NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 2147

SHANNON HULTBERG AND JORDAN HULTBERG

VERSUS

GENERAL INSURANCE COMPANY OF AMERICA AND MARGARETTA SPIELMAN

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 511,456, Section 24
Honorable R. Michael Caldwell, Judge Presiding

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General Insurance Co. of America and Margaretta Spielman

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered OCT 30 2009

Welch, J., dissents in part with reasons. JEW by RHP

PARRO, J.

In this personal injury suit, Shannon Hultberg appeals a judgment in her favor against the defendants, Margaretta Spielman and General Insurance Company of America, seeking an increase in damages awarded to her by the trial court. We affirm.

FACTS AND PROCEDURAL BACKGROUND

This action involves a vehicular collision on July 15, 2003, at Benny's Carwash (Benny's), located on Perkins Road in Baton Rouge, Louisiana. Benny's is an automated carwash where the customer chooses a particular wash option and drives to a designated position in line for the wash tunnel. When the vehicle reaches this position, the wheels are guided onto a conveyor that transports the vehicle toward the wash tunnel. The driver remains inside the vehicle, and at the beginning of the conveyor, encounters a sign stating and illustrating that the vehicle must be placed in neutral, the driver's foot must be removed from the brake, and the driver's hands must be taken off the steering wheel. A Benny's employee (guider) stands near the entry to the wash tunnel, makes eye contact with the approaching driver, and points to a second sign providing the same information on how to proceed. The guider has the responsibility to help confused drivers and to hit a stop button if a driver fails to heed instructions.

The conveyor runs 36 feet from the point at which a vehicle's wheels first encounter it to the point of entering the wash tunnel. The conveyor has rollers which keep vehicles separated while entering the wash. If a vehicle is properly on the rollers of the conveyor, with the transmission in neutral and without the brake being applied, the vehicle will roll through the wash tunnel at a speed of approximately eight inches per second. If the brakes are applied while a vehicle is on the conveyor, the rollers will go underneath the vehicle and the vehicle will not move into the wash tunnel. However, if the transmission is left in drive and the driver takes his or her foot off the brake, the vehicle will travel rapidly through the 125-foot wash tunnel.

On the day of the accident, Shannon Hultberg entered Benny's. Margaretta Spielman was driving the vehicle immediately behind Ms. Hultberg. As Ms. Spielman drove her vehicle onto the conveyor, the guider pointed to the sign giving instructions to place her vehicle in neutral, take her foot off the brake, and remove her hands from the steering wheel. Ms. Spielman became confused and took her foot off the brake without placing her car in neutral, causing the vehicle to proceed toward the wash tunnel at a higher rate of speed than if the rollers had been transporting it. The guider attempted to correct Ms. Spielman by knocking on her window and shouting instructions, but Ms. Spielman could not correct the situation in time to stop her vehicle. Immediately after Ms. Spielman's vehicle entered the wash tunnel, the guider stopped the carwash. However, the Spielman vehicle had already rear-ended Ms. Hultberg's vehicle while both were in the wash tunnel, injuring Ms. Hultberg.

Benny's and Ms. Hultberg reached a private settlement after the accident. Ms. Hultberg and her husband, Jordan, sued Ms. Spielman and her insurer, General Insurance Company of America, for Ms. Hultberg's general and special damages and Mr. Hultberg's loss of consortium damages.[1] Although Ms. Spielman and her insurer had originally requested a trial by jury, at the beginning of the trial, counsel for Ms. Spielman and her insurance company advised the court that, "the plaintiffs have stipulated that the cause of action does not exceed the sum of $50,000, exclusive of interest and costs." In response, the Hultbergs' attorney corrected this statement and stated that the stipulation was with regard to the "amount in controversy."

After presentation of the evidence, the trial court awarded $30,317 for Ms. Hultberg's medical expenses, $45,000 for her general damages, and $15,000 for Mr. Hultberg's loss of consortium. The court stated the following concerning liability:

[1] In their answer to the Hultbergs' petition, Ms. Spielman and her insurer alleged the fault and negligence of Benny's, causing the Hultbergs to file a supplemental petition naming Benny's as a defendant.

> Benny's had the greater duty to protect customers on its premises from harm. I drive by that carwash all the time, but I've only been in it once or twice. It is, as testified by Ms. Spielman, somewhat confusing. You do go into a dark tunnel, and your car is covered with soap; and you can't see what's going on. As I said, I think Benny's has the greater duty in this case. I think Benny's, with this automated car wash, has created a risk and has a greater duty to prevent an injury. And I don't think that Benny's did enough in this case to escape liability. It was the testimony of Ms. Spielman that the very demonstrative actions of the guider caused her to be confused and perhaps not see the signs that were there. So I think there is certainly liability on the part of Benny's.

After noting that Ms. Spielman also had to bear some of the liability, the court assessed 75% fault to Benny's and 25% fault to Ms. Spielman.

At the conclusion of the court's oral reasons for judgment, Ms. Spielman's attorney asked the court to clarify whether the amount in controversy stipulation of $50,000 was the starting point for fault allocation. Ms. Hultberg's counsel responded that no reduction should be made until there was a final figure to determine whether the total award was in excess of $50,000. Both counsel then informally discussed with the court whether the allocation of fault should be made on the total award, with a further reduction to $50,000 only if the final award exceeded that amount, or whether the allocation of fault should begin at $50,000. The court indicated this decision would be made in connection with the judgment.

On August 5, 2008, the court signed a judgment reflecting that $50,000 was the starting point to which the fault allocation was applied. Since Ms. Spielman was responsible for 25% of that amount, she and her insurer were ordered to pay Ms. Hultberg $12,500 in total damages, plus legal interest from the date of judicial demand.

Ms. Hultberg appealed, asserting five assignments of error that she contends were reversible error: (1) allocating 75% fault to Benny's and only 25% fault to Ms. Spielman; (2) improperly taking judicial notice of facts in dispute; (3) awarding only $45,000 in general damages to Ms. Hultberg; (4) refusing to admit into evidence the medical examination report of defendant's expert, Dr. Allen Joseph; and (5) reducing the plaintiff's damages twice, by first reducing the

damages to the stipulated "amount in controversy" of $50,000, and then further reducing the damages in proportion to the allocation of fault.[2]

ALLOCATION OF FAULT

The trier of fact is owed some deference in allocation of fault since the finding of percentages of fault is a factual determination. Duncan v. Kansas City S. Ry. Co., 00-0066 (La. 10/30/00), 773 So.2d 670, 680-81, cert. dismissed, 532 U.S. 992, 121 S.Ct. 1651, 149 L.Ed.2d 508 (2001). Thus, a trier of fact's allocation of fault is subject to the manifestly erroneous or clearly wrong standard of review. Stobart v. State through Dept. of Transp. and Dev., 617 So.2d 880, 882 (La. 1993). Allocation of fault is not an exact science, or the search for one precise ratio, but rather an acceptable range, and any allocation by the fact finder within that range cannot be clearly wrong. Foley v. Entergy Louisiana, Inc., 06-0983 (La. 11/29/06), 946 So.2d 144, 166. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award, and then only to the extent of lowering it or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. Clement v. Frey, 95-1119 (La. 1/16/96), 666 So.2d 607, 609, 611.

In determining the percentages of fault, the trier of fact should consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. Watson v. State Farm Fire and Cas. Ins. Co., 469 So.2d 967, 974 (La.

[2] Mr. Hultberg did not appeal the damages awarded to him.

1985). These same factors guide the appellate court's evaluation of the respective fault allocations. See Clement, 666 So.2d at 611.

After reviewing the record, we conclude that there was no manifest error in the allocation of only 25% fault to Ms. Spielman. Benny's had a duty to ensure its customers entered the wash tunnel correctly. It was aware that if a vehicle entered the wash tunnel with the transmission in drive, that vehicle would proceed unchecked and could strike the machinery or the rear of any preceding vehicle in the wash tunnel. Benny's was also well aware that customers could become confused by the unusual movement caused by the conveyor procedure. In deposition testimony, Benny's guider acknowledged it was her responsibility to make sure a driver entered the wash tunnel correctly. She stated that when a customer goes toward the wash tunnel with the brake pedal depressed, "[w]e stop the whole thing and tell them to take their foot off the brake or put their car in neutral. We automatically make sure the car is in neutral though." From this testimony, it is apparent that the guider had the duty to ensure that a driver had complied with all instructions before entering the wash tunnel. Also, if something were wrong, the guider had the duty and the ability to stop the mechanism.

Ms. Spielman testified that she was confused and the guider did not help clear her confusion. She said that while she had her foot on the brake and was waiting for instructions, the guider hit the car window and hollered at her to take her foot off her brake. Ms. Spielman testified that the guider never told her to put her car in neutral or made sure that her car was in neutral before telling her to take her foot off the brake, both duties of the guider. With a limited conveyor length within which to correct her situation, Ms. Spielman obviously felt she had to act in haste and became flustered. Once she entered the wash tunnel, she could not see what was in front of her because of the soap and water on her car, increasing her confusion.

The accident occurred because Ms. Spielman was allowed to enter the wash tunnel incorrectly. Benny's had a greater appreciation of the risk and the

best opportunity to prevent the incident that occurred in this case. Applying the Watson factors, we do not find the trial court's allocation of only 25% fault to Ms. Spielman was clearly wrong.

JUDICIAL NOTICE

Judicial notice may be taken only of facts which may be regarded as forming part of the common knowledge of every person of ordinary understanding and intelligence, and a court may not take judicial notice of a fact merely within the judge's individual knowledge. State Through Dept. of Highways v. Thurman, 231 So.2d 692, 695 (La. App. 1st Cir. 1970).

Ms. Hultberg argues that the trial judge committed legal error when he said that in his experience, Benny's automated carwash was somewhat confusing, thereby taking judicial notice of adjudicative facts not in evidence in reaching his conclusion. See LSA-C.E. art. 201. We disagree. Witnesses for both parties testified as to possible and actual confusion during the carwash process. The guider was present to assist with exactly the type of pre-entry conveyor confusion that occurred in this case. Ms. Spielman described the wash tunnel experience as confusing to her because of the soap and water on the car. Additionally, an expert witness testifying on her behalf stated that entering the wash tunnel can be confusing, especially since it is dark and soap is covering the vehicle. While the trial judge's comment may have reflected his own experience, the confusing nature of the process was already in evidence from witnesses for both parties. Therefore, we find no merit in this assignment of error.

ADMISSIBILITY OF EXPERT REPORT

Generally, the trial court is granted broad discretion on its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. Smith v. Smith, 04-2168 (La. App. 1st Cir. 9/28/05), 923 So.2d 732, 742. Ms. Hultberg sought to introduce a medical examination report from Dr. Allen Joseph, a specialist hired by the defendants to review her medical condition. The trial court refused to admit the report, concluding it was hearsay and that

none of the hearsay exceptions applied to allow its admission into evidence. Ms. Hultberg proffered the report for this court's consideration.

According to Louisiana Code of Evidence article 801, hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted. Article 802 states that hearsay is not admissible except as otherwise provided by the Code of Evidence or other legislation. Turner v. Ostrowe, 01-1935 (La. App. 1st Cir. 9/27/02), 828 So.2d 1212, 1217 n.7, writ denied, 02-2940 (La. 2/7/03), 836 So.2d 107.

In this case, Ms. Hultberg sought to introduce Dr. Joseph's report to prove the extent of her injuries and to causally link them to the accident. The report was thus an out-of-court writing offered in court to prove the truth of the matter asserted. However, Ms. Hultberg contends the report was not hearsay, but an authorized admission under LSA-C.E. art. 801(D)(2), because it was offered against the defendants and (a) was made by their representative, (b) was a statement in which they had manifested their adoption or belief, and/or (c) was made by a person authorized by the defendants to make a statement concerning the subject. See LSA-C.E. art. 801(D)(2).[3]

However, official comment (c) to Article 801(D)(2)(a) indicates that these statements are "personal," in that they are made by the parties themselves. Clearly, Dr. Joseph is not a party, nor is there any indication that he was the agent or representative of the defendants, rather than an independent medical expert reaching his own conclusions concerning Ms. Hultberg's injuries. As to subparagraph (b) of Article 801(D)(2), since the defendants decided not to use Dr. Joseph's report in furtherance of their case, they obviously did not adopt it or

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[3] Article 801(D)(2) provides that a statement is not hearsay if it is offered against a party and is:

> (a) His own statement, in either his individual or a representative capacity;
>
> (b) A statement of which he has manifested his adoption or belief in its truth; or
>
> (c) A statement by a person authorized by him to make a statement concerning the subject.

indicate any belief in its truth. Finally, as to subparagraph (c), although Dr. Joseph apparently was hired by the defendants to express an opinion to them concerning Ms. Hultberg's medical condition, he clearly was not authorized by them to make a statement to anyone else concerning the subject. Ms. Hultberg could have subpoenaed the doctor to testify on her behalf, if she believed his medical opinion would support her case.

In briefs to this court, neither party included any Louisiana jurisprudence concluding that an expert's report is admissible non-hearsay when introduced against the party on whose behalf the report was prepared, when that expert has not been shown to be unavailable to testify and has not been deposed. Based on the above, we conclude that under these circumstances, an expert's report does not qualify as non-hearsay under LSA-C.E. art. 801(D)(2). Therefore, the court did not err in excluding this document.

GENERAL DAMAGES

The role of an appellate court in reviewing general damages is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. Wainwright v. Fontenot, 00-0492 (La. 10/18/00), 774 So.2d 70, 74. The initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the "much discretion" of the trier of fact. Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1260 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or decrease the award. Id. at 1261.

In this case, Ms. Hultberg was awarded $45,000 in general damages and $30,317 for medical expenses, the total of which was reduced based on a

stipulation. After a careful review of the record, we find that the trial court's award was reasonable and not an abuse of discretion. The record shows that this accident involved a minor impact. No injury was reported to the police officer who investigated the accident. The last time Ms. Hultberg saw a health care provider for her injuries was in October 2005. The general damage award of $45,000 was within the range of what a reasonable trier of fact could assess as damages.

STIPULATION

Whether the trial court correctly applied the allocation of fault to the stipulation concerning the "amount in controversy" is a question of law. Appellate review of a question of law is simply a decision as to whether the lower court's decision was legally correct or incorrect. Cangelosi v. Allstate Ins. Co., 96-0159 (La. App. 1st Cir. 9/27/96), 680 So.2d 1358, 1360, writ denied, 96-2586 (La. 12/13/96), 692 So.2d 375.

In this case, the parties stipulated that the "amount in controversy" did not exceed $50,000. At the end of the trial, the trial court used this amount as the starting point and then reduced it based on the allocation of fault. Ms. Hultberg argues that the trial court committed legal, reversible error in failing to recognize the difference between "amount in controversy" and "cause of action" with regard to this stipulation. Therefore, Ms. Hultberg contends that the trial court should not have used $50,000 as a starting point; rather, the award should only have been reduced if the final award, after applying the allocation of fault to the total award, exceeded $50,000. Thus, the initial question is whether there is a distinction between the terms "cause of action" and the "amount in controversy" under the facts of this case.

Ms. Spielman cites several cases which support the method employed by the trial court in determining the final amount awarded to Ms. Hultberg. In Stevens v. Winn-Dixie of La., 95-0435 (La. App. 1st Cir. 11/9/95), 664 So.2d 1207, 1210, the parties stipulated that the "amount of the case" was $20,000. The trial court found the plaintiff was 50% at fault and the defendant was 50% at fault and

awarded the plaintiff $30,000, which was reduced by her percentage of fault. On appeal, the First Circuit found that the trial court erred in assessing the plaintiff's damages in excess of $20,000. Id. at 1213. Because the parties had stipulated that $20,000 was the maximum award, fault should have been allocated, based on that stipulated amount.[4]

The Louisiana Supreme Court in Bullock v. Graham, 96-0711 (La. 11/1/96), 681 So.2d 1248, cited with approval the method used in Stevens. In Bullock, the plaintiff alleged that the "amount in controversy" did not exceed $20,000. The supreme court determined that when a stipulation is made, the award should first be reduced to the stipulation and then fault should be allocated. In Bullock, the court found that the terms "amount in controversy" and "cause of action" were synonymous. This part of the opinion was abrogated by the supreme court in Benoit v. Allstate Ins. Co., 00-0424 (La. 11/28/00), 773 So.2d 702, 707.

In Benoit, the supreme court stated that the term "cause of action" found in LSA-C.C.P. art. 1732, prohibiting a jury trial in a suit if no individual petitioner's cause of action exceeds $50,000, is not synonymous with the term "amount in controversy." Benoit, 773 So.2d at 707. The court concluded that the language in Article 1732, as amended in 1989, was intended to focus, not on the amount of the plaintiff's overall claim arising out of the transaction or occurrence, but on the value of the plaintiff's cause of action against the defendant or defendants who are before the court at the time the right to a jury trial is litigated. Id. at 708. The supreme court further noted as follows:

> In the more frequently occurring tort case where a tort victim's suit is against two defendants whose concurrent conduct gave rise to one cause of action for damages, and one of the defendants settles prior to trial, the amount of the plaintiff's cause of action for damages against the remaining defendant remains the same, because the remaining defendant may be found by the trier of

[4] A similar calculation was performed in Hussey v. Russell, 04-2377 (La. App. 1st Cir. 3/29/06), 934 So.2d 766, 777, writ denied, 06-0962 (La. 6/14/06), where two of the plaintiffs had stipulated that their claims did not exceed $50,000 each. Although the court found they were entitled to greater damages, the judgment in their favor was limited to $50,000, and the percentage of fault allocated to the defendant, 35%, was applied to that amount. Therefore, each plaintiff was awarded $17,500. There was no discussion of the distinction between "cause of action" and "amount in controversy."

fact to be one hundred percent at fault.

Benoit, 773 So.2d at 709.

In this case, originally the defendants had requested a jury trial. Later, in an ex parte motion for cancellation of the jury bond, the defendants stated that the plaintiffs stipulated that their **cause of action** did not exceed the sum of $50,000, thus eliminating the right to a jury trial. In open court, the plaintiffs corrected that stipulation to state that the "amount in controversy" did not exceed $50,000. Since the defendants had initially requested a trial by jury, it was only after the plaintiffs agreed to a stipulation that the "amount in controversy" did not exceed $50,000 that the defendants' right to a jury trial was precluded. This reduction of the plaintiffs' overall claim arising out of the occurrence at issue was a voluntary remission by the plaintiff of part of her claim in order to reduce the amount of her cause of action for damages below the minimum threshold amount for a jury trial. See Benoit, 773 So.2d at 708. We believe that the use of the term "amount in controversy" in open court did not change the effect of the stipulation in this case, since there were multiple defendants whose concurrent conduct gave rise to one cause of action for damages. See Benoit, 773 So.2d at 709. Therefore, to calculate the appropriate award, the judge correctly reduced the total award to the stipulated amount and then allocated fault. We find no error in this determination of the proper award.

CONCLUSION

For the foregoing reasons, we affirm the judgment. All costs of this appeal are assessed to Shannon Hultberg.

AFFIRMED.

SHANNON HULTBERG AND JORDAN HULTBERG

VERSUS

GENERAL INSURANCE COMPANY OF AMERICA AND MARGARETTA SPIELMAN

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JEW by RHP **Welch, J. concurring in part and dissenting in part.**

I agree with the opinion on the evidentiary issues, as well as the fault allocation and the general damage award. However, I disagree with the calculation of the percentage reduction for Benny's comparative fault. I believe the trial court should have applied the 75% reduction for the fault of Benny's to the total amount of damages awarded rather than to the $50,000 stipulation.

A stipulation has the effect of a judicial admission or confession, which binds all parties and the court. **Triche v. Allstate Insurance Company**, 96-0575, pp. 6-7 (La. App. 1st Cir. 12/20/96), 686 So.2d 127, 131. As such, a stipulation constitutes the law between the parties and is interpreted according to the intent of the parties to the agreement. See **Triche**, 96-0575 at p. 7, 686 So.2d at 131; see also **Robling v. Allstate Insurance Company**, 97-0582, pp. 12-13 (La. App. 1st Cir. 4/8/98), 711 So.2d 780, 787.

The only question the trial court was called upon to decide in determining the appropriate calculation reduction was whether the parties intended that the reduction of Ms. Hultberg's damages because of the negligence of another tortfeasor would be made from the total damages awarded or from $50,000. This question can only be answered by looking at all of the circumstances under which the stipulation was made.

Ms. Hultberg settled with Benny's before filing this lawsuit against Ms. Spielman and her insurer. At the beginning of the trial, the only defendant sued apprised the court that plaintiffs stipulated that the "cause of action" did not exceed $50,000. Ms. Hultberg's counsel immediately corrected this statement by advising the court that the stipulation was only with respect to the "amount in controversy." Obviously, Ms. Hultberg's attorney clarified the stipulation to ensure that it referred only to the value of

her claim against Ms. Spielman and her insurer, the only defendants at trial, after her settlement with Benny's, and **not** to the total value of her claim for damages regardless of which tortfeasors were involved in the litigation. It would be unreasonable to conclude that a plaintiff, who incurred over $30,000 in medical expenses alone, agreed that the value of her claim against all parties responsible for her injuries was less than $50,000. Under the circumstances of this case, I can only conclude that the parties understood, intended, and agreed that the stipulation would apply only to the value of Ms. Hultberg's claim against Ms. Spielman and her insurer, and not to the total value of her damages. The court was bound by this stipulation, and should have calculated the reduction for the percentage of fault attributable to Benny's from Ms. Hultberg's total award, rather than reducing Ms. Hultberg's total award to $50,000 and then reducing that sum further by the percentage of fault attributable to Benny's. Therefore, I respectfully dissent from that portion of the opinion upholding the trial court's calculation of the appropriate general damage award.