

JOSE CASTRO

NO. 13-CA-993

VERSUS

FIFTH CIRCUIT

SONIA ESTEVEZ AND ALLSTATE
PROPERTY AND CASUALTY INSURANCE
COMPANY

COURT OF APPEAL
STATE OF LOUISIANA

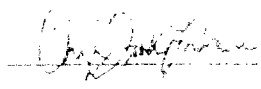
ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 672-320, DIVISION "K"
HONORABLE ELLEN SHIRER KOVACH, JUDGE PRESIDING

COURT OF APPEAL
FIFTH CIRCUIT

SEPTEMBER 24, 2014

FILED SEP 24 2014

SUSAN M. CHEHARDY
CHIEF JUDGE


CLERK
Clerk of Court, 1st District

Panel composed of Judges Susan M. Chehardy,
Fredericka Homberg Wicker, and Hans J. Liljeberg

**WICKER, J., CONCURS IN PART AND
DISSENTS IN PART, WITH REASONS**

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INSURANCE COMPANY

AFFIRMED AS AMENDED

SMC

On appeal, plaintiff challenges the quantum of damages awarded by the jury for his personal injuries sustained in a motor vehicle accident. For the following reasons, we amend and affirm as amended.

Facts & Procedural History

On December 21, 2008, Jose Castro, appellant-herein, was in a motor vehicle accident with Sonia Estevez, appellee-herein, in the parking lot of Esplanade Mall in Kenner, Louisiana. Mr. Castro contended that Mrs. Estevez backed into his vehicle while attempting to enter a parking space. Conversely, Mrs. Estevez claimed that Mr. Castro hit her vehicle from behind because he was not paying attention as he tried to negotiate the parking lot.

Both parties filed suit for personal injuries sustained as a result of the accident; the matters were consolidated. Subsequently, trial of liability and damages was bifurcated. Regarding liability for the accident, the jury found that Mr. Castro was 55% at fault and that Mrs. Estevez was 45% at fault.¹

¹ Neither party is appealing that finding nor the finding of damages with respect to Mrs. Estevez.

Subsequently, after trial of damages, the jury awarded Mr. Castro general damages of \$5,000.00; special damages of \$4,909.77; and lost wages of \$900.00. On September 26, 2013, the trial judge issued its written judgment, which awarded Mr. Castro a total of \$4,864.40 plus interest from the date of judicial demand.² Mr. Castro timely filed an appeal.

Discussion

On appeal, Mr. Castro seeks *additur*. Specifically, Mr. Castro contends that the jury's award of only \$5,000.00 in general damages was abusively low for a plaintiff with his injuries, namely, a neck sprain lasting five months, herniated discs, pain and suffering, and loss of enjoyment of life with his family. He also contends that the jury erred in failing to award future medical expenses for medial branch blocks, which his treating physician has recommended to reduce his pain. Finally, Mr. Castro contends that the trial judge erred in failing to grant his motion for JNOV where the jury's award was abusively low.

Our first inquiry is whether the jury abused its discretion by awarding Mr. Castro only \$5,000.00 in general damages. General damages are those damages that are inherently speculative in nature and cannot be fixed with mathematical certainty. *Duncan v. Kansas City So. Ry. Co.*, 00-66 (La. 10/30/00), 773 So.2d 670, 682; *Wainwright v. Fontenot*, 00-0492 (La. 10/17/00), 774 So.2d 70; *Boswell v. Roy O. Martin Lumber Co.*, 363 So.2d 506, 507 (La. 1978). The standard of review applicable to a general damages award is the abuse of discretion standard. *Coco v. Winston Indus., Inc.*, 341 So.2d 332, 335 (La.1976). The trier of fact is afforded much discretion in assessing the facts and rendering an award because it is in the best position to evaluate witness credibility and see the evidence firsthand. *Duncan, supra* ("Vast discretion is accorded the trier of fact in fixing general

² The total award is the jury's award of \$10,809.77 reduced by Mr. Castro's percentage of fault, 55%.

damage awards.”); *Anderson v. New Orleans Pub. Serv., Inc.*, 583 So.2d 829, 834 (La. 1991).

An appellate court may disturb a damages award only after an articulated analysis of the facts reveals an abuse of discretion. *Theriot v. Allstate Ins. Co.*, 625 So.2d 1337, 1340 (La. 1993); *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 a general damages award 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. *Duncan, supra* at 682-83; *Youn, supra* at 1260. To determine whether the fact finder has abused its discretion, the reviewing court looks first to the facts and circumstances of the particular case. *Theriot, supra*; *Youn, supra* at 1261.

Only if a review of the facts reveals an abuse of discretion, is it appropriate for the appellate court to resort to a review of prior similar awards. *Duncan, supra*; *Cone v. Nat’l Emergency Serv. Inc.*, 99-0934 (La. 10/29/99), 747 So.2d 1085, 1089; *Youn, supra*. In a review of the facts, the test is whether the present award is greatly disproportionate to the mass of past awards for truly similar injuries. *Theriot, supra*; *Reck v. Stevens*, 373 So.2d 498, 501 (La. 1979). Prior awards, however, are only a guide. *Theriot, supra*.

In this case, Dr. F. Allen Johnston, the treating orthopedic surgeon; Dr. Charles Aprill, a radiologist; and Dr. David Aiken, an orthopedic surgeon testifying for the defense, found objective evidence in an MRI of Mr. Castro’s lower back that Mr. Castro had a herniated lumbar disc, which was more than likely caused by the motor vehicle accident in question. Further, Dr. Aprill and Dr. Johnston agreed that Mr. Castro had a second herniated lumbar disc, which was

asymptomatic but aggravated by the accident. Dr. Aiken, who had never examined Mr. Castro, did not agree that Mr. Castro had a second herniation.

In addition, Dr. Johnston indicated that Mr. Castro had undergone cortisone injections to two joints in his lower back that alleviated Mr. Castro's pain for about one month. Dr. Johnston recommended that Mr. Castro have further treatment, including Novocain injections and radiofrequency neurotomy to block his pain. Dr. Aiken disagreed with treatment by Novocain injections or neurotomy. Mr. Castro testified that he is still in pain that he treats with over-the-counter pain relievers.

Moreover, Dr. Johnston, Mr. Castro's treating physician, found objective evidence of a sprain in Mr. Castro's neck that was more probably than not caused by the accident in question. Mr. Castro complained of pain and stiffness in his neck, which resolved within 5 months of the accident.

When this testimony is considered along with the unrefuted testimony that Mr. Castro had no complaints of pain in his back or neck before this accident, we find that the jury award of \$5,000.00 for general damages was abusively low.

After determining that an award for general damages is an abuse of the trial court's discretion, this Court can review prior awards to determine the highest or lowest point, which is reasonably within that discretion. *Herzog v. Fabacher*, 01-432 (La.App. 5 Cir. 10/17/01), 800 So.2d 997, 1000. Our review of the jurisprudence reveals that awards for a non-surgical herniated lumbar disc requiring treatment with injections are between \$40,000.00 and \$50,000.00. *See, Sanchez v. Dubuc*, 12-526 (La.App. 5 Cir. 2/21/13); 110 So.3d 1140, 1146 (no abuse of discretion in award of \$47,462.00 for non-surgical herniated lumbar disc); *Sutton v. Oncale*, 99-967 (La.App. 5 Cir. 3/29/00), 765 So.2d 1072, 1080 (general damage award raised to \$40,000.00 for one herniated lumbar disc). Accordingly,

based upon the testimony presented in this case, we find that lowest permissible award to Mr. Castro for his general damages caused by this accident is \$40,000.00.

Decree

For the foregoing reasons, the judgment of the trial court is amended to increase the jury's award for general damages to \$40,000.00, which will still be reduced by 55% to \$18,000.00. In all other respects, the judgment of the trial court is affirmed. Costs of this appeal are assessed against appellee, Allstate Insurance Company.

AFFIRMED AS AMENDED

JOSE CASTRO

NO. 13-CA-993

VERSUS

FIFTH CIRCUIT

SONIA ESTEVEZ AND ALLSTATE
PROPERTY AND CASUALTY
INSURANCE COMPANY

COURT OF APPEAL
STATE OF LOUISIANA

FNW

**WICKER, J., CONCURS IN PART AND DISSENTS IN PART,
WITH REASONS**

I agree with the majority that the jury's award of \$5,000 in general damages was abusively low. I respectfully dissent from the majority's decision with respect to the lowest reasonable award of general damages. As discussed in the majority opinion, the record reflects that Mr. Castro sustained a herniated lumbar disc as a result of the accident in question. In *Sanchez v. Dubuc*, this Court recently found that the lowest reasonable general damage award for a non-surgical herniated disc within a jury's discretion is \$50,000. *Sanchez v. Dubuc*, 12-526 (La.App. 5 Cir. 2/21/13); 110 So.3d 1140, 1146 (citing *Webb v. Horton*, 01-978 (La.App. 5 Cir. 2/13/02); 812 So.2d 91, 99; *Rehm v. Morgan*, 04-344 (La.App. 5 Cir. 10/26/04); 885 So.2d 687, 692-93). Therefore, Mr. Castro's general damages award should have been increased to \$50,000.

In all other respects, I agree with the majority's opinion.

SUSAN M. CHEHARDY
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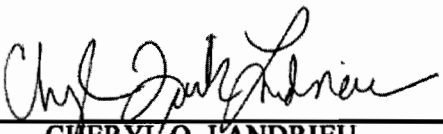
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**NOTICE OF JUDGMENT AND
CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **Uniform Rules - Court of Appeal, Rule 2-20** THIS DAY **SEPTEMBER 24, 2014** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:


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CLERK OF COURT

13-CA-993

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