COURT OF APPEAL
FIFTH CIRCUIT

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Peter J. Fitzgerald, Jr.
CLERK

FREDERICK GONZALES	NO. 09-CA-368
VERSUS	FIFTH CIRCUIT
BUILD-A-BEAR WORKSHOP, INC. AND ZURICH NORTH AMERICAN INSURANCE COMPANY	COURT OF APPEAL
	STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 617-822, DIVISION "D"
HONORABLE ROBERT M. MURPHY, JUDGE PRESIDING

DECEMBER 8, 2009

WALTER J. ROTHSCHILD
JUDGE

Panel composed of Judges Walter J. Rothschild, Fredericka Homberg Wicker, and Jude G. Gravois

WICKER, J., CONCURS WITH REASONS

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VACATED AND REMANDED

In this suit for personal injuries, defendant appeals from a default judgment rendered in plaintiff's favor. The issue presented is whether the evidence introduced by the plaintiff, Frederick Gonzales, against defendant HA Logistics to confirm the default judgment was sufficient to establish a *prima facie* case under La. C.C.P. art. 1702. After reviewing the record and the applicable law, we find that the plaintiff failed to sustain his burden of proof for confirmation of the default judgment and we therefore must vacate the judgment and remand for further proceedings consistent herewith.

Factual and Procedural History

On March 10, 2005, Frederick Gonzales, an employee of Sundown Express, Inc., filed the instant petition for damages against Build-A-Bear Workshop, Inc. ("Build-A-Bear") and its insurer for injuries he sustained while delivering a bale of cotton to defendant's location at Lakeside Shopping Center in Metairie, Louisiana. Build-A-Bear subsequently filed an answer denying the allegations of the petition. Thereafter, the workers'

compensation insurer for Sundown Express, Inc. filed a petition to intervene in the proceedings for benefits paid to Gonzales as a result of his injuries.

Discovery proceeded in this matter, and on June 18, 2008, defendant Build-A-Bear filed a third party demand against HA Logistics, Inc. based on a contract between the two entities regarding the movement of supplies for Build-A-Bear's business. Build-A-Bear asserted it was entitled to a defense and indemnity from HA Logistics for plaintiff's claim for personal injury pursuant to the terms of this contract. A copy of the agreement between the parties was attached to the third party demand.

On June 23, 2008, plaintiff filed a Supplemental and Amending Petition naming as defendant "HA Longistics, Inc." "HA Longistics, Inc." was served via certified mail pursuant to the Long Arm Statute on July 12, 2008. No answer was filed on behalf of this defendant, and the trial court entered a preliminary default on August 12, 2008. However, this default was subsequently vacated by the trial court as "HA Longistics, Inc." was not the proper defendant in these proceedings.

The record also contains a Joint Motion for Partial Dismissal which was signed by the trial court on November 6, 2008 indicating that the claims between plaintiff and Build-A-Bear were settled and dismissing those claims, but reserving plaintiff's rights to proceed against HA Logistics, Inc.

On November 18, 2008, plaintiff filed a 2nd Supplemental and Amending Petition correctly naming HA Logistics, Inc. as defendant in the main demand. This defendant was served at its corporate address via certified mail pursuant to the Long Arm Statute on December 1, 2008, and no answer was filed on behalf of this defendant. The trial court entered a preliminary default against HA Logistics, Inc. on January 22, 2008. On

January 29, 2009, the trial court confirmed the preliminary default and entered judgment against defendant, HA Logistics, Inc. in the amount of $211,384.65, together with costs and judicial interest from March 10, 2005.

HA Logistics, Inc. now appeals from this judgment on the basis of several assignments of error: that the trial court erred in finding plaintiff met his burden to establish a prima facie case pursuant to La. C.C.P. art. 1702; that the trial court erred in failing to quantify comparative fault of all parties prior to entering judgment; that the trial court erred in holding that judicial interest ran from the date of the original demand. Because we find merit in defendant's first assignment of error which requires us to vacate the judgment, it is unnecessary to reach the remaining assignments.

Applicable Law

A judgment of default must be confirmed by proof of the demand sufficient to establish a *prima facie* case. La. C.C.P. art. 1702A. For a plaintiff to obtain a default judgment, he must establish the elements of a *prima facie* case with competent evidence, as fully as though the defendant denied each of the allegations in the petition. The plaintiff must present competent evidence that convinces the court that it is probable that he would prevail on a trial on the merits. Schaff v. Cardinal Services, Inc., 00-1164 (La.App. 5 Cir. 2/14/01), 778 So.2d 1278, 1280, writ denied, 01-1035 (La.6/1/01) 793 So.2d 196, citing Thibodeaux v. Burton, 538 So.2d 1001, 1004 (La.1989). When a demand is based upon a delictual obligation, the testimony of the plaintiff with corroborating evidence, which may be by affidavits and exhibits annexed thereto which contain facts sufficient to establish a *prima facie* case, shall be admissible, self-authenticating, and sufficient proof of such demand. The court may, under the circumstances of

the case, require additional evidence in the form of oral testimony before entering judgment. La. C.C. P. art. 1702(B)(2). When the demand is based upon a claim for a personal injury, a sworn narrative report of the treating physician or dentist may be offered in lieu of his testimony. La. C.C.P. art. 1702(D).

Standard of review

The determination of whether there is sufficient proof to support a default judgment is a question of fact and should not be disturbed on appeal unless it is manifestly erroneous. Ledet v. Moe, 03-745 (La. App. 5 Cir. 12/9/03), 864 So.2d 643, 644. Where it is uncontested that entry of the default judgment was procedurally proper, appellate review is limited to determining whether there was sufficient evidence introduced at the default confirmation hearing to support the default judgment. Akerman v. Dawes, 94-757 (La. App. 4 Cir. 1/19/95), 658 So.2d 1270, 1271-1272.

Prima Facie Case

In its first assignment of error, HA Logistics argues that plaintiff did not present a *prima facie* case of liability or damages, citing La. C.C.P. art. 1702. While we pretermit the issue of whether the evidence submitted by plaintiff with regard to liability is sufficient to prove a *prima facie* case, we find the medical evidence to be insufficient to meet plaintiff's burden.

At the confirmation hearing, plaintiff submitted the following: excerpts from depositions of the corporate representatives of Build-A-Bear and Sundown Express, Inc., a copy of an agreement between HA Logistics and Build-A-Bear, plaintiff's wage records, certified copies of plaintiff's medical records and plaintiff's own testimony regarding the accident and his injuries.

Plaintiff testified that at the time of the accident herein, he was employed by Sundown Express, Inc. and was making a delivery to Build-A-Bear location in Lakeside Shopping Center. He identified his wage records and stated that he was paid based upon the number of and weight of deliveries he made every day. He stated that the cotton bale he was delivering to Build-A-Bear on the date in question weighed approximately 700 pounds. During this delivery, Build-A-Bear employees furnished him a furniture cart which was smaller than the cart usually used for this delivery and that the weight of the cotton broke the cart and the bale of cotton fell on top of him. Plaintiff was shown a copy of the agreement between HA Logistics, Inc. and Build-A-Bear and he testified he had never seen the agreement and no one had told him of the manner of making deliveries specified in the agreement. He testified he was not given training by HA Logistics on how to deliver the bales of cotton. He also testified that the bales of cotton did not arrive strapped onto a cart as indicated in the agreement.

Plaintiff briefly described the injury to his neck, the medical treatment he received, the amount of time he was out of work and his inability to continue to work as a delivery person. He also testified that he underwent surgery on his neck and described his level of pain as a result of this injury.

Plaintiff also submitted excerpts of the deposition testimony of two corporate representatives from Build-A-Bear. Julie Ann Phillips stated that she completed an accident report for plaintiff's injuries on March 16, 2004 and Jeffery Lynn Fullmer testified that Build-A-Bear entered into a contract with HA Logistics, Inc. in 2002 to deliver their products to their stores. Mr. Fullmer identified the contract in question as a true and correct copy and the

contract was attached to his deposition. He stated that pursuant to the agreement, HA Logistics had the duty to communicate the method of delivery contained in the agreement to their independent contractors and failure to do so would be considered a violation of the agreement.

We first consider the issue of whether the medical evidence submitted by plaintiff is sufficient to meet his burden of establishing a *prima facie* case. To obtain a default judgment, one must establish the elements of a *prima facie* case with competent evidence as fully as though the defendant denied each of the allegations of the petition. Ventola v. Hall, 03-703 (La. App. 5 Cir. 11/12/03), 861 So.2d 677. In a claim for personal injuries, La. C.C.P. art. 1702(D) states that "a sworn narrative report of the treating physician or dentist may be offered in lieu of his testimony."

None of plaintiff's treating physicians testified in this personal injury case and there were no sworn narrative reports offered in lieu of testimony. The medical records offered into evidence include certified copies of medical bills and statements, pharmacy receipts, health insurance claims, physician progress notes, letters and reports and operating room reports. The only reference to causation in these records is contained in a letter from Dr. Stewart Altman to an insurer dated March 29, 2004, several weeks after the accident, that plaintiff's symptoms of mild spine and shoulder strain are causally related to the accident.

Plaintiff contends that it is not necessary to introduce either testimony or sworn narrative reports of his treating physicians to meet his burden of proof under La. C.C.P. art. 1702(D). Plaintiff relies on Oliver v. Cal Dive Intern., Inc., 02-1122 (La. App. 1 Cir. 4/2/03), 844 So.2d 942, 945, writ denied, 03-1230 (La. 9/19/03), 858 So.2d 638 and writ denied, 03-1796 (La.

9/19/03), 853 So.2d 648, in which the First Circuit held that a physician's letters in the medical records that plaintiff could no longer continue in his profession were sufficient to establish *prima facie* proof of the treating physician's professional diagnosis. Plaintiff also relies on Arias v. Stolthaven New Orleans L.L.C., 07-650 (La. App 4 Cir. 3/19/08), 980 So.2d 791, 803, reversed on other grounds, 9 So.3d 815 (La. 5/5/09), 08-1111, in which the Fourth Circuit adopted the ruling in Oliver and held that a *prima facie* case concerning medical issues may be made for default purposes under La. C.C.P. art. 1702(B)(2) without either oral physician testimony or a sworn narrative report thereof, depending on the quality of the evidence offered. In that case, the Court found that the trial court committed no error in receiving the certified medical records offered by the plaintiffs in support of the default confirmation.

Although other jurisdictions have found that the lack of a sworn narrative report required by La. C.C.P. art 1702 does not invalidate a default judgment rendered on other evidence, this Court has repeatedly held otherwise. A line of jurisprudence from this Circuit supports a conclusion that the medical evidence presented in this case does not meet plaintiff's burden of presenting a prima facie case. In a similar factual situation, a panel of this Court held that a sworn narrative report or testimony of plaintiff's treating physician is necessary to establish the causal connection between plaintiff's accident and her injuries. Dufrene v. Carter, 05-335 (La. App. 5 Cir. 11/29/05), 917 So.2d 1149, 1153. Further, this Court has held that physician's letter reports do not comply with the requirements of La. C.C.P. art 1702(D). Campbell v. Kendrick, 556 So.2d 140, 141 (La.App. 5 Cir. 1990). The medical bills may be admissible to support the plaintiff's

testimony as to the fact that plaintiff had surgery and the costs incurred, but inadmissible to show the services were necessary. Id. See also, Ventola v. Hall, 03-703, (La. App. 5 Cir. 11/12/03), 861 So.2d 677, 681; Arias v. State Farm Mut. Auto. Ins. Co., 98-978 (La.App. 5 Cir. 3/10/99), 734 So.2d 730.

We are bound to follow previous holdings from this Circuit that the type of evidence presented herein is insufficient to comply with the codal requirements for a default judgment. In the present case, we find that the evidence submitted by plaintiff with regard to causation and medical damages is not sufficient to prove a *prima facie* case. We conclude that plaintiff has failed to establish a *prima facie* case supporting the award of $211,384.65. Accordingly, we vacate and set aside the default judgment rendered in favor of plaintiff and we remand for further proceedings.

VACATED AND REMANDED

FREDERICK GONZALES	NO. 09-CA-368
VERSUS	FIFTH CIRCUIT
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WICKER, J., CONCURS WITH REASONS:

I agree that the judgment of the trial court should be vacated and that this case should be remanded for further proceedings. However, I respectfully disagree with the analysis of the majority opinion for two reasons.

First, I believe that certified medical records should be sufficient to establish a prima facie default judgment so long as the records are admissible and demonstrate both an injury and a causal link between the plaintiff's injuries and the accident at issue. The First, Third, and Fourth Circuit Courts of Appeal adhere to this rule. *See Assamad v. Percy Square and Diamond Foods, L.L.C.,* 2007-1229 (La. App. 1 Cir. 7/29/08), 993 So.2d 644, 650; *Bordelon v. Sayer,* 2001-0717 (La. App. 3 Cir. 3/13/02), 811 So.2d 1232, 1235-36; *Goldfinch v. United Cabs, Inc.,* 2008-1447 (La. App. 4 Cir. 5/13/09), 13 So.3d 1173, 1178. This Court does not.

The Fourth Circuit explicitly rejected our approach in *Arias v. Stolthaven New Orleans, L.L.C.,* 2007-0650 (La. App. 4 Cir. 3/19/08), 980 So.2d 791, 801-02, *rev'd on other grounds*, 2008-1111 (La. 5/5/09), 9 So.3d 815. The *Arias* court determined that the purpose of La. C. C. P. art. 1702(D) is to make it easier for a plaintiff to obtain a default, not to make the process more difficult by requiring sworn narrative reports rather than certified medical records. *Arias,* 980 So.2d at 802. The Fourth Circuit

additionally noted that "there is nothing in [La. C. C. P. art. 1702(D)], expressed or implied, saying that oral physician testimony or a sworn narrative report in lieu thereof is the *sine qua non* of a *prima facie* case for default purposes." *Id.* at 803. I agree with this reasoning and believe that this Court should adopt the rule of the First, Third, and Fourth Circuits.

Second, I respectfully disagree with the majority's conclusion that the plaintiff's certified medical records failed to establish causation. To establish a prima facie case for default judgment, a plaintiff must demonstrate the causal connection between his injuries and the accident by introducing competent evidence establishing that it is more probable than not that the accident at issue caused his injuries. *Hall v. Folger Coffee Co.,* 2002-0920 (La. App. 4 Cir. 10/1/03), 857 So.2d 1234, 1248. If the plaintiff was in good health before the accident, but a disabling condition appeared and continuously manifested itself afterwards, causation should be presumed. *Housley v. Cerise,* 579 So.2d 973, 980 (La. 1991).

Here, the plaintiff submitted certified medical records documenting his injuries and the medical treatment he received following the accident. Dr. Altman's certified medical report indicates he found a causal link between the plaintiff's injuries and the nature of the accident. Dr. Altman in his report concluded that the type of injuries suffered by the plaintiff, including strains in the cervical spine, right shoulder, thoracic spine, and lumbar spine, were consistent with the type of accident that occurred. At the hearing on the default judgment, the plaintiff's counsel did not ask the plaintiff whether he experienced shoulder and neck pain before the accident. However, the history portion of the plaintiff's certified medical records with Dr. Richard Hages indicates that the plaintiff had never previously injured his neck or back prior to this incident. In addition, Dr. Bradley

Bartholomew drafted an office note on August 30, 2007 indicating that the plaintiff denied any previous medical history on his neck or back. Dr. Hages treated the plaintiff in 2006 and 2007. Dr. Bartholomew treated and performed surgery on the plaintiff in 2008. After considering both the presumption favoring causation and the manifest error standard of review, I believe this Court should defer to the trial court's finding of causation in this case.

Nonetheless, I concur in the disposition of this matter because I believe that the trial court erred in admitting into evidence a deposition of Build-A-Bear's corporate representative and a deposition of Build-A-Bear employee Julie Ann Phillips. Both depositions were taken before HA Logistics was made a party to this suit. Under Louisiana law, depositions "may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof." La. C. C. P. art. 1450(A). To satisfy the reasonable notice requirement, the party desiring to take the deposition must notify every other party to the action before taking the deposition. La. C. C. P. art. 1438. Here, HA received no notice of the depositions because it had not been made a party to the suit at the time the depositions were taken. Accordingly, I believe that the trial court was manifestly erroneous in admitting deposition testimony taken prior to HA's involvement in this suit. *See by analogy Silva v. Allen* 256 So.2d 447 (La. App. 4th Cir. 1972) (holding that a deposition of the defendant was inadmissible against a co-defendant because the plaintiff deposed the defendant prior to adding the co-defendant to the lawsuit); *Davlin v. Smalley,* 554 So.2d 763 (La. App. 3d Cir. 1989) (holding that a deposition was inadmissible against the appellants when the record demonstrated that

appellants were not present at the deposition and appellants received no advance notice thereof).

For the foregoing reasons, I respectfully concur.

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NOTICE OF JUDGMENT AND CERTIFICATE OF MAILING

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **DECEMBER 8, 2009** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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