

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NO. 92-CA-0971

SHIRLEY HERNANDEZ, ET AL
Plaintiffs-Appellees

Versus

CONTINENTAL CASUALTY INSURANCE COMPANY, ET AL
Defendants-Appellants

ORIGINAL BRIEF ON BEHALF OF SHIRLEY HERNANDEZ, ET AL

MAY IT PLEASE THE COURT:

This original brief is respectfully submitted on behalf of plaintiffs-appellees, Shirley Hernandez and Carlos Hernandez, in full conformity with Rule 2 of the Uniform Rules of the Courts of Appeal and the Local Rules of this Court.¹

I. INTRODUCTION

This personal injury case presents for this court's determination not only Trial Court errors of fact and law regarding the determination of damages, but also issues of great public and legal import regarding the interpretation and application of La. R.S. 22:1220, the recently enacted statute imposing penalties for bad faith conduct on the part of Louisiana's insurance companies.

In a case of clear cut and undisputable liability, which defendants did not contest at trial or on appeal, Continental Casualty Insurance Company's insured, Jeana Cefalu, made an admittedly illegal left hand turn at a posted intersection, colliding with an automobile in which plaintiff, Shirley Hernandez, was a passenger, in November of 1989. The car was totaled, and Mrs. Hernandez suffered severe injuries, including facial lacerations and disfigurement, a herniated disc requiring surgery (which was unsuccessful), Post Traumatic Stress Syndrome and severe depression, which have physically, emotionally, and financially devastated Mrs. Hernandez and her family. Nevertheless, despite clear liability, numerous demands, adequate proof of loss, and even a judgment against it, the insurer has refused to date to pay Mrs. Hernandez one cent of the amounts it unquestionably owes under its admittedly valid policy with Ms. Cefalu.

Compounding the insurer's bad faith and dilatory tactics at trial, including baseless pleadings and discovery abuse designed to delay Mrs. Hernandez' undisputably deserved

¹ Pursuant to this Court's Order granting Plaintiffs' Motion to Exceed Page Limitations, this Original Brief is 32 pages long, rather than the 25 pages permitted under Local Rule 12.

recovery, the adjuster for the insurer has gone so far as to admit that its appeal of the Trial Court's judgment in Mrs. Hernandez' favor, in which the quantum award is low, has been taken for the purpose of further delaying payment of the amounts due under the judgment. As such, the Trial Court's refusal to impose the penalty provisions of La. R.S. 22:1220, which imposes affirmative duties on the part of insurers to settle and to tender amounts undeniably due to claimants, was a clear error which this court must correct.

Of lesser import to insureds, claimants, and the premium paying public, but of great import to Mrs. Hernandez, are the numerous Trial Court errors of fact and law in determining Mrs. Hernandez' general and special damages. Considering the uncontroverted evidence and compensable elements of damages which the Trial Court either overlooked or for which it refused to award damages, this case merits a *de novo* review of the omitted damages elements, and, contrary to defendants' assertions, an increase in both general and special damages.

Accordingly, in accord with their answer to the defendants' appeal, plaintiffs respectfully request a *de novo* review of the omitted damages elements, an increase in general and special damages to compensate for proven elements of damages omitted by the Trial Court, an award of penalties and sanctions under La. R.S. 22:1220 for bad faith conduct, and an award of sanctions under La. C.C.P. articles 863 and 2124 against defendants for dilatory trial tactics, factually unsupportable pleadings and frivolous appeal.

II. STATEMENT OF THE CASE

A. FACTS

On the morning of November 5, 1989, plaintiff-appellee Carlos Hernandez and his wife, plaintiff-appellee, Shirley Hernandez, were driving east on Metairie Road, traveling in the right hand lane at 25 to 30 mph (III R. 27, IV R. 13),² approaching the intersection of Pontchartrain Boulevard in Orleans Parish. Just as Mr. Hernandez, who was driving, approached the green light in his 1987 Isuzu, (III R. 13) defendant-appellant, Jeana E. Cefalu, who was driving west on Metairie on Road in her mother's 325 BMW (V R. 112), suddenly and without warning, made a left hand turn into the path of the oncoming Isuzu (III R. 14), despite a posted traffic sign prohibiting left hand turns. (III R. 250). Mr. Hernandez did not see the BMW until it was right in front of him a few feet away (III R. 31-37). He swerved to the left, blew his horn, and put on his brakes to try to avoid the accident, all to no avail (III R. 40-41), and his car violently collided with the BMW's right rear side. (IV R. 13). The police officer investigating the accident issued citations to Ms. Cefalu, for making a left hand turn on a "no left turn" sign after she admitted making an illegal left turn at the intersection to the officer (III R. 252). No traffic citations were

². Citations to the record are to the volume number and page, i.e.: "III R. 6" means volume number three of the record at page 6.

issued to Mr. Hernandez, who was traveling within the speed limit (III R. 251) and did not have time to avoid the accident. (III R. 14, 37). The Hernandez car was totaled, and was towed from the scene. (III R. 45-46).

Mr. Hernandez and Ms. Cefalu suffered only minor injuries, but Mrs. Hernandez was seriously injured (III R. 257). On impact, Mrs. Hernandez's knee violently hit the dashboard, she was thrown about the car, and her head smashed through the windshield, shattering it completely. (III R. 15, IV R. 13). She was taken to Mercy Hospital by ambulance (III R. 45, 251), and, while Mrs. Hernandez remained conscious, the hospital staff attempted to remove shattered glass from her face for twenty to thirty minutes (IV R. 17). The glass removal was a very painful process which was not entirely successful: glass fragments continued to extrude from Mrs. Hernandez's forehead for months thereafter (III R. 16), leaving her face permanently scarred. (III R. 18).

In addition to her head injuries, Mrs. Hernandez also suffered injuries to her knee, back and neck. On November 9, 1989, four days after the accident, she visited Dr. William Batherson, a chiropractor, complaining of headaches, neck pain, back pain, trembling of her left upper arm, bilateral knee pain and stomach discomfort. (III R. 112-113). Dr. Batherson concluded that she suffered a contused patella of the knee, nerve root compression secondary to disc involvement in the lumbar area, a hyperflexion injury to her neck with respect to the cervical spine, and symptoms from the blunt trauma to her head. (III R. 116-117). After conservative treatment for four months failed to relieve her pain, Dr. Batherson referred Ms. Hernandez to Dr. Toussaint Leclercq, a neurosurgeon, on March 6, 1990. (III R. 117-118, 123).

Dr. Leclercq first saw Mrs. Hernandez on March 28, 1990, and he recorded her complaints of continuing severe back, neck and leg pain. (III R. 151-152). An MRI revealed a central and left paricervical L5-S1 herniated disc, for which Dr. Leclercq recommended surgery. (III R. 153). He explained to Mrs. Hernandez that her only other option was to live with the pain (III R. 154) and, even though her pain was severe, (IV R. 316-317), her fear of surgery drove her to live with her pain for several months. During this period, she was forced to continue working as a shoe salesperson, although she was in extreme pain, for financial reasons. IV R. 316-317.

When the pain became unbearable and was not improving, Mrs. Hernandez decided to submit to surgery. (III R. 156, IV R. 19). She was admitted to Mercy Hospital on October 1, 1990 for a stay of five days and Dr. Leclercq performed a discectomy between the L5 and S1, which he described as only partially successful. (III R. 238). Because of her continued pain, including neck and low back pain, on her next visit to him on November 14, 1990, Dr. Leclercq ordered a nerve conduction study and an EMG (III R. 165-67), very painful tests (IV R. 22), which were conducted during her third hospitalization on November 28, 1990. (IV R. 22). On her next visit on December 19, 1990, Mrs. Hernandez still suffered pain in her back, neck, legs

and hands, well over one year from the November 1989 accident. (III R. 169). Dr. Leclercq's report at this time stated it was unpredictable when she could return to work. (III R. 174).

On Mrs. Hernandez's way home from the doctor's office on December 19, 1990, she was rear-ended at the I-10 Clearview Interstate Exit, and then, on December 29, 1990, she was again rear-ended by an intoxicated driver on the I-10 Service Road. (IV R. 281-284). Although both of these accidents were minor, (IV R. 47), they temporarily aggravated her pain, particularly in her neck. (IV R. 37, 173-IV, 281).

Mrs. Hernandez returned to Dr. Leclercq on January 2, 1991, at which time he performed an MRI, which showed **no evidence of new injury to her low back condition.** (III R. 175-176). Because of her low back problems after surgery, she still was not able to return to work at her job as a shoe salesman, with all the bending and lifting involved, as Dr. Leclercq confirmed, and when she was unable to return to work at Cook and Love Shoes on January 2, 1991, she was fired. (IV R. 274). Her only employment since the surgery occasioned by the November 1989 accident was a five day tenure as a hostess at the Tiffin Inn, which she was forced to leave because she could not stand the pain. IV R. 32-33.

After Mrs. Hernandez's next visit on January 18, 1991, Dr. Leclercq recommended continuation of conservative treatment, and she visited physical therapists for seventeen treatments over the two month period from January 24, 1991 through March 8, 1991. (III R. 177-78). Still in pain, Mrs. Hernandez again visited Dr. Leclercq on March 25, 1991, and, concerned about the pain in her back and legs, Dr. Leclercq admitted her to the hospital for a fourth time for additional testing including a lumbar discogram, a lumbar myelogram and a facet arthrogram (III R. 179-182), all of which, the doctor testified, are very painful tests for which the patient must remain awake. (III R. 182-186). Mrs. Hernandez seconded the doctor's medical opinion regarding the painful nature of these tests by first hand experience: She recalls being probed with long needles in her back and legs "like somebody stabbing or digging into you "while fully awake", crying like a baby" because of the extreme pain. (IV R. 22-26).

The results of these tests, according to Dr. Leclercq, showed that her back pain was caused by scar tissue from the partially unsuccessful surgery before the two December 1990 accidents, and that her continuing pain was caused by the first accident. (III R. 181, 185-186). He decided that no further neurosurgical treatment was indicated although follow up visits would be required (III R. 194) and, in his August 5, 1991, report, referred her back to Dr. Batherson for continued conservative treatment for her pain. (III R. 125, 187, 191, 239).

Mrs. Hernandez's present condition, according to Dr. Leclercq, **includes a ten to fifteen percent permanent disability for her back caused by the first accident (III R. 195, 221) with residual problems and pain after the partially unsuccessful surgery caused by greater than normal post operative adhesions.** (III R. 233). He also opined that she has nerve damage

which was exacerbated by the second two accidents as a result of the scar tissue from the first surgery. (III R. 231). He also pointed out that her ruptured disc makes her more susceptible to arthritis and herniated discs in the future (III R. 199) and noted, due to her pain producing scar tissue, that a fusion may be required in the future at L5-S1. (III R. 201). Dr. Batherson noted, based on his visits with Mrs. Hernandez from August 30, 1991 to September 25, 1991, at the time of trial, that her injuries, which she is still suffering two years after the accident, are probably permanent (III R. 137-138) and she will continue to have discomfort for the rest of her life. (III R. 136-138). Both Dr. Leclercq and Dr. Batherson recommended continued conservative chiropractic treatment every one to two weeks for the rest of Mrs. Hernandez's life, for as long as it affords her relief. (III R. 138, 192-193, 222).

As Mrs. Hernandez and her husband confirmed, she has constant low back pain, and when home she spends most of her time lying down or propped up on a chair with pillows. (IV R. 27-28). Even bending over slightly really bothers her. (IV R. 30). She can no longer perform basic household chores such as vacuuming, cleaning the bathrooms, and washing the dishes, which Mr. Hernandez now must do. (III R. 12, IV R. 27-28). Her housework has been reduced from twenty hours to eight to ten hours per week. (IV R. 31-32). Other household chores, even simple tasks like making the beds and sweeping, which she continues to do, cause her pain. (IV R. 27-28, 30-31). She still has scars on her forehead and from the surgery on her lower back. (III R. 18). She also still has headaches and trouble sleeping. (IV R. 27-28). And, very upsetting to her morale and her family's finances, she has not been able to go back to work since the surgery, although she desires to do so, (III R. 48). Moreover, her personality has completely changed: she upsets easily (III R. 9), she can no longer tolerate children in the house because of the noise (III R. 10), she no longer gets along with Mr. Hernandez's mother, who lives with them (III R. 11), and she gets in a lot of arguments with people (IV R. 34). Her marriage, which was, according to her husband, "wonderful" for five years prior to the accident, including sports activities, walks, and a normal sex life, has been seriously affected because of her emotional stress and physical problems with her back. (III R. 9, IV R. 35). She is very upset because of complaints from her husband about their sex life (IV R. 35), and feels "worthless" because she can no longer work to help support her family. (IV R. 33). Her trauma and fear when driving or riding as a passenger in a car, which continue to this day, along with her severe depression, led her to seek help for psychiatric problems from Dr. Adrian Blotner. (IV R. 33).

Dr. Blotner, a psychiatrist specializing in the emotional affects of trauma and surgery (IV R. 91) first saw Mrs. Hernandez on July 16, 1991. At the time of that visit, she was (and still is) suffering from severe nervousness with pins and needles sensations under her skin (IV R. 93), was suffering extreme anxiety while driving during the day, and had discontinued driving at night completely. (IV R. 95). She experienced (and still experiences) nightmares (IV R. 159-60),

difficulty sleeping, decreased concentration, irritability, startle response, and severe neck and arm muscle tension associated with driving. (IV R. 96-97). She also had (and still has) persistent dry mouth (IV R. 94) and recurrent intrusive thoughts about her accident. (IV R. 121-122). She also suffered from (and still suffers) depression and severe fatigue and a decrease in energy (IV R. 99), with daily crying spells (IV R. 118), and a weight gain of forty-five percent of her body weight. (IV R. 121-122). She demonstrates decreased concentration and short term memory, and loss of pleasure in her every day activities. (IV R. 121-122). She was (and is) taking pain pills, sleeping pills and valium, all prescribed medications, to try to alleviate her pain, anxiety and sleeplessness (IV R. 96-97).

Dr. Blotner's diagnosis, based on the traumatic circumstances of her November 1989 accident, where her head went through the windshield, and her response to the accident, the unsuccessful surgery, and the pain it has caused, was that Mrs. Hernandez was (and is) suffering from Post Traumatic Stress Disorder, (IV R. 101-102) and in addition from major depressive illness (IV R. 123), **both caused by the November 1989 accident** (IV R. 119, 176-77). He pointed out that both are serious, debilitating, major psychiatric disorders. Further, the severity of her pain, her emotional suffering and her disability have caused a severe impairment on her central nervous system as well as her ability to function, which the doctor described as "severe social and occupational dysfunction." (IV R. 106-109). The accident of November 1989 and the resulting injury and disability have had a "severe impact on her ability to enjoy life" as well. (IV R. 129-130). He stated that her emotional impairment extends even beyond her physical impairment (IV R. 129-130), and pointed out that, had the disc repair been successful to restore her to the point where she could function, the psychiatric impact would have been minimal. (IV R. 130). However, Mrs. Hernandez was not so fortunate. Dr. Blotner noted that from the standpoint of physical pain and emotional suffering, she is not employable in any capacity at this time (IV R. 145) nor is she ready for vocational rehabilitation. (IV R. 170-171).

Bobby S. Roberts, a vocational evaluation specialist to whom Dr. Leclercq referred Mrs. Hernandez for testing (III R. 197), and whom Dr. Leclercq felt did a good job on her evaluation and a very complete report which coincided with his medical diagnosis (III R. 196), examined Mrs. Hernandez on August 21, 1991, performed a full range of physical, educational, intelligent and aptitude tests, and put together a comprehensive vocational evaluation. See plaintiff's exhibit 7. It was Mr. Roberts' opinion, based on his tests and on Dr. Leclercq's reports, that her return to work is "unpredictable" (III R. 98) with an "extremely guarded" vocational prognosis (Exhibit 7), and that Mrs. Hernandez was and is not presently employable in any capacity, and needs to continue to seek help from psychiatric and medical professionals (III R. 71). She has in fact, other than her one five day attempt to maintain employment, not been able to work since her surgery because of constant low back pain.

For almost three years after the accident, Mr. and Mrs. Hernandez have suffered extreme financial hardship and have been unable to pay Mrs. Hernandez's hospital and medical bills incurred as a result of the November 5, 1989 accident. Nevertheless, despite the plaintiffs' demands and the proof of loss provided as far back as October of 1990, the clear liability of its insured as reflected in the accident report, Mrs. Hernandez's deposition taken in March of 1991, and the uncontroverted evidence of damages reflected in the medical bills and reports which plaintiffs forwarded to Continental Casualty Insurance Company, the insurer has failed to tender any sums of money to Mrs. Hernandez even for her undisputed medical and surgical treatments. Nor has the insurer entertained reasonable settlement offers from the plaintiffs, one of which was for less than the judgment now due. In fact, defendants have done nothing but attempt to delay Mrs. Hernandez's entirely deserved recovery, as discussed in more detail infra.

B. PROCEEDINGS BELOW

After sending their first demand letter to defendant, Continental Casualty Insurance Company, see plaintiffs' exhibit 6A, plaintiffs filed suit on October 10, 1990, against Ms. Cefalu and her insurer in Civil District Court for the Parish of Orleans, No. 90-19707, Division "E", Docket No. 4, for damages for Mrs. Hernandez's injuries, and for penalties and attorneys fees for the insurer's violation of Louisiana R.S. 22:1220. Despite the absolutely clear liability of Ms. Cefalu, its insured, and after reviewing plaintiff's medical bills and reports, see plaintiffs' exhibit 7, defendants answered plaintiffs' petition on November 21, 1990 denying all allegations except the existence of the policy, and alleging without any factual basis that the November 1989 accident was caused by plaintiffs' or third party negligence.

Plaintiffs thereafter attempted to commence discovery, serving interrogatories on defendant insurer on November 26, 1990 and again on December 18, 1990, which defendant Continental Casualty Insurance Company refused to answer for months, necessitating the filing of a Motion to Compel on February 11, 1991. Then, and throughout the course of this entire matter, defendant Continental Casualty Insurance Company's tactics were nothing but dilatory and designed to delay Mrs. Hernandez's undeniably deserved recovery.

On February 6, 1991, plaintiffs moved to set the suit for trial on the merits without a jury, and a bench trial was set for September 26, 27 and 31, 1991 before the Honorable Gerald P. Federoff.³ Plaintiffs then issued a subpoena duces tecum tecum to Continental Casualty

³ On May 15, 1991 defendants Jeana E. Cefalu and Continental Casualty Insurance Company filed a Third Party Petition against the drivers, owners and the insurers of the two automobiles which rear-ended Mrs. Hernandez in two additional collisions on December 19, 1990 and December 29, 1990, subsequent to the filing of plaintiffs' suit, and urging that the Third Party defendants were responsible, wholly or in part, for Mrs. Hernandez's damages, and seeking contribution and indemnity. For some reason, plaintiffs did not receive a copy of this Third Party Petition until August 19, 1991. On August 14, 1992, the defendants responsible for the December 19, 1990 accident answered defendants Third Party Demand, denying liability and requesting a trial by jury. The remaining defendants answered on August 20, 1991, denying liability and inserting the affirmative defenses of comparative or contributory

Insurance Company requesting the production at trial of the insurer's file pertaining to Mrs. Hernandez and the insurer's decision not to offer an unconditional tender or a reasonable settlement offer. The defendants filed a Motion to Quash the Subpoena, and on August 23, 1991, defendants moved for summary judgment on plaintiffs' claim under Louisiana R.S. 22:1220.

After entertaining argument on these motions on September 20, 1991, Judge Federoff, in his Judgment on Motions dated September 23, 1991, denied the defendants' Motion for Summary Judgment, upheld plaintiffs' right of action as claimants under R.S. 22:1220, and granted in part and denied in part the defendants' Motion to Quash, ordering Continental Casualty's production of its files on Mrs. Hernandez of those documents post dating the effective date of the act, July 6, 1990. On September 24, 1991, defendants applied for Supervisory Writs to this Honorable Court complaining of the denial of the Motion for Summary Judgment and the partial denial of the Motion to Quash, and plaintiffs filed an opposition thereto on the same day. Noting that Continental Casualty Insurance Company enjoyed an adequate remedy on appeal, this Court, per Judges Williams, Klees and Byrnes, denied the application on September 24, 1991⁴.

The suit proceeded to a bench trial on September 25, 1991, and on October 2, 1991, Judge Federoff issued a judgment in favor of Shirley Hernandez and against Continental Casualty Insurance Company and Jeana E. Cefalu, in solido, for \$280,029.00, including \$200,000.00 general damages and \$80,000.00 in special damages itemized as \$26,000.00 for lost wages \$25,000.00 for loss of employment options, \$25,929.00 for medical expenses, and \$4,000.00 for future medical expenses for visits to Dr. Blotner.

In its two page reasons for judgment entered on October, 1991, the Trial Court confirmed that Ms. Cefalu's liability was clear, and that she was solely at fault. The Court noted that, even had there been no sign prohibiting left hand turns at the intersection, defendant "should not have turned left into the immediate path of traffic proceeding on a green light." Reasons, p.1.

Commenting on Mrs. Hernandez's injuries, the court recognized the rupture of the L5-S1 disc during the November 5, 1989 accident, rather than the December accidents, as the cause of Mrs. Hernandez's disability. The court further noted that the plaintiff "experienced a more than usual emotion reaction." However, the Trial Court did not see this condition "as an independent

negligence on the part of Ms. Cefalu. Plaintiffs filed a Motion to Dismiss without Prejudice and/or Sever the Third Party Demand, which was granted by the Court on its Judgment on Motions dated September 23, 1991, on the grounds that the third party action would unduly delay the trial scheduled for September 26, 1991.

⁴ Defendants have not assigned as error or submitted any argument in their brief regarding the trial court's rulings in either the Judgment on Motions or the final Judgment upholding plaintiffs' right of action as claimants under the statute, or its rulings that the statute applied to insurer conduct after the effective date of the statute, including conduct after the commencement of litigation. Therefore, those rulings are not subject to review. See Uniform Rules of the Louisiana Appellate Courts, Rule 1-3: "...The Courts of Appeal will review only issues which were submitted to the trial court **and which are contained in specifications or assignments of error....**" and Rule 2-12.4: "All specifications or assignments of error must be briefed...." See also *Gurvich v New Orleans Private Patrol*, 578 So.2d 195 (La. App. 4th Cir. 1991)(Issue not assigned as error or briefed cannot be considered by the court of appeal, even where issue is raised in motion for appeal); and *Leblanc v Ochsner*, 563 So.2d 312 (La. App. 5th Cir. 1990) (Issues not briefed deemed abandoned.)

medical condition" warranting separate treatment in the judgment. Neither did the Court see fit to award general damages for Mrs. Hernandez's loss of enjoyment of life. Thus, the entire general damages award was estimated at \$200,000.00.

As for special damages, the court held that plaintiff is now and will remain disabled from employment for twelve months after trial, with lost wages as of that time of \$26,000.00. Because the court concluded that she could be retrained for "sedentary employment", it made no award for loss of future earnings, only an award of \$25,000.00 for Mrs. Hernandez's loss of freedom of choosing more strenuous work. The court also awarded Mrs. Hernandez her medical expenses up to December 1990 of \$19,418.00, but awarded only half of her subsequent medical expenses of \$11,223.00 due to the two accidents in December of 1990. Further, the court awarded only \$4,000.00 for future medical expenses of treatment by Dr. Blotner for her psychiatric disorders, with no award for future medical expenses for her physical problems. The court made no awards at all for the loss of Mrs. Hernandez's fringe benefits, or the value of the loss of her household services.

Regarding the plaintiffs' claims for penalties for Continental Casualty Insurance Company's bad faith under R.S. 22:1220, the court properly recognized that insurers owe a duty to claimants as well as insureds under the statute, and implicitly recognized that this duty continues after litigation commences, but held that the statute only provides for the insurer's duty to make a reasonable effort to settle claims, requiring a reasonable settlement offer by the plaintiff which the insurer arbitrarily rejects. The court did not read the statute to require an unconditional tender, and found that, in the instant case, Continental Casualty Insurance Company did not arbitrarily refuse an offer it was bound to consider reasonable. As such, the Court denied plaintiffs' claim for penalties under R.S. 12:220.

On October 31, 1991, defendants filed a Motion and Order for Suspensive Appeal and a suspensive appeal bond, and the order for suspensive appeal was signed on November 7, 1991 and entered November 15, 1991. On November 20, 1991, plaintiffs answered the appeal, specifically setting forth the elements of their cross appeal, in part contesting the judgment. As set forth therein, and discussed in detail *infra*, plaintiffs respectfully request that the court undertake a *de novo* review of omitted elements of general and special damages, and that judgment be modified on appeal to increase the amount of general and special damages, to include penalties for bad faith conduct under Louisiana R.S. 22:1220, and to include sanctions against defendants for frivolous appeal and for filing pleadings solely to delay Mrs. Hernandez's recovery, including attorney's fees and costs.

IV. ISSUES PRESENTED

- 1. Whether the Trial Court's omissions of compensible and proven elements of general and special damages warrant *de novo* review of the omitted elements and an increase in quantum;**
- 2. Whether the Trial Court erred in failing to recognize and compensate Mrs. Hernandez' severe depression, Post Traumatic Stress Disorder, debilitating psychological injuries and mental anguish stemming from the November 1989 accident;**
- 3. Whether the Trial Court erred in failing to recognize and compensate Mrs. Hernandez' established and uncontroverted loss of enjoyment of life;**
- 4. Whether, under the facts of this case, the Trial Court abused its discretion in determining the basic general damages award for Mrs. Hernandez' physical injuries;**
- 5. Whether the Trial Court erred in failing to award Mrs. Hernandez special damages for the established complete impairment of her earning capacity and loss of her profession, rather than solely for loss of employment options;**
- 6. Whether the Trial Court erred in failing to award Mrs. Hernandez the value of her lost fringe benefits;**
- 7. Whether the Trial Court erred in failing to award Mrs. Hernandez the value of her lost household services;**
- 8. Whether the Trial Court erred in failing to compensate Mrs. Hernandez for all of her past medical bills stemming from the November 1989 accident;**
- 9. Whether the Trial Court erred in failing to compensate Mrs. Hernandez for future medical care required for her physical problems;**
- 10. Whether the Trial Court abused its discretion in permitting Plaintiff's treating chiropractor to testify;**
- 11. Whether the Trial Court abused its discretion in excluding a surveillance videotape and the testimony of the private investigator who made the videotape, which were not provided or disclosed to Plaintiffs prior to trial;**
- 12. Whether the Trial Court erred in failing to award the Plaintiffs penalties against Continental Casualty Insurance Company under Louisiana Revised Statutes 22:1220; and,**
- 13. Whether this Court should impose sanctions under La. C.C.P. art. 2124 and La. C.C.P. art. 863 against defendants in light of their unfounded pleadings at the trial level and their frivolous appeal of this judgment, which have been interposed solely for delay.**

V. ASSIGNMENTS OF ERROR

A. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE AND COMPENSATE MRS. HERNANDEZ' SEVERE DEPRESSION, POST TRAUMATIC STRESS DISORDER, DEBILITATING PSYCHOLOGICAL INJURIES AND MENTAL ANGUISH STEMMING FROM THE NOVEMBER 1989 ACCIDENT.

B. THE TRIAL COURT ERRED IN FAILING TO RECOGNIZE AND COMPENSATE MRS. HERNANDEZ FOR HER LOSS OF ENJOYMENT OF LIFE.

C. THE TRIAL COURT ERRED IN FAILING TO AWARD MRS. HERNANDEZ SPECIAL DAMAGES FOR THE COMPLETE IMPAIRMENT OF HER EARNING CAPACITY AND LOSS OF HER PROFESSION.

D. THE TRIAL COURT ERRED IN FAILING TO AWARD MRS. HERNANDEZ THE VALUE OF HER LOST FRINGE BENEFITS.

E. THE TRIAL COURT ERRED IN FAILING TO AWARD MRS. HERNANDEZ THE VALUE OF HER LOST HOUSEHOLD SERVICES.

F. THE TRIAL COURT ERRED IN FAILING TO COMPENSATE MRS. HERNANDEZ FOR ALL OF HER PAST MEDICAL BILLS

G. THE TRIAL COURT ERRED IN FAILING TO COMPENSATE MRS. HERNANDEZ FOR FUTURE MEDICAL CARE REQUIRED FOR HER PHYSICAL PROBLEMS.

H. THE TRIAL COURT ERRED IN FAILING TO AWARD PENALTIES UNDER LOUISIANA REVISED STATUTES 22:1220.

IV. ARGUMENT ON ASSIGNMENTS OF ERROR

A. The Trial Court Correctly Determined that the November 1989 Accident, and not the Minor December Accidents, were the Cause of Mrs. Hernandez' Injuries and Damages.

Defendants unbelievably claim that the minor December 1990 accidents, in which Mrs. Hernandez was rear ended, were "debilitating," and that they, and not the November 1989 accident, which required four hospitalizations and major surgery in October of 1990, caused **all** of her permanent disability, physical and emotional problems, and inability to work after December 1990. Defendants further argue that the Trial Court ignored these accidents in awarding general damages, lost wages and past medical expenses despite the Trial Court's express recognition of the accidents, which, the court stated, stretched the scar tissue from the unsuccessful surgery on her ruptured disc required by the first accident, and **temporarily** exacerbated her pain, but were not "the cause of any disabling or permanent low back pathology." Reasons, p.1. The trial court certainly did not ignore these accidents, but simply concluded that the November 1989 accident was the legal cause of Mrs. Hernandez' injuries and most of her damages.⁵ The evidence shows that the Trial Court was correct.

Mrs. Hernandez' treating physicians, and both of defendants' doctors, the only defense witnesses who testified on the subject, concluded that the November 1989 accident, the resultant ruptured disk, and the partially unsuccessful surgery in October of 1990, two months before the minor December accidents, were the cause of Mrs. Hernandez' subsequent problems. According to Dr. LeClerq, her present condition, including a fifteen percent disability for her back, with residual problems caused by greater than normal post operative adhesions, was caused by the first accident. III R. 195, 221, 233. The two december accidents involved mainly her neck, not her back. III R. 220. Further, any pain she suffered to her back as a result of the second two accidents would not have occurred absent the scar tissue from the partially unsuccessful first surgery, which was stretched, blocking the nerve. III R. 231-232, 237-238. **Defendants' own Doctor, Dr. Walker, based on an independent medical examination six weeks prior to trial, confirmed that her physical problems were a result of the initial injury in the November 1989 accident, and the resulting scar tissue.** IV R. 186-188. He testified that he reported this to the insurance company, and stands by it today. IV R. 185, 188.

Dr. Blotner, her treating psychiatrist, also concluded that the first accident, and not the minor December accidents, caused her Post Traumatic Stress Syndrome, Major Depression, mental anguish, and loss of enjoyment of life. IV R. 119-122, 129-30. In addition to pointing out that the severity and trauma of the first accident, wherein her head smashed through the

⁵ The court concluded that \$5611.50 of Mrs. Hernandez' post December 1990 medicals were attributable to the December accidents, an error which is addressed *infra*.

windshield, and her disc at L5-S1 was ruptured requiring major surgery, was incomparable to the minor December accidents, wherein she suffered no lasting effects, he expressly stated that her anxiety dates back to the November 1989 accident, which most closely mimics the situation in which she has the most anxiety today, as a passenger, not a driver, in a car. IV R. 116, 176-77. Further, he pointed out that she would not be suffering today had the surgery been successful, and restored her to a point where she could function. IV R. 130. Finally, he stated that any reaction she may have had to the second two accidents would not have occurred absent the first accident- the second accidents were not severe enough to precipitate her disorders.IV R.161-163. Even Dr. Colomb, defendants' own psychiatrist, stated that her anxiety and depression began with the 1989 accident, and were but aggravated by the later accidents.V R. 24.

Accordingly, the evidence overwhelmingly establishes the November 1989 accident as the cause of Mrs. Hernandez' physical and psychological injuries, and the cause of her lost wages and medical treatments. But for the prior injury, Mrs. Hernandez would not have been affected to any discernable extent by the later minor accidents. And, even if the two later accidents aggravated her previous injuries, under the law of this state, defendants are still responsible for her damages.

For example, in *Starnes v Caddo Parish School Board*, 598 So.2d 472 (La. App. 2d Cir. 1992), the plaintiff was involved in a minor accident with a school bus, which caused an unstable knee. His Doctor prescribed a knee brace, but did not recommend surgical intervention. Approximately four months later, the plaintiff severely injured his knee in a volleyball game, at which time he was not wearing his knee brace, and required major surgery on the knee. The trial court held the school board responsible not only for the initial accident and injury, but also for the subsequent accident, and the court of appeal affirmed, noting that:

If the negligent actor is liable for an injury which impairs the physical condition of another's body, the actor is also liable for harm sustained in a subsequent accident which would not have occurred had the other's condition not been impaired, and which is a normal consequence of such impairment.

598 So.2d at 477, citing Restatement (Second) of Torts Section 460 (1965). See also *Ward v State Farm Mutual Automobile Ins. Co.*, 182 So.2d 130,134 (La. App. 4th Cir. 1966) *writ denied* 184 So.2d 26 (La. 1966), in which this court held that hypertension, headaches and anxiety unrelated to the accident at issue, which increased the plaintiff's disability and aggravated the neck and back strain caused by the accident, did not warrant decreasing the plaintiff's damages; and *Eble v City of New Orleans*, 181 So.2d 805, 808 (La. App. 4th Cir. 1966), in which this court refused to reduce amounts awarded because of the fact that the plaintiff suffered a later fall reinjuring herself. Cf. *Weber v Charity Hospital of Louisiana*, 475 So.2d 1047 (La. 1985), wherein the Supreme Court held that tortfeasors are liable not only for the initial injuries suffered

by the plaintiff, but also for subsequent injuries caused by the negligence of medical personnel in treating the initial injuries.

As the *Weber* Court discussed, phrased differently, the issue becomes one of causation, requiring examination of both the cause in fact and the legal cause of Mrs. Hernandez' injuries. As for cause in fact, or "but for" causation, it is clear that any damages caused by the minor December 1990 rear end collisions would not have been sustained absent the initial injury in November 1989 and the unsuccessful surgery in October 1990. The treating physicians and the Trial Court recognized that any results of the second two accidents arose from the scar tissue from the surgery, which stretched, temporarily blocking her nerves and causing her pain. Without this scar tissue, the minor December 1990 accidents would not have affected her. And, Dr. Blotner stressed that minor accidents of that sort could never have caused, although they may have aggravated, her Post Traumatic Stress Disorder. Defendants put on no evidence to the contrary, in fact, both of their doctors agreed that the November 1989 accident was the cause of her subsequent problems, with perhaps some aggravation caused by the subsequent accidents. As for legal cause, which requires a duty-risk analysis, the duty on the driver in this case to refrain from negligent injury of another clearly encompasses the risk of weakening or impairing the tort victim's physical and mental condition, so as to render her more susceptible to aggravation of the injuries by subsequent accidents.

As such, the Trial Court was correct in holding defendants liable for Mrs. Hernandez' injuries, whether or not they were aggravated by the minor December 1990 rear end collisions. Defendants are liable for the consequences of their negligence, which includes any aggravation of Mrs. Hernandez' condition caused by the later accidents, which would not have occurred absent defendants' fault.

B. The Trial Court's Omission of Proven and Compensible elements of General and Special Damages Mandates Increasing Mrs. Hernandez' Recovery.

1. This Court Must Conduct a *De Novo* Review of Omitted Elements of the Damages Awarded by the Trial Court.

Although appellate review of damage awards is typically governed by the principles set forth by the Louisiana Supreme Court in *Coco v Winston Industries, Inc.*, 341 So.2d 332 (La. 1977), providing for modification of a damages award upon a determination of an abuse of discretion by the trier of fact, the trial court's factual and legal errors in the instant case partly remove this court's review from the dictates of *Coco*.

As recognized by the Louisiana Supreme Court, by this Honorable Court, and by every other circuit court of appeal in this state, where a trial court's quantum award omits compensible and proven elements of damages, the appellate court must exercise its own discretion to make a

res nova determination of additional damages to compensate for the omitted elements. *See Mart v Hill*, 505 So.2d 1120 (La. 1987) (*res nova* determination of quantum is required where factual errors relate to cause, extent or duration of injury); *Jackson v United States Fidelity and Guaranty Co.*, 382 So.2d 223, 230 (La. App. 3d Cir. 1980) *writ denied* 385 So.2d 275 (La. 1980) (where damages are to compensate for elements which the trial court overlooked or for which it refused to award damages, increasing the award does not violate *Coco.*); *Alphonso v Charity Hospital of Louisiana*, 413 So.2d 982 (La. App. 4th Cir. 1982) *writ denied* 415 So.2d 952 (La. 1982) (when compensible injuries proven by a preponderance are not included in the judgment, it is the function and duty of the trial court to increase the judgment.)⁶

As demonstrated below, in the instant case, the trial court has failed to compensate Mrs. Hernandez for legally compensible elements of both general and special damages which were clearly proven at trial. Accordingly, this court is required to increase the damages awarded in order to rectify the trial court's omissions.

2. The Trial Court erred in omitting compensible and proven elements of General Damages from the judgment.

a. The Trial Court erred in failing to recognize and compensate Mrs. Hernandez' severe depression, Post Traumatic Stress Disorder, and debilitating psychological and mental anguish stemming from the November 1989 accident.

The Trial Court brushed off the extensive testimony of Dr. Adrian Blotner, Mrs. Hernandez' treating psychiatrist (IV R. 91-130,145,159-60,170-177), Bobby Roberts, her vocational evaluationist (III R. 71,98), and Mr. and Mrs. Hernandez (III R. 8-11,48; IV R.27-28,33-35) detailing Mrs. Hernandez' severe, debilitating and continuing psychological injuries, including major psychiatric disorders of severe depression and Post Traumatic Stress Disorder, with the comment that Mrs. Hernandez just had an "emotional reaction" to the 1989 accident which did not require any special compensation. Reasons, p.1.

The only evidence in the record which could possibly have been construed by the court to support this conclusion, which is contradicted by at least four witnesses and the Diagnostic and Statistical Manual of Mental Disorders (3d Ed.), the definitive diagnostic reference for mental health professionals, (IV R. 103) is the completely erroneous opinion by Defendant's psychiatric expert Dr. Colomb, a Veteran's Administration Doctor, (V R. 6) that only events out of the realm of human experience, such as war, can trigger Post Traumatic Stress Disorder. V R.

⁶ See also *Pullen v Ziegler*, 562 So.2d 1093 (La. App. 4th Cir. 1990) *writ denied* 567 So.2d 106 (La.1990) (factual or legal errors below mandate independent evaluation of record and *de novo* quantum award); *Vidrine v Keller*, 541 So.2d 940 (La. App. 5th Cir. 1989) (where an increase is required to compensate a plaintiff for damages not attributed to the accident in the judgment, the award is *res nova*); *Marcel v Allstate Ins. Co.*, 536 So2d 632 (La. App. 1st Cir. 1988) *writ denied* 539 So.2d 631 (La. 1989) (where the trial court commits an error of law, e.g., an inconsistent finding of future medical expenses without a general damages award, a *res nova* assessment of damages is required).

13. This opinion has no basis in fact, and cannot serve as a reason for disregarding Mrs. Hernandez' established Post Traumatic Stress Disorder.

In *Alphonso v Charity Hospital of Louisiana*, 413 So.2d 982 (La. App. 4th Cir. 1982) writ denied 415 So.2d 952 (La. 1982); this Court held that Post Traumatic Stress Disorder injuries deserve compensation, 413 So.2d at 986, citing *Lalonde v Weaver*, 360 So.2d 542 (La. App. 4th Cir. 1978) and *Humphries v Delta Fire and Casualty Co.*, 116 So.2d 130 (La App. 1st Cir 1959). See also *Jackson v United States Fidelity and Guaranty Co.*, 382 So.2d 223 (La. App. 3d Cir. 1980) writ denied 385 So.2d 275 (La. 1980) and *Jackson v International Paper Company*, 163 So.2d 362 (La. App. 3d Cir. 1964) writ denied 165 So.2d 484 (La 1964). Further, this court has judicially recognized the symptoms of Post Traumatic Stress Disorder:

"Post Traumatic Stress Disorder has familiar symptoms: feelings of anxiety which result from an event that would create significant symptoms of stress in most people; feelings of re-experiencing the trauma; intrusive recollections of the event; and avoidance of activities or people which arouse those recollections."

Alphonso, supra, 413 So.2d at 986.

Moreover, this court, and every other appellate court, has recognized that the events precipitating Post Traumatic Stress Disorder need not be as earth shattering and horrific as first hand experience of War: *Smith v Farm Bureau Insurance Company*, Slip Op. No. 90-1306, 1992 WL 109805 (La. App. 3d Cir. May 20, 1992) involved Post Traumatic Stress Disorder caused by a pet racoon bite; *Gagnard v Baldrige*, 597 So.2d 1269 (La. App. 3d Cir. 1992) involved a slap on the back by plaintiff's employer; *Weaver v Siegling*, 569 So.2d 97 (La. App. 4th Cir. 1990) writ denied 572 So.2d 67 (La. 1991), involved an auto accident with only minor injuries; *Jackson v United States Fidelity and Guaranty Co.*, supra, involved an automobile accident with only moderate soft tissue injuries; *Mayer v McNair Transport Inc.*, 384 So.2d 525 (La. App. 2d Cir. 1980) involved a woman who watched her home burn down, to whom the court awarded \$18,000.00; and *Lalonde v Weaver*, 360 So.2d 542 (La. App. 4th Cir 1978) involved a rear end collision with only soft tissue injuries, for which this court awarded the plaintiff \$45,000.00 for Post Traumatic Stress and depression reaction.

The evidence in this case conclusively established that Mrs. Hernandez suffered and still suffers all of the symptoms of Post Traumatic Stress Disorder, including anxiety, panic attacks, re-experiencing the accident, intrusive recollections, and fear and avoidance of driving. Moreover, Plaintiffs clearly established, **without any testimony or evidence to the contrary**, that Mrs. Hernandez is afflicted with not only Post Traumatic Stress Syndrome, but also anxiety attacks, nightmares, sleeplessness, crying spells and yet another major psychiatric disorder: major depression. VI R. 121-123. She still takes anti-depressants, anti-anxiety drugs, and sleeping medications. IV R. 96-97. Her psychological injuries, from dealing with prolonged pain and the

restrictions on her activities, her marriage, and her career, extend even beyond her physical disability. IV R. 129-130. These disorders, and accompanying mental anguish, according to Dr. Blotner, manifest in "severe social and occupational dysfunction" (IV R. 106-109) which prevent her return to work, and have had a "severe impact on her ability to enjoy life." IV R. 129-130.

As such, it was clear error for the trial court to refuse to compensate her separately for her established and unrefuted psychiatric problems, and to brush them off as simply a more than normal "emotional reaction" to her trauma. Plaintiffs submit, considering the profound effect her psychiatric disorders have had upon her life, that an independent general damages award of no less than \$50,000.00 should be awarded for Mrs. Hernandez' emotional anguish occasioned by her severe depression and Post Traumatic Stress Disorder, in addition to the general damages awarded by the Trial Court.

b. The Trial Court erred in failing to compensate Mrs. Hernandez for her loss of enjoyment of life.

The Trial Court further erred in failing to recognize and compensate Mrs. Hernandez' loss of enjoyment of life: indeed, the Trial Court did not even mention this separate and legally compensible element of damages in its judgment.

Louisiana has joined the growing number of states which recognize "loss of enjoyment of life" as a compensible element of damages completely separate and distinguishable from physical and mental pain and suffering.⁷ For example, in *Andrews v Mosley Well Service*, 514 So.2d 491 (La. App. 3d Cir 1987) *writ denied* 515 So.2d 807 (La. 1987), the plaintiff suffered a ruptured or bulging disk which required surgery at L3-4. As in the instant case, the surgery was only partially successful, and the plaintiff suffered permanent stiffness and pain in his back. Mr. Andrews, like Mrs. Hernandez, could not return to manual labor, could not work full time, could not bend, stoop, push, pull, climb or lift, and could not sit or stand for long periods. He, like Mrs. Hernandez, was unable after the surgery to take part in recreational activities. His only activities, like Mrs. Hernandez' activities, included some light housecleaning and cooking. Further, as with Mrs. Hernandez, Mr. Andrews' inability to work and support his family, as well

⁷ These states include: Alaska [see *Buoy v ERA Helicopters Inc.* 771 P.2d 439 (Alaska 1989)]; Colorado [see *Deweese v United States*, 419 F.Supp 170 (D.C. Colo 1976) *aff'd* 576 F.2d 802 (10th Cir. 1978)]; Connecticut [see *Katsetos v Nolan*, 170 Conn 637, 368 A.2d 172 (1976)]; Florida [see *Powell v Hegney*, 239 So.2d 599 (Fla. App. Div. 4 1970)]; Georgia [see *Underwood v Atlanta & W.P. Ry. Co.* 105 Ga. App. 340, 124 S.E. 2d 758, *aff'd in part and rev'd in part* 218 Ga. 193, 126 S.E. 2d 785 (1962)]; Illinois [see *Sherrod v Berry*, 629 F.Supp. 159 (N.D. Ill. 1985), *aff'd* 827 F.2d 195 (7th Cir. 1987) *vacated on other grounds* 835 F.2d 1222 (7th Cir. 1988), *on rehearing* 856 F.2d 802 (7th Cir 1988) ("Hedonic damages")]; Indiana [see *King's Indiana Billiard Co. v Winters* 106 N.E. 2d 713 (Ind. App. 1952) *overr'd on other grounds* 154 N.E. 2d 708 (Ind.1958)]; Maryland (see *McAlister v Carl* 233 Md. 446, 197 A.2d 140 (1964)]; Michigan [see *Dyer v United States*, 551 F. Supp. 1266 (W.D.Mich 1982)]; Minnesota [see *Anunti v Payette*, 268 N.W. 2d 52 (Minn 1978)]; Nebraska [see *Swiler v Baker's Super Market, Inc.*, 203 Neb. 183, 277 N.W.2d 697 (Neb. 1979)]; New Jersey [see *Kasiski v Central Jersey Power and Light Co.* 132 A. 201 (N.J. 1926)]; New York [see *McDougald v Garber*, 73 N.Y.2d 246, 536 N.E.2d 372 (N.Y. 1989)]; Tennessee [see *Thompson v National Railroad Passenger Corp*, 621 F.2d 814 (6th Cir. 1980) *cert denied* 449 U.S. 1035 (1980)]; Washington [see *Reed v Jamieson Inv. Co.* 168 Wash. 111, 10 P.2d 977(1932)]; Wisconsin [see *Benson v Superior Mfg. Co.*, 147 Wis. 20, 132 N.W. 633 (1911)]; and Wyoming [see *Fox v Fox*, 75 Wyo. 390, 296 P.2d 252 (1956)]. See generally Annot., *Damages Element- Loss of enjoyment of Life*, 34 ALR 4th 293, and Annot. Supp.

as the restrictions on his daily activities, took their toll on his self esteem. The jury in Andrews awarded Mr. Andrews a total sum of \$671,000.00 dollars. \$400,000.00 of that amount was for general damages, specifically itemized as \$250,000.00 for pain and suffering; \$75,000.00 for mental pain and suffering, and \$75,000.00 for loss of enjoyment of life.

Defendants argued on appeal that the award was excessive as a matter of law, because "loss of enjoyment of life" was not a separately compensible element of general damages, and that the award was thus duplicitous of the pain and suffering award. The court of appeal disagreed, noting that, as the trial court had correctly explained to the jury, loss of enjoyment of life is indeed different from physical and mental pain and suffering and deserves separate compensation. 514 So.2d at 499.

Other Louisiana courts as well have affirmed separate awards for loss of enjoyment of life as an additional compensible element of general damages in addition to separate awards for physical pain and suffering, mental pain and suffering and physical disability. See e.g. *Falgoust v Richardson Industries Inc.*, 552 So.2d 1348 (La. App. 5th Cir. 1989) writ denied 558 So.2d 1126 (La. 1990), affirming a \$200,000.00 award for loss of enjoyment of life in addition to separate awards for physical pain and suffering, mental suffering and emotional stress and physical disability; *Benoit v State Farm Automobile Insurance Co*, Slip. Op. No. 90-1369, 1992 WL 109804 (La. App. 3d Cir. May 20, 1992), affirming separate awards for physical and mental suffering and loss of enjoyment of life; *Pitre v Government Employee's Insurance Company*, 596 So.2d 256 (La. App. 3d Cir. 1992) writ denied No. 92-C-1375 (La. July 1, 1992) noting that failure to award damages for loss of enjoyment of life offset a grossly excessive award for medical expenses and loss of future earnings; *Davis v Wal-Mart, Inc.*, 594 So.2d 557 (La. App. 3d Cir. 1992), writ denied No. 92-C-1029 (La. June 5, 1992), reversing on other grounds a slip and fall case wherein plaintiff was awarded \$25,000.00 for loss of enjoyment of life in addition to \$50,000 awarded for pain, suffering and mental anguish; *Bernard v Royal Insurance Company*, 586 So.2d 607 (La. App. 4th Cir. 1991) writ denied 589 So. 2d 1058 (La. 1991), affirming a \$25,000 award for loss of enjoyment of life in addition to four separate general damages awards for pain and suffering, mental anguish, disfigurement and disability.

Considering the uncontradicted evidence in this case as to the deterioration of Mrs. Hernandez' formerly happy marriage and life, her continuing depression, anxiety attacks, and mental anguish (IV R. 91-130,145,159-60,170-177), the severe limitations upon her physical activities, including her former sports activities and walks with her husband in the park, her household activities and her sex life, (III R. 8-11,48; IV R.27-28, 33-35) her ability to drive and her ability to work, (III R. 71,98; Exhibit 7), the effect these limitations have had on her self esteem and morale (VI R. 33-35), and Dr. Blotner's express testimony that the November 1989 accident and its resulting injury and disability have had a "severe impact on her ability to enjoy

life" (IV R. 129-130), the lower court clearly erred in failing to even consider Mrs. Hernandez' loss of enjoyment of life as a separate element of damages, and in failing to compensate her for this legally compensible and proven injury. Based upon the *Andrews* decision, which is remarkably similar to the instant facts, plaintiffs respectfully suggest that an additional award of \$75,000.00 is merited to compensate Mrs. Hernandez for her loss of enjoyment of life occasioned by the 1989 accident.

c. The Trial Court Did not Abuse its Discretion in Awarding \$200,000 in General Damages for Mrs. Hernandez' physical injuries.

Other than to correct the Trial Court's erroneous omission of damages for the elements of psychological injury, mental anguish and loss of enjoyment of life by adding additional damages,⁸ this court should affirm the basic general damages award of \$200,000.00 for her physical injuries as well within the court's discretion.

In *Andrews v Mosley Well Service*, 514 So.2d 491 (La. App. 3d Cir. 1987) writ denied 515 So.2d 807 (La. 1987), the court of appeal, as discussed *supra*, affirmed a general damages award of \$400,000.00 to the plaintiff, who required one surgery which was partially unsuccessful, as in the instant case, for his back injury. Even without the \$75,000.00 award for loss of enjoyment of life, the award totaled \$325,000.00. In *Thibodaux v ACME Truck Lines*, 443 So.2d 716 (La. App. 5th Cir. 1983) writ denied 445 So.2d 439 (La. 1984) the Fifth Circuit awarded \$350,000.00 in general damages, again for one back operation. In *Spangler v North Star Drilling Co.*, 552 So.2d 673 (La. App. 2d Cir 1989) the court of appeal, noting that the plaintiff had undergone three myelograms and an MRI, fewer than suffered by Mrs. Hernandez, awarded \$375,000.00 in general damages. Although the plaintiff in *Spangler* had two surgeries, the second surgery was necessitated by painful scar tissue which developed after Mr. Spangler's first surgery, a condition Mrs. Hernandez suffers which may well require another surgery to correct. III R. 201.

This Court, in *Hoffman v Travelers Insurance Co.*, 587 So.2d 143 (La. App. 4th Cir 1991), awarded \$440,000.00 in general damages for a C5-6 fusion; in *Burton v Berthelot*, 567 So.2d 649 (La. App. 4th Cir. 1990) writ denied 569 So.2d 989 (La. 1990), awarded \$290,000.00 for physical pain and suffering plus \$87,000.00 mental pain and suffering, for a total general damages award of \$378,300.00 for a herniated disc and depression; in *Johnson v Dufrene*, 433 So.2d 1109 (La. App. 4th Cir. 1983) awarded \$300,000.00 in general damages; and in *Labit v*

⁸ Considering the numerous cases mandating a *de novo* increase in damages where the trial court overlooks evidence and fails to include damages for clearly established injuries, this court should simply add appropriate damages for Mrs. Hernandez' injuries excluded from the judgment, including \$50,000.00 for her severe and continuing depression and Post Traumatic Stress Disorder and \$75,000.00 for her loss of enjoyment of life, to increase the existing general damages award of \$200,000.00 to at least \$325,000.00. See cases cited in section IV(A)(1), *supra*, particularly *Alphonso v Charity Hospital of Louisiana*, 413 So.2d 982 (La. App. 4th Cir 1982) writ denied 415 So.2d 952 (La. 1982), in which this Court noted that it is the function and duty of the trial court to increase the damages when compensible injuries proven by a preponderance are not included in the judgment.

Setiff, 489 So.2d 942 (La. App. 4th Cir 1986) awarded \$375,000.00 general damages, for injuries similar to Mrs. Hernandez's.

Considering the general damages awards in many cases without the severe psychological injury, emotional injury, and loss of enjoyment of life suffered by Mrs. Hernandez, Plaintiffs respectfully submit that this court should sustain the basic award of \$200,000 for her physical injuries, and add to that the requisite amounts to compensate for the omitted elements of Post Traumatic Stress Disorder (\$50,000) and Loss of Enjoyment of Life (\$75,000), to increase the award to \$325,000.

3. The Trial Court erred in Omitting Compensible and Proven Elements of Special Damages

a. The Trial Court erred in failing to award Mrs. Hernandez special damages for the complete impairment of her earning capacity and loss of her profession.

The Trial Court held that Mrs. Hernandez would be disabled from employment for twelve months from the date of trial, but that she would "thereafter be able to do sedentary employment of which she is now capable or for which she is easily trainable. She will be able to earn as much as she was earning before our accident. But she has lost the freedom of choosing more strenuous work and for this loss she will be awarded \$25,000.00." (Trial Court Reasons for Judgment at p. 2). These conclusions by the trial court are factually unsupportable: Mrs. Hernandez' earning capacity has been effectively eliminated by the physical and emotional effects of her injuries.

Dr. Blotner established that Mrs. Hernandez is not employable in any capacity at this time due to her physical pain and emotional suffering. IV R. 145. He could not definitely say when or if her depression and Post Traumatic Stress Disorder, which have continued years after her accident, would be cured. Moreover, from an employers' standpoint, considering Mrs. Hernandez' history of psychiatric problems, she is simply undesirable as an employee. Mr. Munier, defendant's own vocational expert, testified that he could not imagine an employer even considering an application from, much less hiring, a potential employee with a major psychiatric illness such as severe depression or Post Traumatic Stress syndrome. IV R. 240-242.

As for her physical disability, and its effect on her ability to work, Mr. Roberts, who performed a full range of physical, educational, intelligence and aptitude tests on Mrs. Hernandez, opined that her return to any type of work is "unpredictable" (III R. 98) with an "extremely guarded prognosis." Exhibit 7. The most serious problem from a physical standpoint is Mrs. Hernandez' 10-15% permanent disability for her back with permanent residual pain and problems from the partially unsuccessful surgery. III R. 195, 221, 233. As such, she has a sustained sitting tolerance of only thirty minutes, and a standing tolerance of only about two hours. Dr. Leclerq and Mr. Roberts both noted that Mrs. Hernandez, of course, is unable to

return to her former employment as a shoe saleswoman, which requires bending, lifting and climbing. III R. 73-74. Nor is she physically capable of performing any of the other types of work with which she has had some experience, including waitressing, clerical, and janitorial work, because of her incapacity for bending, carrying and sustained sitting or standing. III R. 60-61,66,83. She is unable to do "sedentary" work, which requires sustained sitting (III R. 83) or "light" work, which requires standing, sitting and working with weight at the ten to twenty pound range under Department of Labor classifications. III R. 85. Mrs. Hernandez corroborated this, testifying that sitting and standing are painful, and she is forced to spend most of her time lying down or propped up on pillows. IV R. 27-28.

In sum, Mrs. Hernandez, who has only a low to average intelligence (III R. 65), is incapable of performing any of the jobs for which she is intellectually and educationally capable. Moreover, from a physical standpoint, in order to find employment, Mrs. Hernandez would have to find a job where she could lie down, which is impossible. Her injuries are permanent, and, as Doctor Batherson testified, she will continue to suffer back pain and discomfort for the rest of her life. III R. 136-138. Clearly, she is physically and mentally incapable of employment for now, and, according to the great weight of the evidence, for the rest of her life. Thus, the trial court clearly erred in determining that she was physically or mentally capable of "sedentary" employment, or that, considering her physical and mental disabilities, she could ever obtain employment.

Furthermore, even were Mrs. Hernandez physically capable of performing sedentary work, which the evidence proves she is not, such work would require extensive retraining, which legally she is not required to undertake. The type of clerical work which Mr. Munier opined that she could physically perform required typing skills of at least 40-45 words per minute. IV R. 231. However, Mrs. Hernandez, who has not done any type of clerical work in ten years (IV R. 29-30), and has never done the type of work suggested by Mr. Munier, types at only 20 words per minute (IV R. 29-30), and further has no familiarity with computer equipment or word processing. As such, in order to qualify for the "sedentary" positions, Mrs. Hernandez would be required to go back to school to retrain for an entirely unfamiliar field. Under the controlling law, however, such retraining in a different field is not legally required, and Mrs. Hernandez must be compensated for loss of the ability to work in her former profession.

As this Court recently held in *Corliss v Elevating Boats, Inc.* Slip. Op. 91-CA-1768, 1992 WL 97078 (La. App. 4th Cir. May 13, 1992), injured plaintiffs must be compensated for the loss of their **profession** and loss of future earning **capacity**, not loss of future earnings, **whether or not they choose to retrain for another type of employment:**

The law allows not merely for loss of future earnings, but rather for loss of earning capacity. It is well known that under present economic conditions and under the current insurance rates paid by employers, employers will not hire a person with physical disabilities, other than under federally subsidized programs for the hiring of the handicapped, for fear of increases in their insurance. The existence of the injury places plaintiff at a distinct disadvantage in the marketplace of job competition. Likewise the earning capacity loss for which plaintiff is compensated is not loss of future earnings, but is loss of future earning capacity. Plaintiff was in his chosen profession at the time of the accident. He is compensated for the loss of that profession. If plaintiff is able to compensate for his injury by retraining himself to engage in another profession, he is not penalized by his efforts to do so, but rather is still awarded damages for the lost profession.

Corliss, 1992 WL 97078, at p 6 (Emphasis Added.)

Thus, even assuming that Mrs. Hernandez is capable of some type of employment, which plaintiffs deny, she is still entitled to an award for loss of her chosen profession and loss of her earning capacity, and not just the minor sum the trial court awarded for loss of her employment "options" to choose strenuous work. And, under this Court's decision in *Corliss, supra*, Mrs. Hernandez is simply not required to retrain herself, and cannot be penalized even if she is determined to have the ability to do so, which plaintiffs deny. The court still must award her damages for her lost profession and the uncontroverted impairment of her earning capacity.

Dr. Melville Wolfson, a noted expert and professor of economics, concluded that the present value of her future impairment of earning capacity if she is unable to return to work is \$266,746.00. IV R. 64. Even if she were able to find work at a minimum wage job, which plaintiff submits will not be possible considering her physical and mental impairment and history, Dr. Wolfson testified that the present value of her loss is \$86,000.00. IV R. 65. Thus, this Court should increase the special damages to award Mrs. Hernandez \$266,746 for the impairment of her earning capacity and loss of her profession.

b. The Trial Court erred in failing to award Mrs. Hernandez the value of her lost fringe benefits and lost household services.

The Trial Court completely overlooked the evidence regarding the value of Mrs. Hernandez' lost fringe benefits, and failed to award any amounts for this legally compensable element of damages. Based on the fact that Mrs. Hernandez. would have received employer contributions for her hospitalization insurance from Cook and Love Shoes, from which she was fired when she could not return to work within ten days of her surgery, Dr. Wolfson testified that the present value of her lost fringe benefits is \$26,383.00. IV R. 74. As this court has often stated, such fringe benefits of employment are recoverable as a matter of law. *See e.g. Averno v Industrial Fabrication and Marine Service, Inc.*, 562 So.2d 1157 (La. App. 4th Cir. 1990) and *Faciane v Carter*, 381 So.2d 1312 (La. App. 4th Cir. 1980.) Other circuits concur: see *Hawthorne v Southeastern Fidelity Ins. Co.* 387 So.2d 26 (La. App. 3d Cir. 1980) and *Unbehagen v Bollinger Workover, Inc.*, 411 So.2d 507 (La. App. 1st Cir. 1982.) As such, the trial

court clearly erred in failing to award special damages for Mrs. Hernandez' lost fringe benefits, and this Court should increase the damages award to include \$26,383.00 in lost fringe benefits.

As for household services, despite uncontroverted testimony that Mrs. Hernandez is now unable due to constant back pain to perform at least ten hours per week for personal service activities such as household cleaning, washing, mopping, ironing, and other chores (II R. 12, IV R. 27-28, 31-32) the Trial Court failed to award any amounts to compensate Mrs. Hernandez for the loss of her household services. This Court has confirmed that the loss of household services is compensable, See e.g., *Averna v Industrial Fabrication and Marine Service, Inc.*, 562 So.2d 1157 (La. App. 4th Cir 1990); See also *Brooks v City of Baton Rouge*, 558 So.2d 1177 (La. App. 1st Cir. 1990) *writ denied* 566 So.2d 982 (La. 1990) (affirming \$95,000.00 award for loss of household services). Dr. Wolfson testified, using a figure of 10 hours per week to age 70, assuming a life expectancy of age 79, based on the rate of \$6.29 per hour, the equivalent of her previous income, that the present value of lost personal services is \$82,272. As such, the Trial Court clearly erred in refusing to award compensation for this legally compensable element of damages, and this Court should add \$82,272.00 to Mrs. Hernandez' special damages.

c. The Trial Court erred in failing to award all of Mrs. Hernandez' past medical bills

Although the Trial Court found that the cause of Mrs. Hernandez' back injury was the November 1989 accident, and not the minor December 1990 rear end collisions, it allocated fully half of Mrs. Hernandez' medical expenses after the December accidents, which as of the time of trial totaled \$11,223.00, for treatment of her back and neck, to the December accidents, reducing her recovery to \$5,611.50 of her medical expenses. The facts clearly show that the court was in error: Mrs. Hernandez was still undergoing treatment just prior to the December accidents, indeed, the accidents occurred on her way home from Dr. LeClerq's office, whom she had just visited because of her continued back and neck pain and problems. The post December medicals, which included testing and hospitalization necessitated by the partially unsuccessful surgery performed two months earlier, continued conservative treatment for her back by physical therapists and a chiropractor, and psychiatric care necessitated by the November 1989 accident, were all attributable to the November 1989 accident. Mrs. Hernandez testified that the problems caused by the December 1990 rear end collisions were minor and temporary, as did her treating physicians.[See record citations supra, section IV(A)]

Therefore, because the evidence proved more likely than not that her past medical treatments were necessitated by the November 1989 accident, the trial court's arbitrary reduction of Mrs. Hernandez' past medical bills must be reversed, and this court should award an additional \$5611.50 in special damages.

d. The Trial Court erred in failing to compensate Mrs. Hernandez for future medical care required for her physical problems.

Although the Trial Court even recognized that Mrs. Hernandez would be physically unable to work for at least twelve months following trial, it made absolutely no provision in the judgment for future medical care for her physical condition. In fact, the only award at all for future medical care of any sort was \$4000.00 for psychiatric treatment by Dr. Blotner.⁹ Not only is this omission inconsistent with the court's factual findings regarding her disability, it is also refuted by the uncontroverted testimony of Dr. LeClerq and Dr. Batherson.

Again, Dr. Leclerq, Mrs. Hernandez' neurosurgeon, testified that Mrs. Hernandez suffers from a 10-15% permanent disability for her back caused by the first accident (III R. 195, 221) with residual pain and problems caused by post operative adhesions and scar tissue after the partially unsuccessful surgery. He further testified that she has nerve damage as a result of the scar tissue from the surgery (III R. 231), and definitely stated that follow up visits would be required. III R. 19. Dr. Batherson, to whom Dr. LeClerq referred Mrs. Hernandez, testified, based on his treatment and on her continued suffering two years after the accident, that her injuries are most probably permanent (III R. 137-38), and she will continue to live in pain for the rest of her life. III R. 136-38.

Both Dr. LeClerq, Mrs. Hernandez' treating Neurosurgeon, and Dr. Batherson, her treating chiropractor, recommended that she continue her chiropractic treatment every one to two weeks, at \$45.00 per visit, for the rest of her life, as long as it continues to afford her relief. III R. 138, 192-93, 222. This testimony was not refuted by any testimony or evidence from the defendants. Therefore, plaintiffs respectfully request that this court amend the award to provide for \$2340.00 per year (\$45.00 per week times 52 weeks) from the time of trial, at which time Mrs. Hernandez was 32 years old, for the remainder of Mrs. Hernandez' life expectancy of 79 years of age, for a total of \$109,980.00, for her continued chiropractic treatments.

C. The Trial Court did not abuse its discretion in its evidentiary rulings.

Defendants' complaints that the Trial Court committed error in permitting plaintiff's treating chiropractor Dr. Batherson to testify, and in excluding a surveillance tape and surveillance witness, are meritless. First of all, it is beyond peradventure that Trial Judges have great discretion in the manner in which proceedings are conducted in their Courts, see La. C.C.P. article 1631, and great discretion in rendering evidentiary rulings, which cannot be disturbed

⁹ Defendants have not assigned as error or briefed the Court's award of future medical expenses for psychiatric treatment, and therefore this award is not subject to review. See Uniform Rules of the Louisiana Appellate Courts, Rule 1-3: "...The Courts of Appeal will review only issues which were submitted to the trial court **and which are contained in specifications or assignments of error...**" See also *Gurvich v New Orleans Private Patrol*, 578 So.2d 195 (La. App. 4th Cir. 1991) (Issue not assigned as error or briefed cannot be considered by the court of appeal, even where issue is raised in motion for appeal).

absent an abuse of discretion. See e.g. *O'Bannon v Azar*, 435 So.2d 1144 (La. App. 4th Cir. 1983) *writ denied* 441 So.2d 749 (La. 1983) *cert. denied* 466 U.S. 928 (1984). Second, this was a bench, not a jury trial, so defendant's complaints of undue prejudice fall short. Third, the Court's rulings were eminently correct, and even assuming *arguendo* that they were not, they can only be termed harmless errors.

Defendants complain that the Trial Court permitted Dr. Batherson, who saw Mrs. Hernandez before and after her surgery, to testify as to his post surgical treatment of her because defendants, who knew that he provided her earlier treatment, allegedly were unaware that he was the particular chiropractor providing her later treatment. Defendants, however, were well aware that she was under the care of a chiropractor after the surgery, as reflected in the medical reports of Dr. LeClerq. In fact, based on these reports, defendants requested and performed an independent medical examination by their own chiropractor just prior to trial. Since this was a bench, not a jury trial, and since defendants had the testimony of their own chiropractor at trial (who, by the way, merely confirmed that plaintiff's injuries were caused by the November 1989 accident), defendants can hardly claim they were prejudiced by this permissible testimony.

The trial court excluded the surveillance videotape and the testimony of Bob Eubanks, the witness who filmed Mrs. Hernandez, for the simple reason that defendants hid their existence from the plaintiffs, having failed to list the witness in the pre-trial order, or to respond to plaintiffs' continuing interrogatories, and having neglected to exchange and mark the tapes as an exhibit. The Trial Court also correctly relied upon this court's decision in *Sires v National Service Corp.*, 560 So.2d 448 (La. App. 4th Cir. 1990) *writ denied* 563 So.2d 865 (La. 1990), indicating that the shielding of impeachment evidence is improper. Finally, a review of the proffered tape and testimony will demonstrate that, even if the court erred in excluding them, the error was harmless. The tapes do not show Mrs. Hernandez engaging in any activity more strenuous than getting into and out of a car. As such, the evidentiary rulings of the Trial Court must be affirmed.

D. The Trial Court erred in failing to award penalties under Louisiana Revised Statutes 22:1220

In the wake of the Champion Insurance Debacle, the Louisiana Legislature deemed fit to provide a remedy with teeth for insureds and claimants who were being victimized by insurance company bad faith tactics, by enacting Louisiana Revised Statutes 22:1220, which became effective on July 6, 1990. The statute, as amended in 1991, provides in part:

A. An insurer including but not limited to a foreign line and surplus line insurer owes to his insured a duty of good faith and fair dealing. **The insurer has an affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims**

with the insured or the claimant, or both. Any insurer who breaches these duties shall be liable for any damages sustained as a result of the breach.

B. Any one of the following acts, if knowingly committed or performed by an insurer, constitutes a breach of the insurer's duties imposed in subsection A:

(1) Misrepresenting pertinent facts or insurance policy provisions relating to any coverages at issue.

* * *

(5) Failing to pay the amount of any claim due any person insured by the contract within sixty days after receipt of satisfactory proof of loss **from the claimant** when such failure is arbitrary, capricious, or without probable cause.

C In addition to any general or special damages to which **a claimant** is entitled for breach of the imposed duty, **the claimant** may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or five thousand dollars, whichever is greater.....

The trial court in the instant case correctly recognized that Section A of this statute imposes duties upon the insurer with regard to claimants as well as insureds, as expressly stated by the court in its Reasons for Judgment at p. 2. Moreover, by its Judgment and its Judgment on Motions dated September 23, 1991 denying defendants' Motion for Summary Judgment and denying in part defendants' Motion to Quash, the court correctly ruled that the statute applies to bad faith insurer conduct post-dating the effective date of the statute even where the accident occurred prior to the effective date of the statute, and to bad faith conduct occurring after the commencement of litigation. The court incorrectly ruled, however, that the only duty the insurer owes to the claimant under the statute is to make a reasonable effort to settle claims, that this duty must first be triggered by a reasonable settlement offer which the insurer arbitrarily rejects, and that the statute does not require an unconditional tender of undisputed amounts. Finally, the court incorrectly concluded that Continental Casualty did not arbitrarily refuse an offer it was bound to consider reasonable, and denied plaintiffs' claim for penalties under the statute.

1. The Trial Court Correctly held that R.S. 22:1220 applies to claimants and to conduct after the commencement of litigation.

The Trial Court correctly held in its Judgment on Motions and its final Judgment that the statute applies to claimants, as well as insureds, and that the statute applies to bad faith insurer conduct occurring after the effective date of the act and after the commencement of suit. The appellants did not assign these rulings of the Trial Court as error, and in fact did not address the statute at all in their brief, and therefore these rulings must stand. See Rules 1-3 and 2-12.4, Uniform Rules of the Louisiana Courts of Appeal, *supra* notes 3 and 8; *Gurvich v New Orleans Private Patrol*, 578 So.2d 195 (La. App. 4th Cir. 1991) (Issue not assigned as error or briefed cannot be considered by the court of appeal).

In an abundance of caution, however, plaintiffs will show that the rulings are correct. As for the application of the statute to claimants, the express language of the statute applies the duties owed to claimants as well as insureds. Subsection A, again, provides that the "affirmative" duties to adjust claims fairly and promptly and to make a reasonable effort to settle claims apply to claimants, not just insureds. And, the first sentence of Subsection B provides that the bad faith conduct listed therein "constitutes a breach of the insurer's duties imposed in Subsection A," which are owed to claimants. As such, insurers must be held liable to claimants for violating any of the provisions of Subsection B. Any other result would instill affirmative duties with no means to be breached. Moreover, the court in *Premium Finance Co. v Employer's Reinsurance Corp.*, 761 F. Supp. 450 (W.D. La. 1991), expressly found that the statute applied to claimants, as well as insureds: "We hold that the new act creates new rights [in favor of claimants] where none had previously existed." 761 F. Supp. at 451. Finally, the Second Circuit in *Dier v Hamilton*, Slip. Op. No. 23,478-CA, 1992 WL 103520 (La. App. 2d Cir. May 13, 1992), has indicated that R.S. 22:1220 provides claimants a remedy when the insurer fails to pay under a written settlement agreement within the specified time period.

The Trial Court was also correct in applying the statute to bad faith insurer conduct post dating the effective date of the statute, including conduct after the commencement of litigation. The Louisiana Supreme Court in *McDill v Utica Mutual Insurance Company*, 475 So.2d 1085 (La. 1985), interpreting the analogous bad faith statute R.S. 22:658, held that even though the insurer's first notice of the claim was the filing of the suit, the insurer was liable for penalties and attorney's fees for bad faith conduct, including failure to pay the portion of the claim which was unquestionably due within the statutory time period after litigation had commenced. The Supreme Court again, in *Cantrelle Fence and Supply Co. Inc. v Allstate Ins. Co.*, 515 So.2d 1074 (La. 1987), held that a plaintiff may file a separate suit after the litigation at issue has ended against the insurer for bad faith practices under Section 658. And, the Eastern District court, in *V/O Exportkhele v M/V Anpa*, 773 F. Supp. 832 (E.D. La. 1991), held not only that R.S. 22:1220 applied in a case where the accident predated the effective date of the statute, but also where the conduct of the insurer at issue occurred after the settlement and during additional litigation over the defense of the claim. Finally, *Francis v Traveler's Insurance Co.*, 581 So.2d 1036 (La. App. 1st Cir 1991) does not mandate otherwise: in that case, all of the conduct at issue, the trial, and even the appeal took place prior to the effective date of the statute. The sole issue in that case, which is not present in the instant case, was the retroactivity of the statute to violations of the statute prior to the effective date.

2. The Trial Court erred in determining that La. R.S. 22:1220 does not require an unconditional tender of undisputed amounts within sixty days of adequate proof of loss.

The statute provides in part in Subsection A that: "The insurer has an **affirmative duty to adjust claims fairly and promptly and to make a reasonable effort to settle claims with the insured or the claimant or both.**" These duties to the claimant include the **affirmative duty** to the claimant to adjust claims fairly and promptly and the **affirmative duty** to the claimant to make a reasonable effort to settle. As the initial sentence of subsection B provides, the instances of misconduct listed therein, including, *inter alia*, misrepresenting pertinent facts and **failing to pay the amount of any claim due within sixty days after receipt of satisfactory proof of loss from the claimant, constitute breaches "of the insurer's duties imposed in Subsection A,"** which duties are owed to the claimant, as well as the insured. Further, Subsection C provides that: "In addition to any general or special damages to which a **claimant** is entitled for breach of the imposed duty, **the claimant** may be awarded penalties assessed against the insurer...."

As such, all of the obligations created in the statute clearly apply to claimants under the express terms of the statute, including Subsection B(5), which provides, just as its companion provisions La. R.S. 22:656, 657 and 658, for penalties against insurers in the event that claims are not paid within a specified time after adequate proof of loss from the claimant is furnished to the insurer. None of these statutes explicitly provides that an insurer must make an unconditional tender of uncontested sums due within the stated period, and yet the Louisiana Supreme Court has determined that one of these statutes, La. R.S. 22:658, implicitly requires such a tender. For the same reasons expressed by the Court in *McDill v Utica Mutual Insurance Co.*, 475 So.2d 1085 (La. 1985), the unconditional tender requirement must also be deemed applicable to insurers under La. R.S. 22:1220.

In *McDill*, an insured was injured in an intersectional collision when an underinsured driver ran a stop sign, and the insured brought suit against his insurer to recover the underinsured motorists benefits under the policy, asking therein to recover penalties and attorney's fees under La. R.S. 22:1220 in the event that the insurer did not pay the full amount due, or alternatively, the amount unquestionably due as an unconditional tender, within the statutory period. The insurer answered, alleging contributory negligence, and denying liability for penalties and attorney's fees under 22:658 because it never received satisfactory proofs of loss under the statute. The parties agreed that the first notice of the claim was the filing of the suit. After trial on the merits, the jury found that the plaintiff was free of contributory negligence, and awarded the plaintiff damages. The trial judge found the insurer's refusal to pay within the statutory period, which commenced after the suit was filed, to be arbitrary and capricious, and assessed a 12% penalty on the amounts due and \$40,000.00 in attorney's fees. The court of appeal reversed, finding that the proofs of loss were unsatisfactory, because they did not establish the exact extent of plaintiff's damages, a legal cause for the surgery, or the cost of the surgery.

The Louisiana Supreme Court granted writs and reversed. After pointing out that the insurer knew after the deposition of the plaintiff the basis for the claim, the doctors involved, and the negligence of the underinsured motorist, and noting the lack of evidence to show that plaintiff was contributorily negligent or that causation was lacking, the Supreme Court stated:

If the insured has shown that he was not at fault, the other driver was uninsured/underinsured and that he was in fact damaged, the insurer cannot stonewall the insured because the insured is unable to prove the exact extent of his general damages....if the insured has made a showing that the insurer will be liable for some general damages, the insurer must tender the reasonable amount which is due. This amount would be unconditionally tendered to the plaintiff not in settlement of the case, but to show their good faith in the matter and to comply with the duties imposed upon them....

McDill, 475 So.2d at 1091-92. The court noted, finally, that "If the insurer is not required to pay the portion of the claim which is unquestionably due within 60 days of the proof of that claim, R.S. 22:658 is rendered meaningless." 475 So.2d at 1092.

There is simply no reason not to apply the same rationale to La. R.S. 22:1220 Section B(5), which contains identical language to the referenced section in R.S. 22:658. If insurers are aware that they are liable, yet arbitrarily and capriciously withhold and dispute payment of the sums unquestionably due, to the detriment of the claimants, the insureds, and the premium paying public, then they surely act in bad faith. As such, this court should uphold the unconditional tender requirement set forth in *McDill*, and apply it to La. R.S. 22:1220 as well.

3. The Trial Court erred in holding that the statute requires claimants to propose a reasonable settlement offer in order to trigger the statute.

The court clearly erred in determining that the sole duty owed to a claimant under the statute is to make a reasonable effort to settle claims only after the plaintiff initiates settlement discussions and makes a reasonable settlement offer. As demonstrated *supra*, the insurer owes additional duties to claimants under the express terms of the statute, including, *inter alia*, the **affirmative duty** to adjust claims fairly and promptly, the **affirmative duty** to make a reasonable effort to settle claims, the duty not to misrepresent pertinent facts relating to the claims at issue, and the duty to pay claims within sixty days after receipt of satisfactory proof of loss. These duties include the duty to tender amounts undisputably due under the policy under the Louisiana Supreme Court's rationale in *McDill v Utica Mutual Insurance Co.* 475 So.2d 1085 (La.1985) and the "affirmative" duty to make an effort to settle the claims on the part of the **insurer**. To place the burden on the plaintiff to initiate settlement offers which are "reasonable" is to read into the statute onerous requirements which are not contained therein, in violation of the statute itself, as well as established rules of statutory construction. See La. C.C. Articles 9, 10 and 13. Further, there is no caselaw to support the Trial Court's imposition of such a burden on plaintiffs under the statute.

As such, the trial court erred in holding that the insurer's "affirmative duty" to settle presupposes a reasonable settlement offer initiated by the plaintiffs.

4. Even assuming *arguendo* that the statute requires a claimant to propose a reasonable settlement offer, plaintiffs in the instant case fulfilled this duty.

Even assuming for the sake of argument that it was plaintiffs' duty to make a reasonable settlement offer, plaintiffs clearly fulfilled that duty in the instant case, having at one point offered to settle for less than the present amount of the extremely low amounts owed to plaintiffs under the present judgment. As counsel for plaintiffs testified, the demand letter marked as plaintiffs' exhibit 6-A was sent to the insurance company on October 9, 1990, and the medical bills and reports contained in plaintiffs exhibit 7 were forwarded in November of 1990. The initial demand on October 9, 1990 was for \$10,000 per year for plaintiff's work life expectancy, \$20,000 for medical bills, and \$300,000 general damages, all of which were completely reasonable figures, for a total lump sum demand of \$620,000.

The insurance company had in its possession the police report citing Ms. Cefalu as solely and admittedly at fault in causing the accident, and even took the deposition of Mrs. Hernandez in March of 1991, further substantiating their insured's sole liability and Mrs. Hernandez' injuries, hospitalizations and surgeries. As such, liability and definite damages were established with absolute certainty. Yet, it was not until May 10, 1991, seven months after the demand letter, and two months after Mrs. Hernandez' deposition, that the insurance company even communicated a response to this offer to the plaintiffs, with a completely unreasonable counter-offer the equivalent of a lump sum of \$100,000.00. V R. 101.

The second demand letter, plaintiffs' exhibit 6B, was sent to the insurance company on June 4, 1991, reducing the amounts requested to \$500,000.00, to which the insurance company again did not respond. Then on August 9, 1991, plaintiffs sent a third letter forwarding Dr. LeClerq's additional report to the insurance company, and advising that Mrs. Hernandez had to undergo another lumbar myelogram and facet arthrogram, that she was suffering from chronic lumbosacral strain, and that she was being treated by a psychiatrist. Included in the third letter was an updated list of the medical bills, which at that point totaled \$26,968.02. Yet the insurance company still did not respond. V R. 102.

It was not until approximately one week prior to trial that the insurance company responded, orally offering a structured settlement with a present value of \$200,000.00. The representative, Don Paige, stated that Mrs. Hernandez had better take this offer, or the company would start playing "hard ball" with plaintiffs. V R. 104. This offer was memorialized in a letter which plaintiffs received on September 24, 1991, the day before trial. Subsequent to the receipt

of this offer, and based on discussions at the pre-trial conference, where the court itself suggested a figure of \$300,000.00 as reasonable, plaintiffs offered to settle for approximately \$300,000.00. The insurance company representative advised plaintiffs, however, that they would not exceed a structured settlement offer worth approximately \$200,000.00 V R. 106. Then, during trial, the insurance company offered a \$185,000.00 lump sum to settle, which plaintiffs refused. V R.110.

The ultimate judgment awarded by the court, which even omits significant damages due to Mrs. Hernandez, with interest, now totals well over \$300,000.00, proving that plaintiffs' settlement offer was indeed more than reasonable. As such, the Trial Court erred in determining that plaintiffs did not make a reasonable settlement offer which was refused by the defendants, and the Trial Court's denial of penalties under La. R.S. 22:1220 must be reversed.

5. This court should also impose penalties under La. R.S. 22:1220 for the insurer's refusal to pay the judgment within the statutory period.

The trial in this case has taken place, the judgment in this case has been rendered, conclusively confirming, through extensive evidence and testimony which the insurance company did not even attempt to oppose, that Continental Casualty's insured was solely at fault in causing the accident, that the accident was the cause of Mrs. Hernandez' back injury, hospitalizations, and surgery, and that damages are due and owing by the insurance company. And yet, the insurer has not yet paid a cent to Mrs. Hernandez.

Rather, after plaintiffs refused to reduce the amounts due on the judgment at the insurer's demand after the judgment was rendered, the insurer's adjuster threatened to appeal the case and delay Mrs. Hernandez' recovery for at least two more years. Defendants have indeed begun to carry out their threat, having appealed, and having further substantially delayed the appeal by filing no less than three twenty day extensions for filing the appellants' brief with this Court. No doubt, if this Court affirms the award, defendants will take their case to the Louisiana Supreme Court as well, further arbitrarily delaying Mrs. Hernandez' justified recovery, and the payment of her long overdue medical bills.

Plaintiffs submit that Continental Casualty's conduct in failing to tender amounts unquestionably due, failing to settle, and failing to pay the judgment, as well as the company's dilatory tactics throughout this entire case, demonstrates utter bad faith and even malicious conduct calling for application of the penalty provisions of La. R.S. 22:1220.

E. This Court Should Sanction Defendants for Frivolous Appeal under La. C.C.P. art. 2164, and for filing pleadings for improper purposes under La. C.C.P. art. 863.

Louisiana Code of Civil Procedure Article 2164 provides that:

The appellate court shall render any judgment which is just, legal and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

As this Honorable Court has held, Louisiana Code of Civil Procedure Article 2164: "authorizes the appellate court to award damages for frivolous appeal whenever it deems them equitable." *Wilson v Fuqua*, 553 So.2d 926 (La. App. 4th Cir. 1989.) Instances meriting damages for frivolous appeal include cases where the appeal fails to present a substantial legal question, where the appeal was taken solely for the purposes of delay, or where counsel does not seriously believe in the law he advocates. *Howard v Howard*, 580 So.2d 696 (La. App. 2d Cir 1991) citing *Parker v Interstate Life and Accident Insurance Co.*, 248 La. 449, 179 So.2d 634 (1965); *In re Succession of Bradford*, 550 So.2d 678 (La. App. 2d Cir 1989). Accord, *In re Medical Review Panel for Claim of Brunet*, 578 So.2d 1011 (La. App. 4th Cir. 1991). For example, in *Wilson, supra*, the court awarded \$7500.00 in damages for a frivolous appeal, including \$1500.00 in attorney's fees, in a simple lease dispute case, where the defendant apparently appealed simply to delay his inevitable eviction. In *State Farm Mutual Insurance Co v Callahan*, 571 So.2d 852 (La. App. 3d Cir 1990), the court of appeal, on review of an automobile accident case in which the defendants' liability was clear, and no evidence was brought forth by the defendants to the contrary, determined that the appeal was frivolous and awarded attorneys' fees against even a pro se defendant.

In addition to sanctions in cases of frivolous appeal, the court may remand the case for a hearing to determine sanctions under Louisiana Code of Civil Procedure Article 863,¹⁰ which imposes upon both litigants and their attorneys the affirmative duty to make an objectively reasonable inquiry into both the facts and the law prior to filing any pleading, *Loyola v A Touch of Class Transportation Service*, 580 So.2d 506 (La. App. 4th Cir. 1991); *Fairchild v Fairchild* 580 So.2d 513 (La. App. 4th Cir. 1991), and to certify that the pleading: "is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." La. Code Civ. P. Art. 863. For example, in *Billeaud v Ass'n of Retarded Citizens*, 569 So.2d 1020 (La. App. 3d Cir 1990), the court of appeal found sanctions appropriate under not only Article 2164, but also under Article 863, where the appeal was determined to be frivolous, i.e. filed solely for purposes of delay. 569 So.2d at 1025.

Misconduct at the trial level which merits sanctions may include, for example, the filing of unsupported allegations in a plaintiff's petition, see *Diesel Driving Academy Inc. v Ferrier*, 563 So. 2d 898 (La. App. 2d Cir. 1990) or the filing of frivolous affirmative defenses in a defendant's answer, see *Derouin v Champion Insurance Co.*, 580 So.2d 1043 (La. App. 3d Cir

¹⁰ This court may notice the improper certification of pleadings at the trial level as well as the appellate level upon its own motion, See Article 863 subsection D, without the issue even being presented in the lower court, and remand the case for a hearing on the amount of sanctions under Subsection E. See e.g. *Billeaud v Ass'n of Retarded Citizens*, 569 So.2d 1020 (La. App. 3d Cir.1990)(Remanding for determination of sanctions against attorney for frivolous appeal); *Chambers v NASCO, Inc*, 501 U.S.____, 111 S.Ct.____, 115 L.Ed. 2d 27 (1992), (Affirming both 5th Circuit's sua sponte determination on appeal that sanctions were merited for litigant and attorney misconduct on appeal and at trial level, and million dollar award after subsequent hearing on sanctions issue by District Court.)

1991) *writ denied* 585 So.2d 574 (La. 1991). In *Derouin*, the third circuit affirmed an award of sanctions in an automobile collision case against an attorney for an insurer for filing an answer containing a general denial, as well as baseless defenses including failure to maintain a proper lookout, failure to wear a safety belt, and assumption of the risk. The award was justified by the attorney's failure to conduct an objective reasonable inquiry into the facts and the law prior to filing the answer and meritless defenses.

Under these legal standards, sanctions are warranted against defendants for filing this frivolous appeal and for filing unsubstantiated pleadings solely for purposes of delay. First of all, from the very beginning, there was no question as to the defendant's liability and no issue of victim or third party fault in causing the accident, as the Trial Court recognized. Ms. Cefalu made an illegal left hand turn, for which she was issued traffic citations, and undeniably caused the accident and Mrs. Hernandez' injuries. The police report, Mr. and Mrs. Hernandez, and even the defendant Ms. Cefalu, all established liability, with no indications to the contrary, long prior to trial. Nevertheless, with absolutely no facts to support their signed pleading, defendants denied liability in their Answer to plaintiffs' Petition, and averred that the accident was the fault of plaintiffs or of some unknown and unnamed third party, and have continued to file pleadings contesting liability, including this appeal, in violation of Article 863.

Furthermore, there is no appealable issue as to damages, as demonstrated by the review of factually similar cases in Section A(2)(c), *supra*, in which the damages awarded were considerably higher than the instant case. Continental Casualty is fully aware of the existence of these cases, and that the general damages awarded in the instant case were very low under the circumstances. Yet, in order to substantially delay her deserved recovery, the insurer has nevertheless appealed, solely on the issue of quantum.¹¹

While defendants have played this dilatory and even malicious stalling game, however, Mrs. Hernandez and her husband have been unable to pay the medical bills for her surgery and related hospitalizations for almost three years since the date of the accident. The Hernandez' have lived in near poverty, and have watched the destruction of their credit rating because of unpaid medical expenses which should long ago have been paid by Continental Casualty. Cases such as this, demonstrating absolute bad faith on the part of insurers, should never proceed to trial, much less to an appeal.

Accordingly, sanctions are clearly due against defendants under both La. C.C.P. Article 2124 and La. C.C.P. art 863. See also *Chambers v NASCO, Inc*, 501 U.S.____, 111 S.Ct.____, 115 L.Ed. 2d 27 (1992), affirming the appellate courts' inherent power to order an award of

¹¹ After the trial, Don Paige, adjuster for the defendant insurer, stated that an appeal would be taken in order to substantially delay Mrs. Hernandez' recovery, for the reason that counsel for plaintiffs refused to agree to a reduction of the judgment.

sanctions for misconduct at the trial level as well as the appellate level. Plaintiffs suggest, due to the egregious behavior of defendants and their counsel in this case, that these awards be computed in addition to the sanctions due for defendants' violations of La. R.S. 22:1220, and include at minimum all of Plaintiffs' costs and attorneys fees for the entire trial and appeal of this suit, which would never have had to be filed had defendants settled the case in good faith without engaging in dilatory tactics.

CONCLUSION

The Trial Court was clearly correct in determining that the November 1989 accident, and not the minor December 1990 rear end collisions, which occurred over a year after the initial accident and two months after Mrs. Hernandez' surgery for her ruptured disc, was the cause of her injuries and damages. And, even if the minor accidents aggravated her condition, under the law of this state, defendants are still liable, since such aggravation would not have occurred without the original physical and mental impairment caused by defendants' negligence.

As for damages, the Court's basic general damages award of \$200,000 was, although on the low side, adequately within the Trial Court's discretion as compensation for her physical injuries alone, and should be affirmed. However, considering the Trial Court's omission of compensable and proven damages elements, plaintiffs respectfully request that this Court conduct a *de novo* review of the omitted general and special damages, and increase those awards in order to compensate Mrs. Hernandez for her Post Traumatic Stress Disorder, severe depression and loss of enjoyment of life, her complete loss of earning capacity, her lost fringe benefits, her lost household services, all of her past medical bills, and her future medical care for her physical injuries.

Further, considering the defendant insurance company's bad faith refusal to settle or to unconditionally tender amounts unquestionably due in this clear cut case of liability, and defendants' dilatory tactics and frivolous appeal, plaintiffs respectfully request that this Honorable Court impose sanctions against defendants under La. R.S. 22:1220, La. C.C.P. article 2124, and La. C.C.P. Article 863, including penalties, costs, and attorney's fees. A clearer case for imposition of penalties for insurer bad faith is simply unimaginable.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this pleading has been served on counsel of record by placing a copy, properly addressed and postage pre-paid, in the United States Mails, on this ____ day of August, 1992.

Law Office of Robert L. Manard