

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-5093  
Summary Calendar

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MARY LOU GRAHAM HICKENBOTAM,

Plaintiff-Appellant,

versus

HOME DEPOT, INC., ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court for the  
Western District of Louisiana  
(CV 92 1049)

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(January 13, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

While shopping at defendant-appellee Home Depot, Inc.'s ("Home Depot") Shreveport, Louisiana store, a gallon can of glue fell from its shelf, striking and injuring plaintiff-appellant Mary Lou Graham Hickenbotam's left knee. Mrs. Hickenbotam sued Home Depot seeking damages, and Home Depot conceded liability. A bench trial was conducted on the sole issue of damages, and the district court

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\*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

awarded Mrs. Hickenbotam \$158,169.19. Mrs. Hickenbotam appeals, contending that certain elements of the damage award were too low.

I

On April 30, 1991, while shopping at the Home Depot store in Shreveport, Louisiana, a gallon can of glue fell from its shelf, striking Mrs. Hickenbotam's left knee, causing a tear of the medial meniscus. On May 22, Dr. Lewis Jones, an orthopedic surgeon who had previously treated Mrs. Hickenbotam for other ailments, performed arthroscopic surgery to repair the tear. During the recovery period following the first surgery, certain actions by Mrs. Hickenbotam arguably aggravated and prolonged her injuries. First, in spite of Dr. Jones's warning not to bear weight on the knee for the next few weeks, Mrs. Hickenbotam was "on her feet quite a bit" during the critical recovery period immediately following surgery. Later, Mrs. Hickenbotam twisted her ankle, suffered two separate falls, and sustained neck injuries in an unrelated automobile accident. Moreover, although she had been advised by Dr. Lewis to lose weight to relieve stress on her joints, Mrs. Hickenbotam failed to lose any appreciable weight. Not surprisingly, the knee injury failed to heal as quickly as Dr. Jones originally anticipated. Eventually, in January 1992, Mrs. Hickenbotam informed Dr. Jones that her knee had improved. However, approximately one year later, because Mrs. Hickenbotam was suffering almost constant knee pain caused by degenerative changes in the joint, Dr. Jones performed a total knee replacement. The

surgery was completed without any complications, and Mrs. Hickenbotam's recovery has been and continues to be uneventful.

II

Mrs. Hickenbotam sued Home Depot for damages in Louisiana state court. Home Depot removed the case to federal court on the basis of diversity jurisdiction. Home Depot eventually conceded liability, leaving only the issue of damages for trial. After the bench trial, the district court awarded the following damages:

General Damages	\$ 75,000.00
Past Medical Expenses	42,349.23
Future Medical Expenses	0.00
Loss of Past Income	22,195.00
Loss of Past Home Services	5,000.00
Loss of Future Income	12,324.96
Loss of Future Home Services	<u>1,300.00</u>
Total Damages	\$ 158,169.19

Mrs. Hickenbotam now appeals.

III

Mrs. Hickenbotam presents three issues for review. First, she contends that the district court's award of only \$75,000 in general damages was clearly erroneous. Next, she argues that the district court erred when it refused to award damages for impairment of earning capacity. Finally, Mrs. Hickenbotam asserts that the district court erroneously failed to award additional damages for future medical procedures.

All three issues presented by Mrs. Hickenbotam concern the district court's award of damages, and such damage awards are considered factual findings. NCH Corp. v. Broyles, 749 F.2d 247,

251 (5th Cir. 1985). When reviewing factual findings of the trial court, we cannot set aside those findings unless we determine that the findings are clearly erroneous. FED. R. CIV. P. 52(a). As dictated by the United States Supreme Court, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed.2d 746 (1948); Lewis v. Timco, Inc., 736 F.2d 163, 166 n.2 (5th Cir. 1984). Moreover, while conducting this review, we shall duly regard the district court's opportunity to observe the witnesses and to judge their credibility. FED. R. CIV. P. 52(a).

A

Turning to Mrs. Hickenbotam's first argument, she contends that the district court's award of \$75,000 in general damages was too low, and, as such, constitutes clear error. The Louisiana cases we have reviewed demonstrate that a district court has a great degree of discretion when awarding general damages. See, e.g., Bossier v. De Soto General Hospital, 442 So.2d 485, 492 (La. Ct. App. 2nd Cir. 1983)(holding that the court has "much discretion" in awarding damages).

In support of her argument, Mrs. Hickenbotam cites several Louisiana cases in which persons who suffered knee injuries were

awarded greater general damages.<sup>1</sup> However, in each case cited, the injury was more extensive than that suffered by Mrs. Hickenbotam, and the resulting pain and impairment was more severe. Other cases, cited by Home Depot, demonstrate the district court's wide discretion in this area. In Coleman v. Jackson, 422 So.2d 179 (La. Ct. App. 3rd Cir. 1982), for example, the plaintiff, who suffered a comminuted<sup>2</sup> fracture of the right femur, spent forty-eight days in a hospital in traction, and had a metal pin inserted into the bone. For two and one-half months following his discharge from the

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<sup>1</sup>Courville v. Cardinal Wireline Specialists, Inc., 775 F.Supp. 929 (W.D. La. 1991)(twenty-nine year old plaintiff, who was awarded \$175,000 in general damages, underwent arthroscopic surgery, continued to experience pain, and suffered a thirty-five to forty percent impairment such that he would be unable to work and his recreational activities would be severely restricted); Doyle v. Picadilly Cafeterias, 576 So.2d 1143 (La. Ct. App. 3rd Cir. 1991)(plaintiff, who was awarded \$500,000 in general damages, underwent fourteen surgeries, suffered severe infections and complications, leaving her with no formal knee joint and with bone that was not solid in the knee area); Roberts v. State, 576 So.2d 85 (La. Ct. App. 2nd Cir. 1991)(plaintiff, who was awarded \$150,000 in general damages, suffered three fractures of the femur, two of which extended into the knee joint, requiring two surgeries, more than two weeks of hospitalization, and resulted in twenty-five percent disability to her leg); Adams v. Department of Transp. & Dev., 536 So.2d 476 (La. Ct. App. 1st Cir. 1988)(plaintiff, who was awarded \$125,000 in general damages, underwent total knee replacement, suffered continuous pain requiring continuous medication, resulting in an inability to sleep, and complete inability to work); Bossier v. De Soto General Hospital, 442 So.2d 485 (La. Ct. App. 2nd Cir. 1983)(plaintiff, who was awarded \$125,000 in general damages, suffered an intertrochanteric fracture of the right hip and femur, and knee injury requiring arthroscopic surgery, which required approximately one month in the hospital, and resulting in a painful recovery).

<sup>2</sup>A comminuted fracture is a segmented or pulverized fracture of the bone.

hospital, he was required to wear a cast brace and use crutches to ambulate. After recovery, the injured leg was approximately one and one-half inches shorter than the other, resulting in a sizeable limp. The appellate court awarded the plaintiff \$40,000 in general damages.<sup>3</sup>

In this case, Mrs. Hickenbotam underwent two surgical procedures that were essentially successful and involved no complications. Although Mrs. Hickenbotam did sustain some permanent impairment of the knee joint, her failure to follow Dr. Jones's advice immediately after the first surgery may have led to some of the impairment. The second surgery was successful, and Mrs. Hickenbotam's recovery, though not yet complete, has been normal and uneventful. As Dr. Jones testified at trial, he expects a full recovery. Moreover, Mrs. Hickenbotam's permanent impairment is limited. A post-operative visit to Dr. Jones not long after surgery demonstrated that she could flex her knee from zero to 100 degrees, that her neurovascular status was intact, and that the knee components were perfectly positioned. At trial, Dr. Jones testified that Mrs. Hickenbotam would be able to perform all household duties, including mowing the yard, within six to eight weeks of the trial, and that she would be able to return to her

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<sup>3</sup>The district court initially dismissed Mr. Coleman's suit, and he appealed. On review, the appellate court reversed the district court and rendered judgment for Mr. Coleman. In rendering judgment, the appellate court determined that an award of \$40,000 in general damages was appropriate.

former employment in four to six months. Overall, Dr. Jones estimated that Mrs. Hickenbotam suffers a lower extremity impairment of twenty percent, and an overall body impairment of eight percent. Although we recognize that Mrs. Hickenbotam has suffered a permanent injury, her injuries are more in line with the injuries suffered by the plaintiff in Coleman v. Jackson than the injuries suffered by the plaintiffs in Courville, Doyle, Roberts, Adams, or Bossier.<sup>4</sup> In the light of the "much discretion" allotted district courts in making awards of this kind, we do not have a definite and firm conviction that an award of \$75,000 in general damages amounts to a mistake.

B

Next, Mrs. Hickenbotam contends that although the district court awarded damages for loss of future income, the court erred by failing to award damages for loss of earning capacity. As its name implies, "earning capacity," refers to a person's ability to work, and may constitute an additional component of damages, separate and apart from lost future income. Folse v. Fakouri, 371 So.2d 1120, 1124 (La. 1979). If an injury is permanent, then the court should consider whether the injured person has suffered a loss of earning capacity. Aisole v. Dean, 574 So.2d 1248, 1252 (La. 1991). If, however, the injury is temporary, an award of damages for loss of earning capacity is not appropriate. Id.

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<sup>4</sup>See supra note 1.

In this case, although the majority of Mrs. Hickenbotam's injury was temporary, she did suffer some permanent impairment of the knee joint. As Dr. Jones testified, he estimated that she suffers from a twenty percent lower extremity impairment and an overall body impairment of eight percent. Dr. Jones further testified that in spite of this permanent impairment, Mrs. Hickenbotam could return to work within a few months, and she could resume household chores within a few weeks. Because the evidence presented at trial reasonably could lead the district court to conclude that Mrs. Hickenbotam suffered no real loss of earning capacity, we find that the district court's failure to award damages for loss of earning capacity was not clearly erroneous.<sup>5</sup>

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<sup>5</sup>Mrs. Hickenbotam argues that the district court failed to take into account that although she has been cleared to return to work at Southern Plastics, no job is currently available. Although we sympathize with Mrs. Hickenbotam's position, the lack of a job opening at Southern Plastics is not necessarily attributable to the accident at Home Depot. Mrs. Hickenbotam, who suffers from several ailments including asthma, arthritis, and fibromyalgia, was on sick leave at the time of her accident at Home Depot. She eventually returned to work but she later "retired" on July 10, 1992. Although she testified that she ceased working because of knee problems--and her exit interview corroborates that testimony--there is also evidence in the record that casts some doubt on her testimony. In May 1992, during her last visit to Dr. Jones before she retired, Mrs. Hickenbotam complained of problems unrelated to her left knee, but she indicated that her knee was "doing better." Although Mrs. Hickenbotam claims that she retired because of knee problems, her next visit to Dr. Jones was three months after she retired. Because Mrs. Hickenbotam's knee appeared to be improving and because she did not seek medical attention until three full months after retirement, the district court could have concluded that Mrs. Hickenbotam may have retired for reasons unrelated to her knee injury. Because Mrs. Hickenbotam may have voluntarily relinquished her position, the fact that such a position is not now available cannot be blamed upon Home Depot.

In Mrs. Hickenbotam's final point, she contends that the district court erred when it failed to award damages to cover future surgeries to replace or revise worn components in her knee.<sup>6</sup> The district court awarded past medical expenses to cover the cost of her initial knee replacement, however, no damages were awarded to cover future revision or replacement of the knee components. We conclude that the district court's decision not to award damages for the future surgery was not clearly erroneous. Testimony by Dr. Jones established that even without the injury caused by the falling glue can, Mrs. Hickenbotam would have faced total replacement of both knees in approximately ten years because of an existing degenerative condition unrelated to her injury. Although the accident at Home Depot accelerated the need for the initial replacement, there is no causal relationship between the accident at Home Depot and the future surgeries. Mrs. Hickenbotam would

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Mrs. Hickenbotam further argues that she suffers an "earning impairment" because she lacks "transferable skills." According to Mrs. Hickenbotam, because she does not possess the necessary skills or education to transfer to another \$9.51 per hour job, and because she cannot return to her position at Southern Plastics, she has suffered an "earning impairment." However, her earning impairment based on lack of transferrable skills cannot be attributed to Home Depot. Home Depot is not responsible for Mrs. Hickenbotam's lack of education or skills. Consequently, we cannot award damages on this basis.

<sup>6</sup>Dr. Jones testified that because Mrs. Hickenbotam was relatively young, there was a "high probability" that she would be required to undergo surgery in ten to fifteen years either to revise or replace components in the left knee.

have had the future surgeries irrespective of the accident at Home Depot. As such, the district court's failure to award damages to cover the future surgery was not clearly erroneous.

IV

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.