NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0520

MITZI SPRAGUE

VERSUS

ZACHARY FLADMO AND SAFECO INSURANCE COMPANY OF ILLINOIS

RHP by Eaby
JMG by Eaby

Judgment Rendered: DEC 10 2013

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 585,936

The Honorable Todd Hernandez, Judge Presiding

* * * * *

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* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

This is an appeal by defendants, Zachary Fladmo and Safeco Insurance Company of Illinois, from a judgment of the trial court awarding damages to plaintiff, Mitzi Sprague. Defendants seek to reduce the amount of damages awarded to plaintiff.

FACTS AND PROCEDURAL HISTORY

Plaintiff was involved in an automobile accident on January 11, 2009, when she was rear-ended by a full-size Dodge Ram truck while driving a Mini Cooper. Following the accident, plaintiff sought medical treatment for pain in her neck and back, as well as headaches, for which she sought damages. She also sought damages for an aggravation of multiple sclerosis, a condition from which she suffered since had 1998. Plaintiff filed suit against defendants, and a trial was held on September 4, 2012. The parties stipulated that damages did not exceed $50,000. Although there was no formal stipulation as to liability, the parties agreed that since this case was a rear-end collision, evidence would be limited to causation and damages. On December 17, 2012, the trial court signed a judgment awarding plaintiff $35,000 in general damages for pain and suffering and $3,520 in special damages. Defendants appeal the amount of general damages awarded alleging that causation as to an aggravation of multiple sclerosis was not proven.

ASSIGNMENT OF ERRORS

Defendants assign as error that the trial court erred (1) in applying the wrong burden of proof regarding causation for aggravation of multiple sclerosis; (2) in finding sufficient evidence to meet the burden of proof as to medical causation; and (3) in awarding $35,000 in general damages for plaintiff's injuries, which defendants believe were limited to soft tissue injuries.

MEDICAL CAUSATION

Burden of Proof

Defendants claim that the trial court applied the wrong standard to determine if the plaintiff met her burden of proving causation. The trial court stated in its written reasons that if the medical evidence did not clearly establish the burden of proof of causation, the court could consider a witness's subjective complaints of pain and discomfort and find the burden satisfied, if the testimony was credible, consistent, and corroborated. Defendants assert that the trial court incorrectly took into consideration the subjective complaints of plaintiff in determining causation. Defendants correctly state the plaintiff must prove causation by a preponderance of the evidence. The test for determining the causal relationship between the accident and subsequent injury is whether the plaintiff proved, through medical testimony, that it is more probable than not that the subsequent injuries were caused by the accident. *Maranto v. Goodyear Tire & Rubber Co.,* 94-2603 (La. 2/20/95), 650 So. 2d 757, 759. When the conclusion regarding medial causation is not one within common knowledge, expert medical testimony is required. *See Lasha v. Olin Corp.,* 625 So. 2d 1002, 1005 (La. 1993). Defendants emphasize the need for *medical testimony.*

Whether plaintiff's multiple sclerosis was aggravated by the automobile accident is not within common knowledge, so this court agrees that medical testimony was required. However, it is well-settled that an appeal is taken from a final judgment, not from written reasons for judgment that are the trial court's explanations of determinations made. It is, however, not improper for the court of appeal to consider written reasons for judgment in determining whether the trial court erred. *State in the Interest of Mason,* 356 So.2d 530, 532 (La. App. 1st Cir. 1977); *See* La. C.C.P. art. 2083.

In an action to recover damages for injuries allegedly caused by another's negligence, the plaintiff has the burden of proving causation by a preponderance of the evidence; that burden has been met when the entirety of the evidence, both direct and circumstantial, shows that the fact or causation sought to be proved is more probable than not. *Boudreaux v. American Ins. Co.*, 262 La. 721, 264 So. 2d 621, 635 (1972)(on rehearing); *Short v. Plantation Management Corp.*, 99-0899 (La. App. 1 Cir. 12/27/00), 781 So. 2d 46, 54. "We note that some opinions seem to imply that plaintiff may only meet this burden through 'medical testimony.' ... However, as noted above, causation is not proven exclusively through expert medical testimony, but can also be proven simply through 'medical evidence' so long as the evidence presented by plaintiff amounts to a preponderance." *Holmes v. Hicks,* 09-0343 n.1 (La. App. 1 Cir. 10/23/09) 2009 WL 3454350 (unpublished opinion)(citing *Cannet v. Franklynn Pest Control Co., Inc.*, 08-56 (La. App. 5 Cir. 4/29/08), 985 So. 2d 270, 276).

With regard to causation, proof by direct or circumstantial evidence is sufficient to constitute a preponderance, when, taking the evidence as a whole, such proof shows that the fact or causation sought to be proved is more probable than not. *Jordan v. Travelers, Ins. Co.*, 257 La. 995, 1008, 245 So. 2d 151, 155 (1971). It is well settled that for a plaintiff to succeed in a tort action, he must prove all the essential elements of his claim by a preponderance of the evidence. *Sharkey v. Sterling Drug, Inc.*, 600 So. 2d 701, 712 (La. App. 1 Cir.), *writ denied,* 605 So. 2d 1099 and 1100 (La. 1992). In cases where medical causation is at issue, medical certainty is not the standard. Our courts have recognized that "medicine is an inexact science at best, but in the courts of law we must be concerned not with concrete and irrefutable truths, but rather the proper distribution of liability based on the preponderance of the evidence." *Id.* (citations omitted.) The defendant in *Sharkey* relied heavily upon the fact that none of the

experts at trial was able to state unequivocally that aspirin caused the plaintiff's Reye's Syndrome. The trial court relied upon the epidemiological or statistical studies, despite the lack of medical testimony, to find that causation had been proven. *Id.*

Evidence on Burden of Proof

The defendants rely on the fact that no doctor in the present case stated that the aggravation of plaintiff's multiple sclerosis was more probably than not caused by the accident. However, the trial court, in its written reasons for judgment, does rely on medical testimony and states as follows:

> The medical experts have clearly established that it is difficult to make a direct correlation between symptoms caused by trauma and symptoms caused by her disease, but they have confirmed that symptoms of MS [multiple sclerosis] can be exacerbated by trauma, such as an auto accident. Dr. Erwin even opined that trauma may cause an aggravation of MS [multiple sclerosis] symptoms, but a difficulty or the impossibility of quantifying any direct correlation. Based upon the medical evidence, it is clear that prior to the accident the plaintiff was doing well and was progressing with objective findings of increased strength, balance and coordination. The medical evidence also clearly indicates a decline in plaintiff's health and increase in symptoms of pain after the accident.

According to Dr. April Ann Erwin, a neurologist who treated the plaintiff, multiple sclerosis is an autoimmune disease in which the patient's own immune system attacks the central nervous system. Multiple sclerosis can cause muscle weakness, changes in sensation, changes in vision, fatigue, mood changes, and difficulty with balance or walking. Plaintiff treated with Dr. Steven Cavalier, a neurologist, for multiple sclerosis both before and after the accident.[1] The medical records of Dr. Cavalier indicate that plaintiff first treated with him on September 22, 2006. Dr. Cavalier noted that the plaintiff's symptoms of multiple sclerosis first appeared following a 1997 motor vehicle accident. He described the plaintiff as having difficulty walking, fatigue in her legs, depression, and migraine

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[1] Dr. Cavalier was unable to be deposed or found for trial and no longer worked at the health care facility where plaintiff was treated.

headaches. On April 23, 2008, Dr. Cavalier noted that the plaintiff had previously used a walker, but was now walking with a cane, had numbness in her left arm, was generally weak, had an unsteady gait, fatigued easily, and had slurred speech at times. Dr. Cavalier also noted that the plaintiff was going to China for stem cell therapy.

Dr. Jyoti S. Pham, a pain management physician, treated the plaintiff on July 1, 2008, after her stem cell therapy and before the automobile accident. Dr. Pham noted that the stem cell therapy had provided increased strength and balance, allowed the plaintiff to run more easily, and permitted her to build endurance. Dr. Pham also noted that the plaintiff was working with an acupuncturist and a personal trainer.

Dr. Cavalier saw the plaintiff on September 16, 2008, prior to the accident. He noted that the stem cell infusions had been "quite successful." The plaintiff was having no problems with balance or gait, had no focal or lateralized weakness, and had migraines once or twice a week.

After the accident, plaintiff saw Dr. Cavalier on March 17, 2009, and she indicated a recent attack of optic neuritis, a history of a motor vehicle accident, neck and back pain, daily headaches, and an unsteady gait. Dr. Cavalier referred plaintiff to Dr. Pham, who treated the plaintiff three days later. The plaintiff reported increased pain levels, increased headaches, and the episode of optic neuritis, and advised Dr. Pham of the motor vehicle accident.

Dr. Pham testified that multiple sclerosis can by aggravated by stress and trauma. Dr. Pham also testified that when she saw the plaintiff on July 1, 2008, approximately six months prior to the accident, the plaintiff had undergone stem cell therapy and exhibited increased strength, balance, running, and endurance. Dr. Pham also saw the plaintiff on October 1, 2008. At that time the plaintiff's main complaint was chronic headaches and neck pain, but the plaintiff was attempting to

cease the preventive medication she took for the headaches due to her improvement following the medication, acupuncture, and stem cell therapy. After the accident, Dr. Pham saw the plaintiff on March 20, 2009, and the plaintiff indicated she had had another episode of optic neuritis. Dr. Pham had treated the plaintiff for optic neuritis in 2007, and plaintiff had had no other complaints until the accident in 2009. The plaintiff also informed the doctor that her headaches had become worse since the accident. Dr. Pham testified as follows:

> Q. Okay. Do you have any opinion as to whether or not the trauma exacerbated any of her MS [multiple sclerosis] symptoms?
>
> A. It would be hard for me to make a direct correlation on that. Although, per her statement, she had said that her headaches had worsened after the accident.

Dr. Erwin, a neurologist who only began treating plaintiff in 2012, testified on behalf of plaintiff. Dr. Erwin testified that she did not find it unreasonable for a patient with multiple sclerosis to have worsening of symptoms following a traumatic incident, such as a car accident, but that she could not quantify the amount of disability connected to the incident. Dr. Erwin was asked on several occasions regarding causation. In the first instance she testified as follows:

> Q. Is it possible for some stressful event to cause a person to have a worsening in their MS [multiple sclerosis] symptoms as they perceive them?
>
> A. I would not find it unreasonable for a patient to come in and say that they felt worse after a traumatic incident; however, it would be impossible to quantify any particular amount of disability that might be connected to that incident.

Dr. Erwin again testified as follows:

> Q. Is there any correlation between stress and traumatic events such as a car accident in this case that would cause an aggravation of MS [multiple sclerosis]?
>
> A. It would not be unusual for me to have a patient come into the office and tell me that they endured a stressful life event and felt worse.
>
> However, I would not be able to quantify the correlation between the event and the subjective way that the patient felt.

Dr. Erwin was again asked about correlating an accident to a stressful event and stated:

> Q. Okay. I got kind of carried away on the end there. Can we say with reasonable medical certainty that there can be an aggravation of MS [multiple sclerosis] as a result of some significant traumatic event?
>
> A. I think it's reasonable to say that if a patient came to me after a traumatic event and said that they felt worse, I would have no trouble believing that that would be the case, but I don't think we have documented evidence to support a quantifiable change that could be expected from a traumatic life event in multiple sclerosis.

Dr. Erwin stated that she could not state with certainty that the automobile accident caused an aggravation of the plaintiff's multiple sclerosis symptoms and she could not quantify the amount of aggravation that may be due to multiple sclerosis.

"In cases where medical causation is at issue, medical certainty is not the standard." *Starkey,* 600 So. 2d at 712. Because medicine is an inexact science, it is the proper distribution of liability based on the preponderance of the evidence with which courts are concerned. *Id.* To require plaintiff to prove defendant's negligence to a "reasonable certainty" is to require him to prove it to such degree as to leave no reasonable doubt, which is equivalent to saying that he must prove it beyond a reasonable doubt. *Lasha,* 625 So. 2d at 1005.

The court's finding regarding causation is a finding of fact and must be reviewed under the manifest error standard. *Johnson v. State through Dept. of Public Safety and Corrections,* 95-0003 (La. App. 1 Cir. 10/6/95), 671 So. 2d 454, 457, *writ denied,* 95-2666 (La. 1/5/96), 667 So. 2d 522; *Paul v. Louisiana State Employees' Group Ben. Program,* 99-0897 (La. App. 1 Cir. 5/12/00), 762 So. 2d 136, 142-43. The two-part test for the appellate review of a trial court's factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the trier of fact; and 2) whether the record further establishes that the

finding is not manifestly erroneous. *Mart v. Hill,* 505 So. 2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. *See Stobart v. State through Dep't of Transp. and Dev.,* 617 So. 2d 880, 882 (La. 1993); *Moss v. State,* 07-1686 (La. App. 1 Cir. 8/8/08), 993 So. 2d 687, 693, *writ denied,* 08-2166 (La. 11/14/08), 996 So. 2d 1092.

We conclude that the trial court correctly held that medical causation was proven by a preponderance of the evidence. In *Sharkey,* medical experts were unable to state unequivocally that aspirin caused the plaintiff's Reye's syndrome. However, the court held that proof of medical causation to a certainty is not required. *Sharkey,* 600 So. 2d at 712. The court also took into consideration epidemiological or statistical studies and testimony as to the plaintiff's symptoms. *Id.* at 713. Therefore, the court concluded that all of the evidence established more probable than not that the aspirin caused the plaintiff's condition.

In *Durrett v. State of Louisiana,* 416 So. 2d 562, 568-569 (La. App. 1 Cir.), *writs denied,* 421 So. 2d 247, 248 and 251 (La. 1982), the plaintiff complained, just as the plaintiff does in the present case, that her multiple sclerosis was aggravated by an automobile accident. The plaintiff's treating physician did testify that the plaintiff's aggravated symptoms were accident related and caused by the extreme physical and emotional stress she endured as a result of the accident. Therefore, the court held that the worsened condition of the plaintiff was more probably than not caused by the accident.

In the present case, the trial court took into consideration the medical testimony, the medical records, and the testimony of the plaintiff to determine that

causation was established more probably than not. Even if the subjective complaints of the plaintiff were not considered, the medical evidence is sufficient for plaintiff to have carried her burden of proof as to causation. Dr. Pham testified that multiple sclerosis can be aggravated by stress. Relying on the plaintiff's complaints, she found the headaches were worsened by the accident. Dr. Erwin stated numerous times that it was reasonable for a multiple sclerosis patient to feel worse after a traumatic incident or a stressful life incident. The medical records of Dr. Cavalier note the physical symptoms of the plaintiff before receiving stem cell therapy, after stem cell therapy, and after the accident. The records show the plaintiff's multiple sclerosis symptoms improved with the stem cell therapy and then got worse after the accident. Given the medical evidence of Dr. Cavalier, combined with the medical testimony of Drs. Erwin and Pham, the trial court was not unreasonable in finding that the accident aggravated plaintiff's multiple sclerosis. We find no manifest error in the trial court's finding of medical causation.

DAMAGES

Defendants assign as error that the damages were excessive and that plaintiff is not entitled to the general damages of $35,000 awarded by the trial court. An appeal court should rarely disturb an award of damages, since great discretion is vested in the trial court. *Youn v. Maritime Overseas Corp.,* 623 So. 2d 1257 (La. 1993), *cert. denied,* 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). It is well-settled that a judge or jury is given great discretion in its assessment of quantum. *Guillory v. Lee,* 09-0075 (La. 6/26/09), 16 So. 3d 1104, 1116-17; *See* La. C.C. art. 2324.1. Furthermore, the assessment of quantum, or the appropriate amount of damages, by a trial judge or jury is a determination of fact that is entitled to great deference on review. *Wainwright v. Fontenot*, 00-0492 (La. 10/17/00), 774 So. 2d 70, 74.

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,* 774 So. 2d at 74; *Youn,* 623 So. 2d at 1261. The initial inquiry by the appellate court is whether the award is a clear abuse of that "much discretion" of the trier of fact. *Youn,* 623 So. 2d at 1260. Reasonable persons frequently disagree about the measure of general damages in a particular case. *Youn,* 623 So. 2d at 1261. Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. *Coco v. Winston Indus., Inc.,* 341 So. 2d 332, 335 (La. 1976).

Defendants specifically assert as error that the plaintiff was awarded excessive general damages. As stated above, this court will not overturn the issue of damages absent an abuse of discretion. Defendants have pointed to no abuse of discretion on the part of the trial court with regard to damages. Given that this court finds there was no manifest error in the trial court's finding of causation, we do not find the trial court abused its discretion in awarding plaintiff $35,000 for both soft-tissue injuries and aggravation of multiple sclerosis.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of the appeal are assessed to defendants, Zachary Fladmo and Safeco Insurance Company of Illinois.

AFFIRMED.