NOT DESIGNATED FOR PUBLICATION

LEONA THOMAS	*	**NO. 2001-CA-0967**
VERSUS	*	**COURT OF APPEAL**
JOHN BROUSSARD AND LAFAYETTE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-8186, DIVISION "F-10"
Honorable Yada Magee, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

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AFFIRMED

Leona Thomas brought a negligence action against John Broussard and Lafayette Insurance Co. for damages allegedly incurred by Ms. Thomas by falling through a hole in the kitchen floor of Mr. Broussard's home. The trial judge ruled in favor of Ms. Thomas and awarded her $35,000 for damages related to the accident. The plaintiff now appeals from this judgment, briefing four major assignments of error. For the following reasons, we affirm the trial court's judgment, finding no misapplication of the law or manifest error in its findings of fact.

FACTS

On Friday, October 25, 1996, the plaintiff spent the night at the defendant's residence. The next day, as plaintiff was in the house dusting, she allegedly fell through a hole in the floor. Plaintiff testified that her leg went into the hole up to the thigh area. About two weeks after the accident, Dr. Hoffman, who had treated Ms. Thomas prior to this incident, examined her and noted injuries to her calf, thigh and right posterior shoulder. Dr. Hoffman also noted that Ms. Thomas had injured her knee before the

incident but her knee did not hurt as much as her thigh and right shoulder. Specifically, Dr. Hoffman noted that the knee was "clear." Subsequent appointments with Dr. Hoffman through the end of March, 1997 revealed no injury or negative prognosis for the knee.

Dr. Seltzer began treating Ms. Thomas in April, 1997. At trial, Dr. Seltzer testified that he specifically asked about a prior knee injury and she told him she had none. An MRI taken May, 1997 revealed degeneration and a complex tear of the body and posterior horn of the medial meniscus, degeneration if not tear of the anterior horn of the medial meniscus, moderate degenerative changes of the posterior patella and femoral condyles of the tibial plateau with marginal hypertrophic lipping and spurring, grade III/IV chondromalacia of the posterior patella, prominent patellofemoral joint disease, and moderate joint effusion. Although the doctor was not aware of any prior injury to the knee, he testified that the October 1996 incident could have aggravated an existing condition.

Prior to the October 26, 1996 accident, Dr. Hoffman treated Ms. Thomas for pain off and on, for at least a year as of September 2, 1994. In April, 1995, Ms. Thomas was involved in a motor vehicle accident. As a result of this accident, she complained of pain in several parts of her body including her right knee. Shortly after the accident, her knee was swollen

and she experienced persistent pain. Dr. Hoffman noted a right knee sprain/strain involving the medial meniscus and a trace effusion, yet no frank meniscal injury or tears were reported. Almost six weeks after the motor vehicle accident, Dr. Hoffman noted that Ms. Thomas was still having problems with her knee. A 1995 MRI of the knee revealed findings consistent with degenerative changes involving the medial compartment of the knee and that the possibility of tearing of the meniscus could not be totally excluded.

Shortly after the accident which is the subject of this litigation, Dr. Hoffman cited no problems with the knee, stating "knee was clear," "[t]here is a good range of motion of the knee" and "[t]he knee is moving well."

PROCEDURAL HISTORY

On May 8, 1997 Leona Thomas filed a petition for damages against John Broussard, Jr., and Lafayette Insurance Co. In her petition, Ms. Thomas asserted that her accident was caused particularly by Mr. Broussard's negligence, alleging the following elements of liability: (a) strict liabilty - owning a residence which contained and allowed an unreasonably safe condition to exist, that is a hole in the floor; (b) negligence – Failing to repair the source of the dangerous and hazardous condition; (c) Allowing the dangerous and hazardous condition to exist in an area where defendant knew

or should have known that visitors would be traversing; and (d) any and all acts of negligence which may be proved at the trial at the matter hereof. Plaintiff's supplemental and amended petition avered that damages were in an amount greater that $50,000.

The trial on the merits was held on September 11, 2000 and after 2 days of trial, considering argument of counsel, the law and evidence on January 22, 2001, the trial judge entered judgment in favor of Leona Thomas and against defendants, John Broussard, Jr., and Lafayette Insurance Company for $35, 000 together with costs and legal interest from the date of judicial demand. In her reasons for judgment, the trial judge stated in pertinent part:

> …In a personal injury suit, the plaintiff bears the burden of proving a causal relationship between the accident and the injuries complained of. The test is whether the plaintiff has shown through medical testimony that more probable than not the subsequent medical treatment was necessitated by trauma suffered in the accident. *Aucoin v. State Farm,* 505 So.2d 993 (La. App. 3 Cir. 1987) citations omitted.
>
> In the instant case, the Court is of the opinion that the causal link between the pre-existing condition (degenerative medial meniscus of the right knee) and the accident was not established. Although Dr. Seltzer testified that the fall could have aggravated her existing condition, the standard of review is "more probable than not" and the evidence did not reveal that the subsequent medical treatment and evaluation of the knee was caused by the October, 1996 accident.
>
> Although the plaintiff failed to prove a causal link

> between the accident and an injury to the knee, the evidence did support that plaintiff fell injuring her leg, thigh and knee. It is the Court [sic] opinion that, at best, the plaintiff aggravated a pre-existing injury to her knee.
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> For the foregoing reasons, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Leona Thomas and against defendant, John Broussard and Lafayette Insurance Company.

Plaintiff/Appellant briefed four assignments of error, arguing that (1) the trial court misapplied the law in requiring the plaintiff to prove the absence of a pre-existing condition rather than requiring the plaintiff to prove that the fall caused an aggravation to her pre-existing condition by a preponderance of the evidence; (2) the trial court failed to consider the substance of Dr. Seltzer's testimony because he failed to use the legal jargon "more likely than not;"(3) committed manifest error in failing to conclude that the surgery to repair a tear of the anterior meniscus, damaged cartilage and chondromalacia was necessitated by the fall and; (4) the trial court committed manifest error by failing to award $28,789.00 in past medical special damages, $23,000.00 for lost earnings, $20,500 for future medical expenses and an adequate award for general damages.

STANDARD OF REVIEW

An appellate court may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Stobart v.*

State through Dept. of Transp. and Development, 617 So.2d 880, 882 (La. 4/12/93). Thus, an appellate court is not to decide whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Id. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Id*. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts. *Canter v. Koehring Co*., 283 So.2d 716, 724 (La. 9/24/73).

In discussion of appellate review of damages awards, the Supreme Court has stated the following:

> [T]he 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. Each case is different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration.
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> 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….Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then for the purpose of determining the highest or lowest point which is reasonably within that discretion.

Youn v. Maritime Overseas Corp. 623 So.2d 1257 (La. 1993).

DISCUSSION

The thrust of the plaintiff's argument centers on the trial court's findings that the plaintiff had reinjured her knee and the trial court's denial of general and specific damage amounts as alleged by the plaintiff based on this reinjury. Plaintiff would have this court believe that the incident at issue also caused separate injuries that caused greater damages than those awarded by the trial court.

ASSIGNMENTS 1 AND 2

Plaintiff argues that the trial court misapplied the law in holding that: (a) the plaintiff had the burden to prove the absence of a pre-existing condition while refusing to award damages upon finding that the accident caused an aggravation to the pre-existing condition; and (b) the substance of Dr. Seltzer's testimony could not be considered because he failed to include the legal jargon "more likely than not."

Plaintiff additionally argues that the trial court was manifestly erroneous in:

(a) falsely concluding that Dr. Seltzer did not relate the necessity for surgery to an aggravation of plaintiff's pre-existing condition; (b) falsely

concluding that Dr. Hoffman treated Ms. Thomas for pain in both ankles and knees particularly the right knee off and on, for about a year as of September 2, 1994, [harmless error]; (c) failing to conclude that Dr. Hoffman believed that Ms. Thomas made a good recovery from her April 1995 motor vehicle accident; (d) failing to find that the "possible tear" of the posterior horn of meniscus revealed by the 1995 MRI was totally excluded by visualization during arthroscopic surgery; and (e) falsely concluding that Dr. Hoffman "cited no problems with the knee."

We find that the trial court properly looked to the principles contained in *Aucoin* in establishing the burden of proof for this issue. This burden hinges on whether the plaintiff has shown through medical testimony more probably than not that subsequent medical treatment was necessitated by medical trauma suffered in the accident. *Aucoin v. State Farm*, 505 So.2d 993, 997 (La. App. 3 Cir. 1987) citations omitted.

The chief sources of evidence relating to these issues is comprised of Ms. Thomas' medical records as compiled by both Dr. Hoffman and Dr. Seltzer, together with their respective expert testimony. This was supplemented by additional medical evidence from Drs. Labranche and Nutik. Based on the outcome at the trial court level, the portion of this evidence regarded as most significant and dispositive was that of Dr.

Hoffman, whose initial medical examination of the plaintiff following the accident in question reflected that he had specifically examined the plaintiff's knee and that the knee was "clear." Dr. Hoffman concluded that the plaintiff had long-standing degenerative changes of the medial compartment of her knee well prior to the accident at issue. During subsequent examinations on November 13 and December 6, 1996, Dr. Hoffman noted the "…knee was moving well, that the motion was doing well…."

Additional evidence consistent with the trial court's conclusions consists of of Dr. Labranche's medical findings, who saw and examined the plaintiff without any complaint concerning her knee, despite his prior treatment of the plaintiff for degenerative arthritis of the knee which had existed since childhood. Also, Dr. Nutik's medical report dated September 22, 2000 established through MRI diagnostics and physical examination of Dr. Hoffman's medical findings that:

> The progressive changes about the posterior horn of the medial meniscus could be related to the progres[sion] of the underlying degenerative disease about the knee joint. There is also the possibility that the changes about the posterior horn of the meniscus could be related to trauma. The absence of any initial findings as documented in Dr. Hoffman's records from October 28th as well as the absence of any swelling in Dr. Selzer's initial records would tend to rule out the possibility of the fall of October 26, 1996 causing a tear of the meniscus and would make it more likely that this patient has progressive changes related to underlying degenerative arthritis.

Based on the various reports and testimony received from these doctors, the trial court concluded that the plaintiff's burden had not been met. Ample reasons for these findings are demonstrated by the above-cited record excerpts, by a lack of specificity as to the damages sustained in a subsequent accident involving injury to the knee, and perhaps by a potential lack of credibility on the issue of special damages. Accordingly, and to restate holding of *Stobart,* an appellate court is not to decide whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. *Stobart,* 617 So.2d at 882. The trial court's findings are to be given great weight, and should be overturned only if upon review they are found to be clearly erroneous. *Aucoin,* 505 So.2d at 995.

After reviewing the record and the evidence presented at trial, we cannot say that the trial court was clearly erroneous in concluding that Ms. Thomas did not meet her burden of proof. While the plaintiff takes issue with the purported treatment of Dr. Seltzer's testimony and medical findings, we note that the trial court's consideration of Dr. Seltzer's testimony on this issue is subject to broad discretion. The trier of fact may evaluate expert testimony by the same principles that apply to other witnesses, and has great discretion to accept or reject expert or lay opinions. See *Lopez v. WalMart Stores, Inc*. No. 94-2059 (La.App. 4 Cir. 8/13/97).

Also, where credibility of witness testimony is concerned, the trial court's findings should not be overturned in the absence of clear error, even if other conclusions from the same evidence are equally reasonable. *Martin v. Dupont*, 32-490 (La. App. 2 Cir. 12/08/99); 748 So.2d 574, 578, *citing Goodwin v.*

ASSIGNMENTS 3 AND 4

Plaintiff lastly argues that the trial court was manifestly erroneous in failing to award plaintiff's proven special damages of $28,789.00 in past medical expenses, $23,000.00 for lost earnings and $20,500.00 for future medical expenses, and in failing to award adequate general damages as a result of the above assignments of error. This court's role in its review of the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to this case. *Youn v. Maritime Overseas Corp.* 623 So.2d 1257 (La. 1993). Applying the standard of review set forth in *Youn*, we must determine if the award is a clear abuse of the much discretion of the trier of fact. *Id*. Additionally, in determining an award for pain and suffering, each injury must be evaluated according to its own peculiar facts and circumstances. *Aucoin*, 505 So.2d *at* 998. Appropriate factors to consider when reviewing a damage award are the severity and duration of

the injuries. *Id*.

Evidence regarding the nature, timing, and extent of the plaintiff's injuries was adduced chiefly from medical records and expert testimony, as well as fact witness testimony from the plaintiff and her family members and friends. Plaintiff did establish that she sustained an injury to her right leg, knee and thigh as a result of the subject fall.

Thus, after reviewing this evidence, we conclude that the trial court did not abuse its discretion in making a general damage award of $35,000.

Accordingly, we affirm the judgment of the trial court.

AFFIRMED