UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

DONALD E. ROLFE	*	CIVIL ACTION
VERSUS	*	NO. 2:19-CV-720
ACE AMERICAN INSURANCE COMPANY, CRST LINCOLN SALES, INC., and JUSTIN BACHMAN	*	JUDGE JAMES D. CAIN, JR.
	*	MAGISTRATE KATHLEEN KAY

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL AND, ALTERNATIVELY, REMITTITUR

NOW INTO COURT, through undersigned counsel, come Defendants, ACE AMERICAN INSURANCE COMPANY, CRST EXPEDITED, INC., and JUSTIN BACHMAN, who file their Memorandum in Support of Motion for New Trial and, alternatively, Remittitur.

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INTRODUCTION

This matter was tried before a jury on June 12, 2023 through June 14, 2023. The jury returned a verdict for Plaintiff, Donald E. Rolfe, and against Defendants, ACE American Insurance Company, CRST Expedited, Inc., and Justin Bachman, finding CRST Expedited, Inc. 88% at fault and Justin Bachman 12% at fault and awarded Rolfe $50,000 in past medical expenses, $100,000 in future medical expenses, $336,000 in past and future pain and suffering, $336,000 in past and future mental anguish, $168,000 in past and future loss of enjoyment of life, ($840,000 total in general damages) and $270,000 in past lost wages and pension benefits for a total award of $1,260,000.

This case arises out of a motor vehicle accident occurring on May 17, 2018 at the intersection of 525 N. Cities Service Highway in Sulphur, Louisiana. Defendant, Justin Bachman, took a left turn on Cities Service Highway from a Walmart parking lot and struck the front driver's side of Plaintiff's, Donald Rolfe, vehicle.

Defendants asserted at trial that Rolfe's claimed lumbar injuries preexisted the accident and was caused by a multitude of accidents occurring in the years leading up to May 17, 2018. Rolfe fell into an empty pool in 2005 and suffered a left percutaneous hip pinning and femur fracture. He fell through a roof in July 2010. In 2017, Rolfe treated his lower back with Dr. Johansen and complained of pain in his lower back and the SI joint demonstrated tenderness. A September 29, 2017 MRI showed spondylolisthesis at L2-3, L3-4, and L4-5 in extension. A repeat of the MRI on October 6, 2017 showed L4-5 large paracentral disc protrusion. His treating physicians agreed that the 2017 MRI and post-accident MRIs were essentially the

same.[1]

Four months prior to the May 17, 2018 accident, Rolfe injured his back when yanking a 300-pound door caused him to fall over. He suffered compression fractures from the event. He reported to treating orthopedic, Dr. Eric Graham, for his lower back. He reported to Dr. Graham that he woke up about a month prior and was unable to walk without assistance and utilized a walker.[2]

Reasonable persons cannot disagree that Rolfe had a preexisting injury to his lower back for which he would have suffered in the future despite the May 17, 2018 accident. The presence of Rolfe's preexisting back condition was supported by his pre-accident medical records as well as from the testimony of his treating physicians. A defendant is not responsible for the normal and natural results of a plaintiff's condition and the jury failed to consider Rolfe's normal and natural results which would have resulted despite this accident.

After the subject accident, Rolfe saw Dr. Eric Graham on June 1, 2018 with complaints of a lumbar injury. Rolfe underwent an MRI on June 20, 2018 at Cedar Lake MRI which had no change in findings from the pre-accident MRI. Rolfe then underwent a course of physical therapy treatment in late summer 2018 and was released from physical therapy the following year. He underwent a lumbar epidural steroid injection on October 22, 2019.

Following the epidural steroid injection, Rolfe focused on the treatment of his left wrist injury and underwent left wrist surgery for which he does not contend was related to the subject accident. Rolfe ultimately underwent lumbar medial branch blocks on October 30, 2022 and December 1, 2020 followed by three sets of radiofrequency ablations (also known as rhizotomy) per side and bilateral radiofrequency ablations on May 23, 2023. His medical records

[1] Exhibit A: Dr. Graham trial deposition, Page 9, lines 24-25 and Page 10, lines 1-12; Exhibit B: Dr. Katz trial deposition, Page 14, lines 3-20.
[2] Exhibit F: Dr. Graham January 26, 2018 medical record (CRST_0001532-0001536).

document great relief from the radiofrequency ablations.

Rolfe presented a claim for past wage loss, yet much of his past wage loss is attributed to his left wrist injury which he agreed was not related to the subject accident. In addition to the excessive general damage award, the jury failed to consider Rolfe's absence from work due to his left wrist injury and Defendants pray this Court reduces his past wage loss to account for the time he was out of work due to the operation of his left wrist.

LAW AND ARGUMENT

1. Governing standard for a new trial and/or remittitur

Rule 59(a) provides that a district court may grant a new trial "on all or some of the issues . . . after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). Under Rule 59, a new trial may be granted if "the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir. 1985); *see also Wright v. National Interstate Insurance Co.*, 2018 U.S. Dist. LEXIS 72651, 2018 WL 2017567, at *3 (E.D.La. 2018).

Yet, in an action based on state law but tried in federal court by reason of diversity of citizenship, a district court must apply a new trial or remittitur standard according to the state's law controlling jury awards for excessiveness or inadequacy. See *Fair v. Allen*, 669 F.3d 601, 604 and *Foradori v. Harris*, 523 F.3d 477, 498 (5th Cir. 2008). Louisiana provides a new trial "[w]hen the verdict or judgment appears clearly contrary to the law and the evidence," La. Code Civ. P. art. 1972, and permits the court to grant a new trial "in any case if there is good ground therefor, except as otherwise provided by law," *Id.* art. 1973.

The Fifth Circuit has explained that "despite permitting a trial court to review the jury's

credibility determinations, Louisiana gives the jury high deference... and provides a new trial 'when the verdict or judgment appears clearly contrary to the law and the evidence.'" ... Louisiana courts still accord jury verdicts great deference. *Fair v. Allen*, 669 F.3d at 604. When granting a new trial, the court can evaluate the evidence, draw its own inferences and conclusions, and determine whether the jury "erred in giving too much credence to an unreliable witness." *Joseph v. Broussard Rice Mill, Inc.*, 772 So. 2d 94, 104 (La. 2000).

If the trial court is of the opinion that the verdict is so excessive or inadequate that a new trial should be granted for that reason only, it may indicate to the party or his attorney within what time he may enter a remittitur or additur. This remittitur or additur is to be entered only with the consent of the plaintiff or the defendant as the case may be, as an alternative to a new trial, and is to be entered only if the issue of quantum is clearly and fairly separable from other issues in the case. *Berry v. Auto-Owners Ins. Co.*, 634 Fed. Appx. 960, 963

2. Rolfe had preexisting significant back pain stemming from age-related arthritis and prior trauma that was ignored by the jury.

This Court instructed the jury that a defendant takes his victim as he finds them, and that the tortfeasor is responsible for the natural and probable consequences of his wrong. Yet, if Plaintiff would have faced this aggravation of his condition whether this incident happened or not, then Plaintiff is not entitled to damages or that portion of his claim, since the Defendant is not responsible for the normal and natural results of Plaintiff's prior condition. Louisiana Civil Law Treatise 18:10. Rolfe's pre-accident medical records set the stage for determining whether his post-accident medical treatment is related to the subject accident.

The Fifth Circuit found that Plaintiff's general damage award was excessive on a Motion for New Trial given that Plaintiff had a preexisting spinal condition in *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1142.

This Court heard testimony from four doctors, Rolfe's treating orthopedic surgeon, Dr. Eric Graham and Rolfe's treating pain management physician, Dr. Kelly Coleman, as well as orthopedic surgeons, Dr. Ralph Katz and Dr. James Butler.

Rolfe had a long history of back pain prior to the accident.[3] Dr. Graham testified that Rolfe complained of left sided back, buttock, and leg pain on September 29, 2017, prior to the accident.[4] Dr. Graham ordered an MRI showing L4-L5 disc herniation, stenosis, and an underlying arthritic condition of the facet joints.[5] The L5-S1 level also had bilateral foraminal stenosis tapping on the nerve roots as they exit the spine.[6] The September 29, 2017 findings were both a result of degenerative changes as well as trauma.[7] Dr. Graham had two objective medical reasons—lumbar disc herniation and arthritic conditions—that explained Rolfe's issues with nerve impingement in 2017.[8]

Then, Rolfe injured himself when a 300-pound door fell on him on January 6, 2018 further injuring his back causing a compression fracture at the L2 vertebrae.[9]

The pre-accident and post-accident MRI scans did not show worsening of Rolfe's condition, rather his post-accident MRI showed improvement in his lumbar herniation.[10] Dr. Coleman testified that the trauma from the prior accidents could have played a role in Rolfe's need for RFA procedures, but he could not say whether he would have needed the RFA procedures regardless of the accident.[11]

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[3] Exhibit A: Dr. Graham trial deposition, Page 33, lines 21-25 and Page 34, lines 1-3.
[4] Exhibit A: Dr. Graham trial deposition, Page 8, lines 7-23.
[5] Exhibit A: Dr. Graham trial deposition, Page 9, lines 24-25 and Page 10, lines 1-12; Exhibit B: Dr. Katz trial deposition, Page 14, lines 3-20.
[6] Exhibit A: Dr. Graham trial deposition, Page 10, lines 1-12
[7] Exhibit A: Dr. Graham trial deposition, Page 10, lines 17-22.
[8] Exhibit B: Dr. Katz trial deposition, Page 14, lines 3-20.
[9] Exhibit A: Dr. Graham trial deposition, Page 11, lines 2-9, Page 34, lines 18-25, and Page 35, lines 1-3.
[10] Exhibit A: Dr. Graham trial deposition, Page 36, lines 21-25 and Page 37, line 1; Exhibit C: Dr. Coleman trial deposition, Page 33, lines 19-25 and Page 34, lines 1-3.
[11] Exhibit C: Dr. Coleman trial deposition, Pages 35-36 and Page 37, lines 18-19.

The established fact from the treating physicians is that Rolfe had a combination of a prior disc herniation, compression fracture from a prior accident, and arthritic condition of the facet joints that predated the subject accident which may have caused the need for the RFA procedures received following the accident.[12] Undoubtedly, Rolfe would have suffered back pain stemming from the normal and natural results of his prior condition despite the subject accident because of his age, prior herniation, and prior compression fracture. The jury failed to consider Rolfe's preexisting back condition and the normal and natural results from that condition to appropriately reduce his recoverable general damage award. Notwithstanding Rolfe's pain due to the natural results of his prior condition, the general damage award is still excessive.

3. The jury erred in awarding Donald Rolfe $840,000 in general damages for the alleged aggravation of lumbar facet joints.

"General damages are those which may not be fixed with pecuniary exactitude; instead, they 'involve mental or physical pain or suffering, inconvenience, the loss of intellectual gratification or physical enjoyment, or other losses of life or life-style which cannot be definitely measured in monetary terms." *Duncan v. Kan. City S. Ry.*, 773 So. 2d 670, 682 (La. 2000). "The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration." *LeBlanc v. Stevenson*, 770 So. 2d 766, 772 (La. 2000).

Applying the "clearly excessive rule" for determining the excessiveness of an award, jury awards will not be disturbed unless they are "so large as to shock the judicial conscience, so gross or inordinately large as to be contrary to right reason, so exaggerated as to indicate bias, passion, prejudice, corruption, or other improper motive, or as clearly exceeding the amount that any reasonable man could feel the claimant is entitled to." *Caldera v. Eastern Airlines, Inc.*, 705 F.2d

[12] Exhibit A: Dr. Graham trial deposition, Page 9, lines 24-25 and Page 10, lines 1-12; Exhibit B: Dr. Katz trial deposition, Page 14, lines 3-20; Exhibit C: Dr. Coleman trial deposition, Pages 35-36 and Page 37, lines 18-19.

778, 784 (5th Cir. 1983) (cleaned up). Under this standard, courts can look to prior awards resulting from similar injuries to provide guidance in the excessiveness determination. See *Williams v. Chevron, USA, Inc.*, 875 F.2d 501, 506 (5th Cir. 1989).

Under the guidance of prior published cases, an award of $840,000 in general damages to Rolfe was an abuse of discretion by the jury.

In a factually similar case, *Berry v. Auto-Owners Ins. Co.*, 634 Fed. Appx. 960, 965, Plaintiff sustained a back injury and treated with rhizotomy procedures. His treating pain management physician testified that Plaintiff would need some form of pain management for the rest of his life, and that future medical treatment will include both the rhizotomies, pain medication, and possibly a pain stimulator. *Id.* at 962. Plaintiff testified that he is unable to pick up or play with his four-year-old son, help his aging parents with chores, or to play sports with friends. *Id.* at 964. Plaintiff's girlfriend testified that Plaintiff lost his confidence and was less happy and outgoing. *Id.* Yet, Plaintiff continued working but would have been unable to if not for the relief gained from rhizotomies. *Id.* The jury returned a verdict awarding Plaintiff $900,000 in general damages.

The district court stated that "is unaware of any judgment from a Louisiana court or a federal court in which an award comparable to $900,000 has been granted for injuries similar to those suffered by Berry." *Berry v. Roberson*, 2015 U.S. Dist. LEXIS 55578 at 14. Appropriately, the Middle District reduced the general damages (past, present, and future physical pain and suffering and loss of enjoyment of life) to $400,000 on a remittitur and the decision was confirmed by the Fifth Circuit on appeal. *Id.*

There are a multitude of general damage awards from Louisiana courts supportive of a general damage maximum award of $400,000 for plaintiffs who injured their lower back and

treated with numerous RFA procedures absent preexisting conditions evaluated in a light most favorable to plaintiffs. Considering Rolfe's preexisting condition and the natural consequences that would have flowed from the preexisting condition, the highest a jury could have reasonably awarded him is $300,000 in general damages.

In a very recent case, *Hall v. Bennett*, 54,995-CA (La.App. 2 Cir. 04/05/23), Plaintiff sustained an aggravation of prior lumbar complaints and treated with RFA procedures and recovered $100,000 in general damages.

In *Hoyt v. Gray Ins. Co*., 00-2517 (La. App. 4 Cir. 1/31/02), 809 So. 2d 1076, writ denied, 02-1222 (La. 6/21/02), 819 So. 2d 343, the Fourth Circuit affirmed a general damage award of $150,000 to a plaintiff diagnosed with C5 radiculopathy without evidence of disc herniation and a bulge at L-5, S-1 which was possibly preexisting. The Court noted that these injuries were disabling injuries, having long-term implications.

Lastly, this Court tried a bench trial in June 2022, *Okey v. United States of America*, 2:20-cv-00119 (USDC-WDLA 06/02/22). In that matter, Plaintiff, Stacey O'Key, sustained a wrist, cervical, shoulder, and lumbar injury. She was diagnosed with a disc herniation at C6-7 and additional positive findings at C3-4. She treated her neck pain with a cervical dorsal medial branch block and radiofrequency thermocoagulation and cervical epidural steroid injection. She testified that she was no longer able to take an active role with her son's sports, carry her grandchild, exercise, or to style hair from her home. She was recommended surgery by Dr. Brennan. Plaintiff was awarded $200,000 in general damages, $89,830.25 in past medical costs, and $985,985 in future medical costs.

The co-Plaintiff in *Okey v. United States of America*, Don Lewis, sustained a shoulder, lumbar, and cervical injury. Lewis treated with Dr. Paul Fenn who prescribed cervical and

lumbar MRIs showing disc bulging and neural canal narrowing at various levels in the cervical spine along with right paracentral herniation with mild cord impingement at C2-C3 and bulging at various levels with herniation at L4-L5 in the lumbar spine. Additionally, his shoulder MRI showed a SLAP tear. Plaintiff treated his lumbar back with a lumbar RFA which offered relief and recommended a subsequent RFA. Lewis testified that his injuries limited his ability to play sports with his sons and restricted him to light duty at his pipefitter assistant job and at a subsequent job building scaffolding which admittedly was a strenuous position. Lewis's family members testified that they had observed him in pain, particularly from his back, since the accident and that he was less active and less able to participate in physical tasks. This Court awarded Plaintiff $125,000 in past and future pain, suffering, and loss of enjoyment of life, $415,294.00 in future medical expenses, and $68,194.99 in past medical expenses.

In this matter, the jury found that Rolfe suffered a facet related lumbar injury. However, Rolfe was capable of returning to his position as an electrician for Tri-City Electric on January 2, 2022. He was never recommended surgery by his treating physicians and the medical records introduced by Plaintiff reflect he received 85%-90% pain reduction in his lower back pain and was capable of working out in the yard and being more active after his RFA procedures a full two years prior to trial.[13]

The Fifth Circuit Federal Court of Appeals upheld a limit for a back injury in *Berry v. Auto-Owners Ins. Co.* and Rolfe's injury is not unlike Berry's in any meaningful way. 634 Fed. Appx. 960. Rather, Berry would suffer a lot longer than Rolfe as he was younger; he could no longer play sports nor pick up his young children. *Id.* at 963. Rolfe's activities were impaired but not significantly as he continued to work and moved to Orlando, Florida following this accident.

[13] Exhibit D: Bienville Orthopaedic Specialists, LLC March 5, 2021 medical record (P19-148-151); Exhibit E: Bienville Orthopedic Specialists, LLC August 10, 2021 medical record (P19-165-169).

The jury award in *Berry v. Auto-Owners Ins. Co.* is the highest Louisiana award for a facet related back injury treated with rhizotomy procedures to date and Defendants pray this Court follows the precedent set in *Berry v. Auto-Owners Ins. Co.* and reduce Rolfe's general damage award to $300,000 which is the highest award the jury could have awarded Rolfe in the light most favorable to him.

4. The jury erred in awarding Rolfe $270,000 in past lost wages and pension benefits.

Awards for past and future lost wages are considered special damages, i.e., those which can be established to a reasonable mathematical certainty. *Simon v. Auto. Club Inter-Insurance Exch.*, 20-156 (La. App. 5 Cir 10/13/21), 329 So. 3d 1072, 1074. A plaintiff is entitled to damages for lost wages upon proof that, but for the accident, she would have been earning wages. *Id.* See also *Boyette v. United Servs. Auto. Ass'n*, 2000-1918, p. 5 (La. 4/3/01), 783 So. 2d 1276, 1280.

Rolfe presents a lost wage claim. He claims to have earned $35 an hour and worked 10-hour days prior to this accident. Defendants took the video trial deposition of Rolfe's prior employer, Fisk Electric.

Fisk Electric named Ray Goodrich as the corporate representative. Goodrich testified that Rolfe was an on and off worker and was retained on a job-by-job basis. Rolfe had an ongoing obligation to report a disability that would prevent him from working.[14] After the subject accident, Rolfe continued to work for Fisk Electric on two different projects, Map Cameron LNG Liquid Project and Akel Sasol project.[15] Rolfe was fully able to perform his work without accommodations on both projects.[16] Rolfe separated from Fisk Electric on June 22, 2018 because the projects had completed, and Fisk Electric did not have a position for general

[14] Exhibit G: Fisk Electric trial deposition, Page 19.
[15] *Id.* at Page 24.
[16] *Id.* at Page 25.

foreman.[17]

The jury failed to recognize that Rolfe's discontinuance of his work functions was due to his left wrist condition that was not related to the subject accident. On October 13, 2018, Rolfe was recommended a left wrist surgery performed by Dr. Henry Leis.[18] Rolfe underwent a left wrist scapholunate ligament reconstruction post anterior interosseous neurectomy on February 21, 2020.[19] He continued to treat for his left wrist injury until December 2020.[20]

He was taken out of work to recover from the left wrist surgery and attended physical therapy up until 10 months after surgery. Rolfe underwent a functional capacity evaluation (FCE) performed on April 21, 2021 by Doug Roll. Roll reported that Rolfe could handle up to 45 pounds. He reported that Rolfe may frequently sit, stand, walk, bend, reach, squat, crouch, kneel, crawl, overhead work, stair climb, and ladder climb.[21]

Rolfe was discharged by Fisk Electric because the project was completed. He then treated for his wrist injury until it healed and then after his wrist healed, he underwent an FCE showing that he was capable of working before actually returning to work in January 2022. The jury erred in awarding Rolfe a past wage loss but manifestly erred by awarding him a past wage loss claim in the amount of $270,000. Defendants pray this Court lowers Rolfe's past wage loss to an amount attributable to his back injury only.

Rolfe was out of work from being discharged by Fisk Electric on June 25, 2018 until gaining employment on January 3, 2022—a total of 1,439 days—and the jury attributed an amount of $270,000 for his lost wages. Rolfe was out of work from October 13, 2018 through December 4, 2020 specifically for his left wrist condition and recovery from surgery—a total of

[17] *Id.* at Page 31.
[18] Exhibit H: Dr. Leis February 21, 2020 operative report (left wrist surgery) (P19-104-105).
[19] *Id.*
[20] Exhibit I: Dr. Johansen December 4, 2020 medical report (CRST_0001633-001634).
[21] Exhibit J: April 20, 2021 FCE report (CRST_001544-001547).

783 days. Thus, 54% of Rolfe's time out of work is related to the wrist injury. The most the jury could have attributed his time out of work, under a mathematical certainty basis, to Rolfe's lumbar back injury is 54% of $270,000 or $146,914. Defendants pray this Court reduces Rolfe's past lost wages to $146,913 representing loss time for Rolfe's lumbar back injury.

CONCLUSION

The sky is simply not the limit for a general damage award and there is not a Louisiana published case supporting a general damage award of $840,000 for a plaintiff sustaining a lumbar back injury requiring RFA procedures but no surgery. The highest Louisiana award for an injury occurring to the facet joints of the lumbar back and requiring RFA procedures is $400,000 under *Berry v. Auto-Owners Ins. Co.*, 634 Fed. Appx. 960. Considering Rolfe's preexisting condition, an award of $300,000 is appropriate.

Additionally, the jury's award of Rolfe's past lost wages is also heavily inflated and does not account for his unrelated wrist injury. The highest award in the light most favorable to Rolfe is closer to $150,000.

For the foregoing reasons, Defendants, ACE AMERICAN INSURANCE COMPANY, CRST EXPEDITED, INC., and JUSTIN BACHMAN, pray this Court grants their Motion for a New Trial and, Alternatively, Remittitur.

JEANSONNE & REMONDET

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system and has been served via electronic filing notification on this 19th day of July 2023.

/s/ Michael J. Remondet, Jr.
MICHAEL J. REMONDET, JR.