

SUPREME COURT OF LOUISIANA

No. 00-C-1918

ARCHIE BOYETTE

VERSUS

UNITED SERVICES AUTOMOBILE ASSOC., ET AL.

CALOGERO, Chief Justice, concurs in part, dissents in part, and assigns reasons.

I concur in part in the judgment. The court of appeal erred in awarding damages in excess of State Farm’s policy limits. Thus, I would reduce the plaintiff’s award for past and future lost wages from \$127,128.96 to \$100,000.00.

Otherwise, I dissent from the majority’s conclusion that the court of appeal “did not place the proper burden of proof on plaintiff to positively prove [sic] his case.” Ante, p. 5. In fact, at the outset of its rather lengthy and detailed analysis, the court of appeal explicitly stated, “The burden of proving a loss of income is on the plaintiff.” Boyette v. United Services Automobile Assoc., 99-1755, p. 6 (La. App. 3 Cir. 4/12/00), 760 So. 2d 492, 496 (quoting Sengsouly v. Allstate Ins. Co., 99-22 (La. App. 3 Cir. 6/9/99), 744 So. 2d 649, writ denied, 99-2526 (La. 11/19/99), 749 So. 2d 677)).

Furthermore, the court of appeal clearly held the plaintiff to the proper burden of proof. The majority focuses inordinately on the appellate court’s statement that “there is an absence of evidence indicating that he would not have continued to work absent his injury.” However, this statement is taken out of context, and the majority completely ignores the appellate court’s preceding review of the evidence, upon which it concluded that the jury had erred in not awarding the plaintiff any damages for lost

wages.

Though it is true that the plaintiff continued to work off and on after the May 1995 accident until his position with his employer was eliminated, the plaintiff, as the court of appeal noted, testified that he could not have continued that type of work, which involved inspecting heavy construction equipment and forestry equipment on location, after the position was eliminated on November 20, 1995. The plaintiff explained that his condition was progressively worsening, that he was experiencing pain, that he was unable to drive long distances, that he was having severe headaches resulting in missed days from work, and that he had fallen numerous times when his legs collapsed while trying to perform his job for his employer. The plaintiff further explained that he did not seek unemployment benefits because he could not certify that he was able to work.

The majority's apparent conclusion to the contrary, the plaintiff's testimony was supported by the other evidence reviewed by the appellate court. Dr. Goodin, a psychiatrist, specifically testified that the plaintiff was permanently and totally disabled, and explained that the plaintiff's impaired concentration was the result of depression from chronic pain caused by the May 1995 accident. Dr. Beurlot, a specialist in physical medicine and rehabilitation, also testified that the plaintiff was, in his opinion, disabled on November 28, 1995, just eight days after the plaintiff's employer downsized and made his position redundant. Dr. Beurlot opined that the plaintiff's mental condition was affecting his physical condition. Dr. Fresh, a neurosurgeon who had performed two cervical fusions on the plaintiff in 1992 and who had diagnosed the plaintiff as suffering from cervical and lumbar strain as the result of the 1995 accident, similarly testified that the plaintiff's physical condition was aggravated by his depression or psychological changes. Dr. Katz, a specialist in pain management, also

believed that the plaintiff's psychological injury was a cause of the plaintiff's pain and was hindering his recovery. Finally, the appellate court had previously noted the testimony of the plaintiff's wife, who related that the plaintiff could not drive, that he could not walk great distances, that he could not walk on uneven terrain, that he could not perform activities such as grocery shopping or working in the yard, and that he could not dress himself without assistance because he was unable to bend. As the court of appeal certainly observed, an observation the majority seizes upon, none of this evidence was contradicted by any witness or other evidence.

Additionally, other evidence was introduced regarding the cause of the plaintiff's continuing pain and degenerating physical condition. That the plaintiff, who had an obsessive-compulsive disorder, had actually suffered a painful physical injury that resulted in depression, which in turn hindered his ability to recover from the physical injury, is not disputed by any witness or evidence. The court of appeal understood that the primary issue at trial was whether the plaintiff was actually suffering from a deteriorating mental and physical condition that prevented him from working. Again, the evidence on that issue is not contradicted.

Given this evidence, which is only a portion of the evidence reviewed by the court of appeal, the jury's decision not to award damages for lost income is without a factual basis in the record. The court of appeal was therefore justified in finding that the jury had erred and that the plaintiff had in fact carried his burden of proving that he was unable to work after his job was eliminated in November 1995 but for the accident in May 1995.

For these reasons, I respectfully dissent in part from the majority's judgment.