STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1433

JACOBEE LEE

VERSUS

LOUISIANA BOARD OF TRUSTEES FOR STATE COLLEGES, AND GRAMBLING STATE UNIVERSITY

Judgment Rendered: MAR 13 2019

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. C593312, Section 27

Honorable Todd Hernandez, Judge Presiding

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BEFORE: McCLENDON, WELCH, AND THERIOT, JJ.

Welch J. concurring in part and dissents in part with reasons assigned.

McCLENDON, J.

In this personal injury case, the defendants appeal the judgment of the trial court that awarded the plaintiff damages for the injuries he suffered following an unauthorized disciplinary run for certain members of the defendant university's basketball team. Defendants raise evidentiary issues and assert that the amount of damages awarded was excessive. The plaintiff also appealed, contending that the trial court erred in vacating the jury's award for future economic losses as being subject to the State's limitation on general damages.[1] For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The plaintiff, Jacobee Lee, graduated from high school in Shreveport in 2009 and accepted a full basketball scholarship to Grambling State University (GSU) beginning in the fall semester of 2009. He arrived on campus on August 12, 2009, past the mandated reporting time of August 9, 2009, for basketball players. Upon arrival, Jacobee attended a brief basketball team meeting where school registration, upcoming practices and general information were discussed. At the meeting, the team decided to have an unofficial weightlifting workout session on August 14, 2009.

Sometime in the early afternoon of August 14, 2009, Jacobee and the rest of the basketball team reported to the weightlifting session at GSU's gym. Coaching staff was present in the gym. The session lasted about forty-five minutes to an hour. After they finished, eight team members, including Jacobee, were told by assistant basketball coach Stephen Portland that, because they were late arriving on campus for the fall semester, they had to run approximately four miles around the university campus.[2] The run, which had also been held the previous year, was called the Tiger Mix. The players were given about one half hour to rest and hydrate between the workout session and the run and were told that they had to finish the run within forty minutes or do the run again on another day.

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[1] The plaintiff's assignment of error is addressed in the lower numbered appeal in **Lee v. Louisiana Board of Trustees for State Colleges**, 2017 CA 1431, also decided this date.

[2] Differing testimony in the record indicates that the length of the disciplinary run was somewhere between four miles and four and a half miles.

During the Tiger Mix, Coach Portland followed the runners in a golf cart. Water, Gatorade, or other fluids were not on the golf cart, although it was over ninety degrees, and outside football practice had been cancelled because of the heat. No athletic trainers or medical personnel were present, as they did not know about the run.

Teammate Rydell Harris was the first to finish the Tiger Mix. When Rydell got back to the gym, he immediately went to get some water to drink, and he heard someone say that another teammate, Henry White, was having trouble finishing the run. Rydell went to help Henry get inside the gym. Henry then passed out. Rydell stated that Henry was breathing heavily and was unresponsive. Another player went to look for the athletic trainer and a coach for help. At some point thereafter, Jacobee finished the run and entered the gym. He got some water, sat down against a wall, and passed out. He awoke briefly, saw Henry slumped over, and passed out again.

Meanwhile, the other players were trying to cool Henry down with water. Coach Stitt, who was then present, called the athletic trainer, Jessica Robinson, and told her that an athlete was not breathing and was unresponsive. Ms. Robinson was in the building and arrived soon after. She immediately began putting ice on Henry to cool him down and called for emergency medical services (EMS) for Henry. When EMS arrived, Henry was transported to the hospital by ambulance. Ms. Robinson then noticed that Jacobee was having difficulty breathing and that other teammates were putting ice on Jacobee. Ms. Robinson called for an ambulance for Jacobee and began helping him. She testified that he was not stable and that she covered him in ice.

Sometime thereafter, a second ambulance arrived, and an intravenous line was started on Jacobee. Eventually, Jacobee was transported by ambulance to the emergency room at Northern Louisiana Medical Center in Ruston. Laboratory tests were performed, which revealed elevated creatine phosphokinase (CPK) levels and volume depletion related to heat exposure, low potassium levels (hypokalemia), and resting sinus bradycardia.[3] Jacobee was admitted to the hospital and aggressively

[3] CPKs are muscle enzymes. The level of these muscle enzymes rise as the muscle is destroyed. When Jacobee was admitted to the hospital after the Tiger Mix, his CPK level was 651. A normal CPK level is between 35 and the low 200s.

hydrated. Jacobee was discharged on August 16, 2009, with diagnoses of heat exhaustion and mild rhabdomyolysis, which is the breaking down of skeletal muscle.[4] Rhabdomyolysis can be caused by extreme physical activity.

While in the hospital, Jacobee shared a room with his teammate, Henry White. Although there was a drape separating the two beds, Jacobee could hear the difficulty Henry was having breathing. Henry died on August 26, 2009, as a result of the severity of the heatstroke he suffered. See **Williams v. Board of Super's of University of Louisiana System**, 48,763 (La.App. 2 Cir. 2/26/14), 135 So.3d 804, writ denied, 14-0666 (La. 5/2/14), 138 So.3d 1249.

After his discharge from the hospital, Jacobee went back to Grambling, but did not rejoin the team or practice with them. Although he was released to regular activities by his cardiologist, Jacobee stated that he was not able to return to competitive basketball because his CPK level would rise upon physical exertion. Jacobee remained at Grambling for the fall semester, but he did poorly academically, failing four of his six classes.[5] Jacobee withdrew from school during the Christmas holidays and in January of 2010 enrolled at Southern University in Shreveport (SUSLA). Although he was physically cleared to play basketball for SUSLA and was on the team for the 2010-2011 basketball season, beginning in the summer of 2010, Jacobee only played in about three games due to academic and disciplinary issues.

One weekend in February of 2010, Jacobee played in an independent basketball tournament. A few days later, on February 8, 2010, Jacobee was admitted to the hospital with fever, a skin disorder, and a urinary tract infection. Testing revealed that Jacobee had a CPK level of 7955. A consultation with a rheumatologist was recommended. After a one-week stay in the hospital, Jacobee was discharged on February 15, 2010.

Jacobee saw Dr. Robert Goodman, the rheumatologist, while in the hospital, on February 12, 2010, to determine the cause of Jacobee's elevated CPK level. Dr.

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[4] The medical evidence shows that Jacobee suffered a heatstroke rather than heat exhaustion.

[5] Jacobee testified that during the fall semester in 2009, he was interviewed by ESPN regarding the Tiger Mix. He stated that after the interview he was treated by the basketball team like an outsider, was excluded, and was shunned by the team. He stated that, for example, he was no longer informed of the dates and times for study hall.

Goodman found that Jacobee appeared to be very acutely ill and was concerned with potential acute renal failure. Upon his review of Jacobee's medical records, Dr. Goodman was of the opinion that the elevation of Jacobee's CPK level was caused by the basketball game two days earlier. He also believed that Jacobee's persistent elevated CPK level was caused by the heatstroke he suffered on August 14, 2009. He stated that the injury was not minimal and believed that the heatstroke caused Jacobee to suffer permanent irreversible damage to his skeletal muscle and permanent exercise intolerance. According to Dr. Goodman, Jacobee experienced a second episode of rhabdomyolisis after playing basketball in February of 2010. It was his opinion that, because of the Tiger Mix, Jacobee would no longer be likely to play college or professional basketball and that Jacobee's future job opportunities were limited as well, stating that employment such as heavy manual labor or the military were no longer viable options.

Thereafter, on August 6, 2010, Jacobee filed a Petition for Damages against the Board of Supervisors for the University of Louisiana System and GSU (collectively Grambling) for the personal injuries and damages he suffered as a result of the negligent actions or inactions of Grambling.[6] On March 23, 2016, following a seven-day trial, the jury found Grambling at fault for Jacobee's injuries and awarded him $2,529,229.00 in damages, as follows:

Past and Future Physical Pain and Suffering		$ 200,000.00
Past and Future Mental Pain and Suffering		$1,000,000.00
Past Medical Expenses		$ 15,229.00
Future Medical Expenses		$ 24,000.00
Past Lost Wages		$ 90,000.00
Loss of Earning Capacity		$ 600,000.00
Loss of Enjoyment of Life		$ 600,000.00
	Total	$2,529,229.00

On April 1, 2016, Jacobee filed a proposed judgment. On April 4, 2016, he also filed a Motion for Judgment on Offer of Judgment and to Tax Costs. On April 4, 2016, Grambling submitted its own proposed judgment. The matters were heard by the trial court on June 14, 2016, and taken under advisement. Thereafter, on September 16,

[6] In Jacobee's petition, the Board of Supervisors for the University of Louisiana System was incorrectly identified as the Louisiana Board of Trustees for State Colleges.

2016, the trial court denied Jacobee's motion for judgment on the offer of judgment and ruled on the motion to tax costs.[7] The trial court also ruled that the judgment on the merits was subject to the State's $500,000.00 limitation on general damages.[8] The trial court found that past and future physical and mental pain and suffering, loss of earning capacity, and loss of enjoyment of life were all collectively subject to the $500,000.00 cap.

The trial court signed a judgment on February 13, 2017, denying Jacobee's motion for judgment on offer of judgment. On February 13, 2017, the trial court also signed a judgment awarding Jacobee past and future physical and mental pain and suffering, loss of earning capacity and loss of enjoyment of life in the amount of $500,000.00; awarding past medical expenses in the amount of $15,229.00; awarding past lost wages in the amount of $90,000.00; capping future medical expenses at $24,000.00, payable through the Future Medical Care Fund; and awarding expert cost and deposition cost in the amount of $29,998.50, in addition to costs of court and legal interest, for a total amount of $659,227.50. On February 13, 2017, The trial court also signed a final judgment in accordance with its rulings.

Thereafter, Grambling timely filed a suspensive appeal, and Jacobee filed a devolutive appeal. In its appeal, Grambling raised the following assignments of error:

1. The trial court erred in allowing fact witness, Thomas Stallworth, to qualify as an expert, who was neither neutral nor disinterested, and present hearsay evidence;

2. The trial court erred in allowing opinion testimony from lay witness Errol Pipkins;

3. The jury erred in the excess award for damages on past and future mental pain and suffering;

4. The jury erred in the excessive award for past lost wages;

5. The jury erred in the excessive award for loss of enjoyment of life;

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[7] The denial of the motion for judgment on the offer of judgment is the subject of the related case of **Lee v. Louisiana Board of Trustees for State Colleges**, 2017 CA 1432, also decided this date.

[8] The State's cap on general damages is the subject of the related case of **Lee v. Louisiana Board of Trustees for State Colleges**, 2017 CA 1431.

6. The trial court erred in allowing testimony from Harold Asher and Thomas Capeliano as to damages resulting from the speculative and remote possibility of Jacobee playing professional basketball in the National Basketball Association (NBA) and international leagues; and

7. The jury erred in the excessive award for loss of earning capacity.

In Jacobee's sole assignment of error, he asserts that the trial court erred in vacating the jury's future economic losses award as being subject to the State's cap on damages.[9]

DISCUSSION

EVIDENTIARY RULINGS

(Grambling's Assignments of Error Numbers 1, 2, and 6)

Grambling has raised certain issues as to the trial court's evidentiary rulings. Since a finding of an evidentiary error may affect the applicable standard of review, in that this court must conduct a *de novo* review if the trial court commits an evidentiary error that interdicts the fact-finding process, alleged evidentiary errors must be addressed first on appeal. **Devall v. Baton Rouge Fire Dept.**, 07-0156 (La.App. 1 Cir. 11/2/07), 979 So.2d 500, 502; **Wright v. Bennett**, 04-1944 (La.App. 1 Cir. 9/28/05), 924 So.2d 178, 182. However, a *de novo* review should not be undertaken for every evidentiary error. Unnecessary or added steps of review not only usurp the jury's function, but are a clear waste of judicial economy. Therefore, a *de novo* review should be limited to consequential errors; that is, the error prejudiced or tainted the verdict rendered. **Wingfield v. State ex rel. Dept. of Transp. and Development**, 01-2668 (La.App. 1 Cir. 11/8/02), 835 So.2d 785, 799, writs denied, 03-0313, 03-0339, 03-0349 (La. 5/30/03), 845 So.2d 1059, 1060, cert. denied, 540 U.S. 950, 124 S.Ct. 419, 157 L.Ed.2d 282 (2003).

Errors are prejudicial when they materially affect the outcome of the trial and deprive a party of substantial rights. **Evans v. Lungrin**, 97-0541, (La. 2/6/98), 708 So.2d 731, 735. Moreover, LSA-C.E. art. 103A provides, in pertinent part, that "[e]rror

[9] However, as previously stated, Jacobee's assignment of error has been addressed in a separate appeal.

may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. **Wright**, 924 So.2d at 183. Thus, even if we determine that the trial court abused its discretion and improperly admitted certain evidence, we must then also find that the error, when compared to the entire record, had a substantial effect on the outcome of the case in order for the error to warrant a reversal. A party alleging prejudice by the evidentiary ruling of the trial court bears the burden of so proving. **Id**.

The trial court is granted broad discretion on its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. **Wright**, 924 So.2d at 183; **Roberts v. Owens-Corning Fiberglas Corp.**, 03-0248 (La.App. 1 Cir. 4/2/04), 878 So.2d 631, 646, writ denied, 04-1834 (La. 12/17/04), 888 So.2d 863. Moreover, LSA-C.E. art. 402 provides that all relevant evidence is admissible, except as otherwise provided by law. Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. LSA-C.E. art. 401.

In its first two assignments of error, Grambling asserts that the failure to exclude the testimony of Thomas Stallworth and Errol Pipkins resulted in the jury being misled and the jury verdict being tainted. Particularly, Grambling contends that both witnesses lacked direct knowledge of the facts of the incident of August 14, 2009, and their testimony was clearly prejudicial to the defendants.

As to Errol Pipkins, Coach Pipkins was Jacobee's high school junior varsity coach. Grambling asserts that the trial court erred in allowing Coach Pipkins's to give his opinion regarding Jacobee's ability to play professional basketball since Coach Pipkins admitted that he was not a scout and never evaluated talent for professional basketball. Further, Grambling contends that Coach Pipkins's testimony was not necessary and simply confused the jury as to Jacobee's ability to play professional basketball. Citing

LSA-C.E. art. 103A, Grambling argues that the testimony was prejudicial by allowing an interpretation of facts inconsistent with the evidence and substantially affecting the outcome of the case.

Generally, a witness not testifying as an expert may not give testimony in the form of opinions or inferences. This rule is subject to the limited exception of LSA-C.E. art. 701, which provides:

> If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are:
>
> (1) Rationally based on the perception of the witness; and
>
> (2) Helpful to a clear understanding of his testimony or the determination of a fact in issue.

Thus, a lay witness may give opinion testimony based on his training, investigation, perception of the scene, and observation of physical evidence. **Rideau v. State Farm Mut. Auto. Ins. Co.**, 06-0894 (La.App. 1 Cir. 8/29/07), 970 So.2d 564, 572, writ denied, 07-2228 (La. 1/11/08), 972 So.2d 1168.

Coach Pipkins testified that he had been the assistant basketball coach at Huntington High School for seventeen years and that he coached Jacobee from 2005 through 2009 at Huntington. Coach Pipkins stated that Jacobee could "run like a deer and jump like a kangaroo" and that people came to the games to see him dunk. He also testified that while on the junior varsity basketball team, Jacobee was not only the leading scorer and best athlete on the team, he was also a team leader. Coach Pipkins testified that Jacobee was on the varsity team beginning in his junior year and made all district in his senior year.

Coach Pipkins was of the opinion that with the right training and work ethic, Jacobee had enough ability that he could possibly have played professional basketball overseas in an international league. He testified that four players from Huntington played overseas basketball and they had the same work ethic and the same skills he saw in Jacobee. He further stated that Jacobee had no discipline issues in high school, on or off the basketball court, and that he was very respectful. While admitting that Jacobee was not a "top 10" player, Coach Pipkins was of the opinion that Jacobee was

a "role player" and did not get the credit he deserved because of two other star players on the basketball team. He stated that the three players were called "the Big 3" in high school and that Jacobee's nickname was Dr. Lee, after Dr. J.

After reviewing the record and considering that a lay witness may give opinion testimony based on his training, perception, and observation, we cannot say that the trial court abused its great discretion in allowing the testimony of Coach Pipkins. Jacobee has asserted that the August 14, 2009 incident deprived him of the opportunity to pursue a basketball career, as well as obtain a college degree. Clearly, Jacobee's career path was at issue, as was his athletic ability and work ethic. Coach Pipkins's opinion was rationally based on his perception of Jacobee's abilities and performance after coaching him for several years and was helpful for a determination of a fact at issue.[10] Accordingly, Grambling's second assignment of error lacks merit.

Grambling also maintains that the trial court erred in allowing Thomas Stallworth to qualify as an expert, alleging that he was neither neutral nor disinterested, and his testimony lacked credibility and at best was self-serving. The standard for determining the admissibility of expert testimony was established by the United States Supreme Court in **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).[11] **Daubert** is now codified in Louisiana Code of Evidence article 702, which governs the admissibility of expert testimony, as follows:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (2) The testimony is based on sufficient facts or data;
>
> (3) The testimony is the product of reliable principles and methods; and

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[10] Further, we note that based on the amounts awarded by the jury for loss of earning capacity and past lost wages, it appears that the jury based its awards on a finding that Jacobee would have obtained a college bachelor's degree, rather than on a finding that Jacobee would have played professional basketball. Therefore, even assuming error in admitting Coach Pipkins's testimony, there was no substantial effect on the outcome of the case, and any error was harmless.

[11] In **State v. Foret**, 628 So.2d 1116 (La. 1993), the Louisiana Supreme Court adopted the test set forth in **Daubert**. Thereafter, the supreme court further specified the admissibility of expert testimony in **Cheairs v. DOTD**, 03-0680 (La. 12/3/03), 861 So.2d 536.

(4) The expert has reliably applied the principles and methods to the facts of the case.

Freeman v. Fon's Pest Management, Inc., 17-1846 (La. 2/9/18), 235 So.3d 1087, 1089-90 (per curiam). The **Daubert** standard requires that expert testimony must rise to a threshold level of reliability in order to be admissible under LSA-C.E. art. 702. **Jackson v. Suazo-Vasquez**, 12-1377 (La.App. 1 Cir. 4/26/13), 116 So.3d 773, 778; **Terrebonne v. B & J Martin, Inc.**, 03-2658 (La.App. 1 Cir. 10/29/04), 906 So.2d 431, 440.

While **Daubert** specifically addressed scientific evidence, **Kumho Tire Co., Ltd. v. Carmichael**, 526 U.S. 137, 141, 119 S.Ct. 1167, 1171, 143 L.Ed.2d 238 (1999), made clear that the trial court's essential gatekeeping function applies to all expert testimony, including opinion evidence based solely on special training or experience. **Kumho**, 526 U.S. at 148-49, 119 S.Ct. at 1174-75. Ultimately, "the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" **Kumho**, 526 U.S. at 149, 119 S.Ct. at 1175 (quoting **Daubert**, 509 U.S. at 592, 113 S.Ct. at 2796). Whether **Daubert**'s specific factors are, or are not, reasonable measures of reliability is a matter that the trial court has broad latitude to determine, and a decision to admit or exclude is reviewed on an abuse of discretion standard. **Kumho**, 526 U.S. at 153, 119 S.Ct. at 1176.

Generally, the test of competency of an expert is the expert's knowledge of the subject about which he is called upon to express an opinion. **State v. Lutz**, 17-0425 (La.App. 1 Cir. 11/1/17), 235 So.3d 1114, 1132. A combination of specialized training, work experience, and practical application of the expert's knowledge can combine to demonstrate that the person is an expert; a person may qualify as an expert based upon experience alone. **Lutz**, 235 So.3d at 1132. Therefore, the factual basis for an expert's opinion determines the reliability of the testimony, and the trial court's inquiry must be tied to the specific facts of the particular case. **Robertson v. Doug Ashy Bldg. Materials, Inc.**, 10-1552 (La.App. 1 Cir. 10/4/11), 77 So.3d 339, 355, writs denied, 11–2468, 11–2430 (La. 1/13/12), 77 So.3d 972, 973.

It is important to note, however, that there is a crucial difference between questioning the methodology employed by an expert witness and questioning the application of that methodology or the ultimate conclusions derived from that application. **Robertson**, 77 So.3d at 355. Further, a trial judge may not decide what expert evidence the jury should hear based on its own credibility determinations and resulting resolution of the disagreements between the experts. **Wingfield**, 835 So.2d at 799.

In this matter, Grambling filed a motion *in limine* and a request for a **Daubert** hearing to exclude the expert testimony of Coach Stallworth, Harold Asher, and Todd Capielano. Following a hearing, the motion was denied as to all three experts.

At trial, Coach Stallworth was offered as an expert in the field of strength and conditioning. He testified that he was a certified strength and conditioning specialist through the national strength and conditioning association. Defense counsel questioned Coach Stallworth, and the trial court then asked Coach Stallworth how long he had been a strength and conditioning coach. After Coach Stallworth responded that he had been a strength and conditioning coach for twelve years, the trial court accepted him as an expert in the field of collegiate strength and conditioning.

Coach Stallworth testified that he was the director of strength and conditioning at GSU, where he worked from 2008 until 2012. He testified that it was his opinion that the Tiger Mix was a blatant disregard for athletic rules and regulations and National Collegiate Athletic Association (NCAA) policies. He stated that pursuant to NCAA bylaws, structured activities are not allowed before the first day of academics in a school year. It was his understanding that the Tiger Mix was mandatory. Coach Stallworth also stated that no one discussed the Tiger Mix with him and, had he been made aware of it, he would have advised that it was "a bad idea." He testified that athletes, and especially freshman athletes, want to please their coaches and will do whatever is asked of them, even though they are not conditioned or acclimated to the heat. He stated that running for four to four and a half miles for any college athlete is an extensive amount of volume on a physiological system, which can be damaging to the central nervous system and to body functioning.

Coach Stallworth also testified regarding hydration, heatstroke, and the three-to-one work-to-rest ratio between physical activities. He explained that based on academic and professional standards there is usually a three-to-one work-to-rest ratio for recovery between any physical activity and the next exercise. For example, for every minute of activity there should be three minutes of time off. For a one-hour weight session, there should be three hours rest before the next activity. Coach Stallwoth stated that the twenty to thirty minute break between the workout session and the disciplinary run in this matter was not enough time to allow the players to adequately recover.

Upon our review of the record, Grambling's objection to the testimony of Coach Stallworth seems to be based primarily on his conclusions as an expert rather than based on an objection to any methodology applied by Coach Stallworth. We cannot say that Coach Stallworth's experience and knowledge as a licensed strength and conditioning coach did not aid the trier of fact in understanding the facts and circumstances of the case and the evidence presented. Accordingly, we can find no abuse of discretion by the trial court in admitting the expert testimony of Coach Stallworth. Grambling's first assignment of error is without merit.

In its sixth assignment of error, Grambling asserts that the trial court erred in allowing the expert testimony of Harold Asher and Thomas Capielano as to damages resulting from Jacobee's lost opportunity to pursue a possible career in the NBA or international leagues because of the August 14, 2009 incident. Grambling contends that Jacobee presented no evidence that he would have been drafted into the NBA, developmental league, or any international league. Therefore, according to Grambling, any testimony from Mr. Capielano and Mr. Asher was pure speculation and conjecture, which cannot form the basis for a loss, and the trial court erred in allowing their testimony.

At trial, Mr. Capielano, a licensed rehabilitation counselor, testified that he met with Jacobee for a vocational assessment. He reviewed the records provided to him, conducted vocational testing, and formed an opinion based on Jacobee's vocational outlook and loss of earning capacity. He stated he reviewed Jacobee's school records,

including his college records, and a variety of medical documents from Jacobee's medical caregivers and other experts. Mr. Capielano stated that he also reviewed the depositions of Jacobee's high school coaches, which showed him that there were no incidents in high school and that Jacobee was a "good kid." He also read the deposition of Jacobee's SUSLA basketball coach about Jacobee's behavior after the August 14, 2009 incident and how Jacobee's diagnosis of PTSD explained some of that behavior. Mr. Capielano opined that Jacobee would have graduated from college if not for the Tiger Mix. According to Mr. Capielano, the Tiger Mix limited Jacobee's future vocational prognosis to entry level lower skilled to semi-skilled types of employment. Mr. Capielano also stated that a military career, which Jacobee had expressed an interest in, was no longer an option for Jacobee due to his physical condition.

Mr. Asher, Jacobee's expert economist, gave his opinion as to Jacobee's lost earning capacity. He presented three different employment scenarios based on the information given to him by Mr. Capielano. The first scenario was based on Jacobee obtaining a bachelor's degree with subsequent employment and a salary commensurate with a college degree. The second scenario presented was based on Jacobee graduating from college and then playing professional basketball overseas for ten years, followed by a collegiate basketball coaching career. The third scenario was based on Jacobee playing professional basketball overseas after graduation, but developing over the ten-year period into an elite player. Mr. Asher calculations for Jacobee's loss of earning capacity over his work lifetime ranged from $1,406,400.00 to $5,489,162.00.

Based on our review of the record, we agree with Grambling that a professional basketball career for Jacobee was too speculative. Mr. Capeliano and Mr. Asher both admitted that they could not predict the likelihood of a professional basketball career for Jacobee. Nevertheless, as previously noted, considering the amounts awarded by the jury for loss of earning capacity and past lost wages, the jury seems to have based its awards on a finding that Jacobee would have graduated from college with a bachelor's degree, rather than on a finding that he would have played professional basketball. The testimony of Mr. Capeliano and Mr. Asher helped the jury to understand the evidence and issues presented, including possible future employment

opportunities for Jacobee. We cannot say that their testimony was based on insufficient facts or data or unreliable principles and methods, or that the experts did not reliably apply the principles and methods to the facts of this case. Therefore, we can find no error or abuse of discretion by the trial court in allowing the expert testimony of either Mr. Capielano or of Mr. Asher.

DAMAGES

(Grambling's Assignments of Error Numbers 3, 4, 5, and 7
and Jacobee's Assignment of Error)

In these assignments of error, Grambling asserts that the general damages awarded by the jury for past and future mental pain and suffering, loss of enjoyment of life, and loss of future earning capacity were excessive. The jury awarded Jacobee $1,000,000.00 for past and future mental pain and suffering, $600,000.00 for loss of enjoyment of life, and $600,000.00 for loss of earning capacity.[12]

Grambling argues that Jacobee's lifestyle was not affected by the injuries he suffered as a result of the Tiger Mix. It contends that Jacobee did not show any deprivation, alteration, or injury preventing him from enjoying basketball, even in college and, therefore, Jacobee suffered no loss of enjoyment of life. Grambling also asserts that the jury's award for mental pain and suffering was excessive. It maintains that Jacobee had problems with academics preceding the Tiger Mix and, therefore, any mental anguish and distress resulting from low scores and academic struggles after the Tiger Mix, were not caused by the disciplinary run.[13] Lastly, Grambling asserts that the jury erred in the excessive award for loss of earning capacity as a professional basketball player because there was no reasonable certainty that Jacobee would have played professional basketball.

It is well settled that a judge or jury is given great discretion in its assessment of quantum, of both general and special damages. LSA-C.C. art. 2324.1; **Guillory v. Lee**,

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[12] The jury's general damages award of $200,000.00 for past and future physical pain and suffering was not appealed by Grambling.

[13] Grambling also maintains that Jacobee's claim for mental pain and suffering was actually related to his diagnosis of PTSD and was a claim by Jacobee for bystander damages arising from witnessing Henry suffer a heatstroke. It contends that Jacobee could not meet the heightened standards of **Lejeune v. Rayne Branch Hosp.**, 556 So.2d 559 (La. 1990), for bystander damages and that Jacobee is not entitled to same. See LSA-C.C. art. 2315.6. We find no merit to this argument.

09-0075 (La. 6/26/09), 16 So.3d 1104, 1116. Further, the assessment of quantum, or the appropriate amount of damages, by a trial judge or jury is a determination of fact that is entitled to great deference on review. **Wainwright v. Fontenot**, 00-0492 (La. 10/17/00), 774 So.2d 70, 74. The standard for appellate review of general damages is set forth in **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), wherein the Louisiana Supreme Court stated that "the discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages." The appellate court's first inquiry should be "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; **Kelley v. General Ins. Co. of America**, 14-0180 (La.App. 1 Cir. 12/23/14), 168 So.3d 528, 540, writs denied, 15-0157, 15-0165 (La. 4/10/15), 163 So.3d 814, 816.

The reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses, but also upon the proper allocation of trial and appellate functions between the respective courts. The role of an appellate court in reviewing a general damages award, one which may not be fixed with pecuniary exactitude, 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. **Guillory**, 16 So.3d at 1116-17; **Kelley**, 168 So.3d at 545.

In reviewing a general damage award, a court does not review a particular item in isolation; rather, the entire damage award is reviewed for an abuse of discretion. 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 reduce the award. **Youn**, 623 So.2d at 1261; **Kelley**, 168 So.3d at 546.

Pain and suffering, both physical and mental, refers to the pain, discomfort, inconvenience, anguish, and emotional trauma that accompanies an injury. **McGee v. A C and S, Inc.**, 05–1036 (La. 7/10/06), 933 So.2d 770, 775. The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. **Jenkins v. State ex rel. Dept. of Transp. and Development**, 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. In comparison, loss of enjoyment of life refers to detrimental alterations of a person's life or lifestyle or a person's inability to participate in the activities or pleasures of life he enjoyed prior to the injury. **McGee**, 933 So.2d at 775; **Kelley**, 168 So.3d at 545. Separate awards for pain and suffering and loss of enjoyment of life are acceptable as such and do not offend the existing concept of general damages. **McGee**, 933 So.2d at 775; **Kelley**, 168 So.3d at 545.

Damages for a loss of earning capacity should be estimated on the injured person's ability to earn money, rather than what he actually earned before the injury. Earning capacity in itself is not necessarily determined by actual loss. **Hobgood v. Aucoin**, 574 So.2d 344, 346 (La. 1990); **Folse v. Fakouri**, 371 So.2d 1120, 1124 (La. 1979). 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 done him has deprived him of a capacity he would have been entitled to enjoy even though he never profited from it monetarily. **Hobgood**, 574 So.2d at 346; **Folse**, 371 So.2d at 1124.

Jacobee testified that following the Tiger Mix he suffered from problems with focus and concentration. He stated that his energy level was not the same as it was before the run and that although he was not lazy, he was no longer "enthusiastic." Jacobee also testified that he could not "let Henry go." He testified that he now has to be careful not to elevate his CPK levels with physical exertion and that although he was cleared by his cardiologist to play basketball at SUSLA, that clearance was for his heart

muscle and not for his skeletal muscle and CPK levels associated therewith. Jacobee testified that he was scared of physically overexerting himself and passing out.

Jacobee's mother testified that her son was not a lot of trouble in high school. She stated that, after the Tiger Mix, he has exhibited low motivation, is isolated, and is depressed. She stated that he was more self-sufficient before the Tiger Mix than he is currently and that Jacobee is "not the same son." She testified that he can't mow the lawn, go jogging, sprinting, running, or even wash cars. Jacobee's grandmother also testified that since the run, Jacobee has had problems with concentration, focus, and memory. She stated that he gets agitated quickly, which was unlike him before the Tiger Mix.

At trial, Jacobee's rheumatologist, Dr. Goodman, explained the difference between heatstroke and heat exhaustion, testifying that Jacobee suffered a heatstroke as a result of the Tiger Mix. Dr. Goodman discussed rhabdomyolysis, explaining that it is a breakdown of muscle that is long in shape, i.e., skeletal muscle, and that heatstroke can cause rhabdomyolysis. Dr. Goodman also testified that heatstroke survivors can experience permanent neurological impairments. He believed that Jacobee's persistent elevated CPK level was caused by the exertional heatstroke he suffered on August 14, 2009. It was his opinion that the heatstroke caused Jacobee to suffer permanent irreversible damage to his skeletal muscle and permanent exercise intolerance.

Dr. Goodman further explained that rhabdomyolysis is a very serious condition. It can cause kidney failure, multi-organ failure, or death. He testified that Jacobee has had two episodes of rhabdomyolysis, the first occurring after the heatstroke Jacobee suffered in August of 2009 and the second occurring in February of 2010 when Jacobee's CPK level elevated to almost 8,000. According to Dr. Goodman, this meant that Jacobee's threshold for suffering from rhabdomyolisis was now lower than it was before August of 2009. He also stated that there is no way for a patient to tell on their own that their CPK level is going up. In his opinion, Jacobee's permanent injury was not minimal.

Todd Lobrano, Jacobee's licensed psychologist, saw Jacobee on July 25, 2015, and testified that Jacobee has PTSD caused by the Tiger Mix. Jacobee was also diagnosed with anxiety and depressive disorder, not otherwise specified. Mr. Lobrano testified that Jacobee was fixated on Henry's death. Grambling's expert rheumatologist, Dr. Joseph Nesheiwat, also admitted that Jacobee suffered from anxiety related to the death of a teammate during the same run that caused Jacobee to suffer a heatstroke.

Mr. Capielano, Jacobee's vocational rehabilitation expert, testified that Jacobee's dream was to become a professional basketball player. It was Mr. Capielano's opinion that Jacobee was on that path, stating that Jacobee blossomed in his senior year in high school and that he was being recruited to play in college. Mr. Capielano opined that although a professional basketball career in the NBA was possible, a basketball career overseas seemed more probable. Because of the Tiger Mix, that path was taken from him. Mr. Capielano also believed that basketball kept Jacobee motivated to get his degree. Although Jacobee was not a star student, he met the requisites for college, took summer classes, and was motivated to succeed. It was Capielano's opinion that Jacobee needed structure and Jacobee could not do one without the other. Because of the support structures available to the basketball team, like tutoring and study halls, it was Mr. Capielano's opinion that Jacobee would have been able to get his college degree. He testified that because of the Tiger Mix, however, Jacobee lacked the motivation and assistance needed to obtain a bachelor's degree. Mr. Capielano also stated that, as a result of the Tiger Mix, Jacobee's vocational options were limited to entry level lower skilled to semi-skilled types of employment. Further, a career in the military, which Jacobee considered, was not a viable option due to his physical condition. In summary, Mr. Capielano determined that Jacobee's vocational prognosis was guarded, and as a result of his injury, he would most likely be limited in his work opportunities as well as opportunities for career advancement.

Mr. Asher, Jacobee's expert in the field of damage calculation and economic losses, formed an opinion regarding Jacobee's loss of economic capacity. Mr. Asher provided three different employment scenarios. The first scenario was where Jacobee graduated from college with a bachelor's degree and started to work. According to Mr.

Capielano, Jacobee's average earnings over his work life would be $54,000.00 a year compared to jobs of $25,743.00 per year average, which was what he was currently able to make. The second scenario was based on Jacobee graduating from college and playing professional basketball internationally for ten years. Although salaries varied widely, between $15,000.00 and $500,000.00 per year, Mr. Asher used a salary at the lower end of $40,000.00 per year. After ten years, Jacobee would then become a college basketball coach. Mr. Asher testified that basketball coaches and assistants make between $80,000.00 and $400,000.00 a year. As an assistant coach, Mr. Asher used the amount of $80,000.00 per year for Jacobee. The third scenario involved a situation where Jacobee actually had a skill set that would have allowed him to go from the low end of $15,000.00 internationally per year to $450,000.00 a year at the end of his tenth year. Under that scenario, Jacobee would then retire and become a college assistant basketball coach starting at $80,000.00 and ending at $120,000.00 per year. Under the first scenario, based on obtaining a bachelor's degree, Mr. Asher calculated a loss of $1,406,404.00. The middle scenario resulted in a loss of about $2.4 million dollars, and under the third scenario, Mr. Asher calculated a $5,489,162.00 loss.

Grambling's forensic economic expert, Dr. Robert Hebert, testified at trial. Dr. Hebert first critiqued Mr. Asher's report, finding it exaggerated, and made his own calculations. The calculations were based on two alternatives, that is, a non-sports-related career path and a sports-related career path. Dr. Hebert compared the conclusions of Mr. Capielano with those of Sandra Kreuter, Grambling's vocational rehabilitation expert. According to Dr. Hebert, if, but for the events of August 14, 2009, Jacobee would have earned the average wage income of a black male with a bachelor's degree, the discounted present value of his potential lost earning capacity was between $367,804.00 (based on Ms. Kreuter's assessment) and $661,525.00 (based on Mr. Capielano's assessment). Also, in the non-sports-career path, if, but for the Tiger Mix, Jacobee would have earned the average wage income of an entry-level computer specialist with some college but no degree, the discounted present value of his future potential lost earning capacity was between zero (Ms. Kreuter) and $629,101.00 (Mr.

Capielano).[14] Further, on the sports-career path, if, but for the Tiger Mix, Jacobee had pursued a professional basketball career through a player development league with subsequent employment as a coach or scout, the discounted present value of his potential lost earning capacity was between zero (Ms. Kreuter) and $269,357.00 (Mr. Capielano).

Based on our extensive review of the record and considering the evidence related to Jacobee's injuries and their effect on his life, we find that the evidence clearly supports the jury's finding that Jacobee has suffered and will continue to suffer from the injuries he sustained as a result of the Tiger Mix. Further, we cannot say the jury's award of $600,000.00 for loss of earning capacity is beyond that which a reasonable trier of fact could have assessed and find no abuse of the jury's discretion. Considering the amount of the award by the jury, the jury seems to have relied on the figures presented by Grambling's economic experts and found that Jacobee would have obtained employment based on a college bachelor's degree, rather than on a finding that he would have played professional basketball.

Having found that the jury did not abuse its vast discretion in its award of $600,000.00 for loss of earning capacity, we address the State's limitation on general damages of $500,000.00 under LSA-R.S. 13:5106. It is undisputed that the governmental statutory cap applies in this case. The jury's award of $600,000.00 for Jacobee's loss of earning capacity exceeds the $500,000.00 maximum amount recoverable for general damages. Therefore, we need not address whether the jury's awards of $1,000,000.00 for past and future mental pain and suffering and of $600,000.00 for loss of enjoyment of life are excessive and pretermit discussion of same.[15] The jury's awards for past and future physical and mental pain and suffering, loss of earning capacity, and loss of enjoyment of life are all collectively subject to the

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[14] Testimony at trial indicated, however, that even before the Tiger Mix Jacobee was not very strong in math and science and, although he expressed an interest in computer science, a career in that field did not seem likely.

[15] Further, we note that even if the $600,000.00 award for loss of earning capacity should not have been included in the statutory cap, as argued by Jacobee, see **Lee v. Louisiana Board of Trustees for State Colleges**, 2017 CA 1431, we, nevertheless, find that, since the $200,000.00 award for past and future physical pain and suffering was not appealed, at a minimum, Jacobee's general damages for past and future mental pain and suffering and for loss of enjoyment of life would have exceeded $300,000.00.

$500,000.00 cap. Accordingly, we affirm the trial court's adjusted award of $500,000.00 for Jacobee's general damages.

In its fourth assignment of error, Grambling asserts that the jury erred in its award for past lost wages, arguing that there was no factual basis in the record for the award. It contends that Jacobee had no work history prior to the incident of August 14, 2009, and, therefore, lost no time from work. Grambling argues that no documentation, such as tax returns or payroll stubs, was provided, and the jury's award was based solely on the figures of Jacobee's experts who predicted what Jacobee's income would have been had he completed college. As such, it maintains that Jacobee failed to produce evidence of lost wages.

A plaintiff seeking damages for past lost wages bears the burden of proving lost earnings, as well as the duration of time missed from work due to the accident. The trier of fact has broad discretion in assessing awards for lost wages, but there must be a factual basis in the record for the award. Where there is no basis for a precise mathematical calculation of a past lost wage claim, the trier of fact can award a reasonable amount of damages without abusing his discretion. **Cotton v. State Farm Mut. Auto. Ins. Co.**, 10-1609 (La.App. 1 Cir. 5/6/11), 65 So.3d 213, 224, writ denied, 11-1084 (La. 9/2/11), 68 So.3d 522.

Mr. Capielano testified that Jacobee's employment opportunities were limited to entry level lower-skilled and semi-skilled types of employment. Mr. Asher calculated Jacobee's loss of earning capacity at $1,460,404.00 based on his inability to obtain a college degree following the Tiger Mix. Mr. Asher was then specifically asked if college was that valuable, and he replied that it was. Mr. Asher testified that, in present value, a college degree was worth about $30,000.00 per year and that Jacobee had a past wage loss of approximately $30,000.00 per year from 2013, when Jacobee would have graduated from college, if not for the Tiger Mix, to the date of trial in 2016. The jury awarded Jacobee $90,000.00 for his past lost wages. Considering the specific facts and circumstances of this case and the totality of the evidence, we cannot say that the award of $90,000.00 for past lost wages was an abuse of discretion, and we decline to disturb the jury's award.

In his sole assignment of error in this appeal, Jacobee complains that the trial court erred in lowering the jury's award for future economic losses based on the State's general damages cap. For the reasons stated and more fully explained in the companion case of **Lee v. Louisiana Board of Trustees for State Colleges**, 2017 CA 1431, we find no error in the judgment of the trial court that found that the jury's $600,000.00 award for "Loss of Earning Capacity" was subject to the State's limitation on general damages. Jacobee's assignment of error lacks merit.

CONCLUSION

For all of the foregoing reasons, we affirm the February 13, 2017 judgment of the trial court. Costs of this appeal in the amount of $28,457.00 are assessed to the defendants, the Board of Supervisors for the University of Louisiana System and Grambling State University.[16]

AFFIRMED.

[16] Given that the issue assigned by Jacobee in this appeal was addressed in a separate appeal, wherein we assessed all costs to him, we decline to assess any costs to Jacobee herein.

JACOBEE LEE

VERSUS

LOUISIANA BOARD OF TRUSTEES FOR STATE COLLEGES, AND GRAMBLING STATE UNIVERSITY

NO. 2017 CA 1433

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

WELCH, J., concurring in part and dissenting in part.

I respectfully concur in part and dissent in part with the majority opinion in this matter. While I agree that none of the defendant's assignments of error have merit, I disagree, for the reasons set forth more fully in my dissent in the companion appeal, **Lee v. Louisiana Board of Trustees for State Colleges**, 2017-1431 (La. App. 1st Cir. 03/13/19) (Welch, J., dissenting), with those portions of the majority opinion determining that the jury's award of $600,000 for loss of earning capacity was subject to the state's $500,000 limitation on general damages and finding no error in the trial court's decision in that regard to reduce or vacate the award pursuant to the cap. The jury's award of $600,000.00 for the plaintiff's loss of earning capacity was based on expert testimony—offered by both the plaintiff and the defendant—and was pecuniary in nature. Thus, pursuant to the Louisiana Supreme Court's holding in **Fecke v. Board of Supervisors of Louisiana State University**, 2015-1805 (La. 9/23/16), 217 So.3d 237, was not subject to the state's cap of $500,000.00 for general damages. Therefore, I would amend the judgment of the trial court in that regard.

Thus, I respectfully concur in part and dissent in part.