of fact in the assessment of general damages. La. C.C. art. 2324.1. Special damages are those that have a "ready market value," such that the amount of the damages theoretically may be determined with relative certainty, including medical expenses and lost wages. The standard of review for special damages is manifest

error or clearly wrong. Kaiser v. Hardin, 06-2092, pp. 11-12 (La. 4/11/07), 953 So.2d 802, 810. Thus, we will examine each award or refusal to make a general damage award for an abuse of discretion and each award or refusal to make a special damage award for manifest error.

At trial, Kent testified that during the initial time period right after his injury, his eye "ached terribly." He said that during the first several months following his injury, his treating ophthalmologist instructed him to stay in a dark room and not partake in any strenuous activity to guard against the risk of re-bleeding. At the time of trial, Kent said he could not see out of the upper left-hand corner of his left eye and that his eyes did not sync like they used to, even though he does "see good straight on." As for the impact the injury has had on his life, Kent said he suffered from depression because his career goals of being a professional baseball player or helicopter pilot were over.

Prior to the accident, Kent was diagnosed with near-sighted vision and wore contact lenses to correct his vision. Immediately following his injury, Kent was seen by doctors in Tennessee, and on returning to Louisiana, he was referred to board-certified ophthalmologist, Dr. Marilu O'Byrne. Dr. O'Byrne[7] first examined Kent on May 8, 2006, three days after he sustained the injury to his left eye. During that visit, she stated that Kent complained of a lot of pain in his left eye. She diagnosed Kent with 30 percent hyphema (blood in the anterior chamber of the eye), corneal edema (swelling of the cornea), traumatic iritis (inflammation of the iris), and vitreous hemorrhage (blood in the posterior cavity of the eye). Approximately four months post-injury, most of the problems that Dr. O'Byrne had diagnosed had substantially or were completely resolved; however, at that time, it was first discovered that Kent had some vision loss. A visual field test

[7] Dr. O'Byrne did not testify at trial. Instead her medical records and two depositions were introduced into evidence in lieu of her live testimony.

conducted on August 14, 2006, confirmed that Kent had a loss of superior peripheral vision, which is vision at the midline eye level and above.

In July 2006, as Dr. O'Byrne began to taper Kent off of steroid eye drops because of the improvement in his traumatic iritis, she also took Kent completely off of pressure medicine.[8] She testified that Kent's eye pressure had remained okay since that time. In regards to future concerns of Kent developing glaucoma, however, Dr. O'Byrne observed that a couple of small tears in Kent's iris root resulted in a possible ten to twenty percent angle recession, with the angle being the area through which fluid drains out of the eye. She opined that the angle recession did not presently cause Kent any problems, but it did increase his risk of developing glaucoma. She also mentioned that angle recession "doesn't do it on everybody," meaning that it does not cause everybody to develop glaucoma. She explained that "[u]sually most of these [patients with angle recession] that will develop glaucoma may have a more extensive injury like maybe more 50 percent or more." She stated that angle recession cannot be fixed once it has occurred, but it should be monitored to make sure that the patient does not develop a high pressure in the eye because of it. As Dr. O'Byrne acceded, the ten to twenty percent angle recession she observed meant that Kent had a possibility rather than a probability of developing glaucoma.

In regard to his future medical treatment and activities, Dr. O'Byrne stated that Kent was off all medications, and she did not anticipate him having to resume any medication. She testified that she advised Kent to have yearly check ups as a follow up and to make sure that his pressure stays normal in the future, but she also noted that he should have follow up since he wears glasses. She also testified that

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[8] Dr. O'Byrne testified that the steroid eye medication is known to cause elevated eye pressure (glaucoma), and Kent did experience elevation of his eye pressure while taking the medication, so Dr. O'Byrne also prescribed pressure medication for Kent to take to counter the glaucoma caused by the steroid medication.

she would recommend that a normal patient, without Kent's problems, seek follow up treatment "[u]sually anywhere from a year or two." Hence, Dr. O'Byrne indicated that Kent would need follow up examinations, despite the injury, because he already wore glasses to correct his vision. Moreover, she also testified that she would make such a recommendation for follow up examinations for persons without Kent's vision problems. Thus, based on this evidence, we find no error in the trial court failing to award Kent additional damages for future medical treatment.

As for damages for loss of vocational opportunities, it has been held that earning capacity in itself is not necessarily determined by actual loss; damages may be assessed for the deprivation of what the injured plaintiff could have earned, despite the fact that he may never have seen fit to take advantage of that capacity. The theory is that the injury has deprived the plaintiff of a capacity he would have been entitled to enjoy even though he never profited from it monetarily. Hobgood v. Aucoin, 574 So. 2d 344, 346 (La. 1990). The loss of vocational opportunities was expressly recognized by the Louisiana Supreme Court in Theriot v. Allstate Insurance Company, 625 So. 2d 1337 (La. 1993). In that case, while the court based the award on the testimony of the minor plaintiff's treating doctors, the doctors in that case testified unequivocally regarding an *extensive* array of occupations that the minor plaintiff would be precluded from performing because of double vision, occupations from the highly skilled to basic manual labor activities. See Theriot, 625 So. 2d at 1343-44.

In this case, however, the evidence is not as compelling. Dr. O'Byrne acknowledged that in the beginning, she restricted Kent from playing baseball to avoid the risk of rebleeding caused by excessive exercise, but she allowed Kent to resume playing baseball six months following his injury. She observed, however,

that the loss of his superior peripheral vision would make it difficult for him to play. She also acknowledged that she knew nothing of Kent's pre-injury athletic skills. As she stated, "[e]vidently, he wanted to be a professional baseball player. I guess he was good. I don't know. I know he told me he can't play anymore." She stated that Kent would not be able to be a professional baseball player or pilot, as those were the things he had said he wanted to be. She also generally opined "it will impair him in certain jobs or activities or things that he may want to do," but acknowledged that a vocational expert would be needed to address how his vision loss might affect other vocations Kent would be interested in pursuing. Dr. O'Byrne assessed Kent with a 12.5 percent total person impairment rating in accordance with the *PDR for Ophthalmology*.

Unlike the doctors in Theriot, who testified unrestrictedly and impartially regarding the occupational limitations faced by the extremely young plaintiff in that case (the plaintiff was eleven years old at the time of injury), Dr. O'Byrne's opinion regarding Kent's vocational abilities not only appears to be equivocal, in that she indicated that she would defer to a vocational expert, but also appears to be dictated in part by the opinions of Kent rather than just an unbiased assessment of his abilities. Thus, based on the evidence presented, we cannot say that the trial court abused its discretion in failing to award Kent damages for loss of vocational opportunities.

Finally, as for the amount of the general damages awarded, we likewise do not find any abuse of the trial court's discretion. It is evident that while Kent continued and will continue to have follow up examinations of his left eye, most of the active treatment of his injury occurred in the first four months following his injury, excepting a slight flare up of his traumatic iritis in January 2007, for which he was again given a limited prescription of steroid eye medication. All of the

physical pain Kent suffered from the injury likewise resolved within those first four months. Dr. O'Byrne testified that Kent's vision is correctable to 20/20 in both eyes wearing glasses or contacts, even though he does have a permanent fifty percent loss of his superior peripheral vision in his left eye. Although Kent testified that he experienced some depression as a result of the injury, no medical evidence was offered to support this statement. Moreover, the school board did offer some medical records to establish that any depression Kent may have suffered post-injury was unrelated to his injury. Thus, considering the totality of the evidence presented, we cannot say that the trial court's award of $20,000.00 in general damages, although somewhat low, constitutes an abuse of discretion.

CONCLUSION

Accordingly, consistent with the record before us and our determinations herein, we amend the judgment of the trial court to hold the Tangipahoa Parish School Board sixty percent liable for the eye injury suffered by Kent Kinchen. Accordingly, the school board is liable for $12,000 in general damages, $8,597.60 in special damages, and $600.00 for Barry Kinchen's loss of consortium claim. In all other respects, the judgment of the trial court is affirmed. We assess all costs of this appeal to Barry and Kent Kinchen.

AMENDED, AND AS AMENDED, AFFIRMED.