NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0267

CLIFFORD BARR

VERSUS

RAY JOSEPH SCHEXNAYDER AND ABC INSURANCE COMPANY

Judgment Rendered: NOV 06 2015

* * * * * *

On Appeal from the Twenty-Third Judicial District Court
In and for the Parish of Ascension
State of Louisiana
No. 107491

Honorable Alvin Turner, Jr., Judge Presiding

* * * * * *

Spencer H. Calahan
Benjamin T. Lowe
David M. Lefeve
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellee
Clifford Barr

Michael K. Heltz
Adam J. Koenig
Gramercy, Louisiana

Counsel for Defendant/Appellant
Ray Joseph Schexnayder

* * * * * *

Theriot, J. concurs with reasons

BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McCLENDON, J.

In this appeal, the defendant challenges a judgment in favor of the plaintiff for damages resulting from a traffic-related altercation. For the following reasons, we affirm the judgment of the trial court. We also deny plaintiff's motion for sanctions for a frivolous appeal and deny defendant's motions to file a reply brief and to strike.

FACTUAL AND PROCEDURAL HISTORY

On August 13, 2012, the plaintiff, Clifford Barr, was operating his 1997 Nissan pickup truck traveling southbound on La. Hwy 431 in Ascension Parish, when he prepared to make a left turn into the parking lot of Rossi's Auto Service (Rossi's). A Dodge 2500 pickup truck was blocking Mr. Barr's entrance into the parking lot, and he waited a moment to see if the truck was going to exit the lot. When the truck did not move, Mr. Barr proceeded to turn left into Rossi's. Simultaneously, the pickup truck, which was being driven by the defendant, Ray Joseph Schexnayder, proceeded to turn left out of the parking lot onto La. Hwy. 431 northbound, and the two vehicles nearly collided. Both vehicles stopped on the highway, and a verbal altercation ensued. Mr. Schexnayder tried to exit his vehicle, opening his door into the door of Mr. Barr's truck, but he could not get out because the vehicles were too close to each other. Rather than leave, Mr. Schexnayder then backed his vehicle into the Rossi's parking lot, and Mr. Barr proceeded forward into the parking lot. Mr. Schexnayder exited his truck, approached Mr. Barr's vehicle, and put his head through the rolled-down window of Mr. Barr's truck. At this point, the parties' stories diverge, with each party accusing the other of throwing the first punch. However, it is undisputed that at some point Mr. Barr, while still seated in his truck, grabbed Mr. Schexnayder and Mr. Schexnayder bit Mr. Barr on the nose, necessitating medical treatment.

On July 15, 2013, Mr. Barr filed a petition for damages against Mr. Schexnayder,[1] who filed a reconventional demand against Mr. Barr. The matter

[1] America First Insurance Company was also made a defendant, in its capacity as the insurer of Mr. Schexnayder, but was dismissed prior to trial by a joint motion for dismissal with prejudice.

proceeded to a bench trial on September 9, 2014, and the trial court took the matter under advisement. On October 9, 2014, the trial court issued reasons for judgment, finding Mr. Schexnayder to be the aggressor and finding no evidence of fault on the part of Mr. Barr. It specifically found Mr. Barr "to be very credible" and concluded that Mr. Schexnayder was the "sole cause of the incident and resulting damages at issue." The trial court awarded damages to Mr. Barr in the following amounts:

Physical and Mental Pain and Suffering	$12,750.00
Past Medical Expenses	$255.00
Future Medical Expenses	$12,000.00
Total Award	$25,005.00

Additionally, the trial court determined that Mr. Barr did not meet his burden of proof as to damages for physical disability, loss of income, and property damage and did not make any award regarding same. The reconventional demand filed by Mr. Schexnayder was dismissed at his cost.

A judgment was signed on October 30, 2014, and Mr. Schexnayder appealed, assigning the following as error:

1) The trial court erred in ruling that Mr. Schexnayder was the aggressor and sole cause of the incident on August 13, 2012;
2) The trial court erred in ruling on the issue of liability prior to the conclusion of witness testimony;
3) The trial court erred in ruling that Mr. Schexnayder committed an intentional tort upon Mr. Barr;
4) The trial court erred in ruling that the injuries claimed by Mr. Barr were caused by the actions of Mr. Schexnayder; and
5) The trial court erred in awarding Mr. Barr damages for physical and mental pain and suffering and future medical expenses.

DISCUSSION

Louisiana courts of appeal apply the manifest error standard of review to factual determinations in civil cases. **Hall v. Folger Coffee Co.**, 03-1734 (La.

4/14/04), 874 So.2d 90, 98. Under the manifest error standard, a factual finding cannot be set aside unless the appellate court finds that the trier of fact's determination is manifestly erroneous or clearly wrong. **Detraz v. Lee**, 05-1263 (La. 1/17/07), 950 So.2d 557, 561. In order to reverse a fact finder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. **Id.** The appellate court must not re-weigh the evidence or substitute its own factual findings because it would have decided the case differently. Thus, where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong, even if the reviewing court would have decided the case differently. **Id.**

Mr. Schexnayder initially asserts that he was not the sole cause of the August 13, 2012 incident. He maintains that Mr. Barr initiated physical contact by putting Mr. Schexnayder in a headlock, lifting him off the ground, and punching him in the head. Mr. Schexnayder contends that his actions were in self-defense and were not intentional.

After a thorough review of the record, we cannot say that the trial court was clearly wrong in its factual finding that Mr. Schexnayder was the aggressor and sole cause of the incident at issue herein. It is uncontroverted that after the near collision of their vehicles, Mr. Schexnayder chose not to continue on his way. Mr. Schexnayder's own testimony was that rather than leaving the area, he backed up his vehicle and returned to the parking lot. In the parking lot, Mr. Schexnayder exited his vehicle while Mr. Barr remained in his. Mr. Schexnayder admitted that Mr. Barr never approached him. Mr. Schexnayder then approached Mr. Barr's truck and put his head through the open window. When asked why he put his head in the window, Mr. Schexnayder replied, "Because I guess I was mad." Mr. Schexnayder also admitted biting Mr. Barr, but asserts his action was an attempt to escape. However, Mr. Barr testified that Mr. Schexnayder ran across the parking

lot, threw himself through the window, and punched Mr. Barr in the face.[2] The trial court clearly believed Mr. Barr's version of the events and had a reasonable basis for its conclusion. In this regard, we find no manifest error.[3]

Mr. Schexnayder also alleges that the trial court erred in ruling on liability in favor of Mr. Barr before Mr. Barr satisfied his burden of proof. In response, Mr. Barr asserts that the trial court's ruling on liability was not made before the completion of Mr. Schexnayder's presentation of evidence.

Louisiana Code of Civil Procedure article 1672B provides for a motion for involuntary dismissal of a plaintiff's action in the course of a bench trial and states:

> In an action tried by the court without a jury, after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief. The court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence.

In determining whether involuntary dismissal should be granted, the appropriate standard is whether the plaintiff has presented sufficient evidence on his case-in-chief to establish his claim by a preponderance of the evidence. **Thornton ex rel. Laneco Const. Systems, Inc. v. Lanehart**, 97-2871 (La.App. 1 Cir. 12/28/98), 723 So.2d 1127, 1130, writ denied, 99-0177 (La. 3/19/99), 740 So.2d 115. The trial court's grant of an involuntary dismissal is subject to the well-settled manifest error standard of review. **Broussard v. Voorhies**, 06-2306 (La.App. 1 Cir. 9/19/07), 970 So.2d 1038, 1041, writ denied, 07-2052 (La. 12/14/07), 970 So.2d 535.

In the case *sub judice*, the record shows that Mr. Schexnayder was initially called to testify under cross-examination, and Richard Rossi, the owner of Rossi's, also testified out of order on behalf of Mr. Schexnayder. Thereafter, counsel for

---

[2] Photographs introduced into evidence show not only injury to Mr. Barr's nose, but a contusion on the side of his face.

[3] We also find no merit to Mr. Schexnayder's contention that Mr. Barr failed to show a lack of consent to Mr. Schexnayder's conduct.

Mr. Barr moved for a directed verdict regarding Mr. Schexnayder's reconventional demand pursuant to LSA-C.C.P. art. 1672.[4] The trial court stated: "I'm not going to dismiss the reconventional demand, but so far as liability is concerned, I'll grant your motion." Mr. Barr then testified regarding his damages. Because Mr. Schexnayder had presented his evidence regarding liability before the trial court's ruling, we find that any error by the trial court was harmless, and this assignment of error lacks merit.

Mr. Schexnayder next asserts that Mr. Barr failed to establish that Mr. Barr's injuries were caused by the actions of Mr. Schexnayder, and therefore the trial court erred in awarding Mr. Barr damages for physical pain and suffering and for future medical expenses. Mr. Schexnayder contends that Mr. Barr offered no medical testimony to corroborate his claims, and that after initially receiving treatment from Lake After Hours, an urgent care facility, on August 13, 2012, Mr. Barr waited fourteen and one-half months before receiving additional medical treatment.

In a tort action, the plaintiff bears the burden of proving fault, causation, and damages. **Wainwright v. Fontenot**, 00-0492 (La. 10/17/00), 774 So.2d 70, 74. The plaintiff bears the burden of proving every element of his case, including the cause-in-fact of damage, by a preponderance of the evidence, that is, whether it is more likely than not that the harm was caused by the tortious conduct of one or more defendants. **Lasha v. Olin Corp.**, 625 So.2d 1002, 1005 (La. 1993). When a conclusion regarding medical causation is not one within common knowledge, expert medical testimony is required in a tort action. **Hutchinson v. Shah**, 94-0264 (La.App. 1 Cir. 12/22/94), 648 So.2d 451, 452, writ denied, 95-0541 (La. 4/21/95), 653 So.2d 570.

Causation is a factual finding that should not be reversed on appeal absent manifest error. **Detraz**, 950 So.2d at 561. Likewise, credibility determinations are factual findings governed by the manifest error standard of review. See

---

[4] We note that counsel incorrectly moved for a directed verdict and that the proper motion in "an action tried by the court without a jury" is an involuntary dismissal. See LSA-C.C.P. art. 1672.

Sportsman Store of Lake Charles, Inc. v. Sonitrol Security Systems of Calcasieu, Inc., 99-0201 (La. 10/19/99), 748 So.2d 417, 421.

Additionally, in meeting the burden of proving causation, a plaintiff may be aided by a presumption of causation if before the accident the plaintiff was in good health, but subsequent to the accident the symptoms of the disabling condition appear and those symptoms continuously manifest themselves afterward providing that the evidence establishes a reasonable possibility of causal connection between the accident and the disabling condition. **Housley v. Cerise**, 579 So.2d 973, 980 (La. 1991). In order to defeat the presumption, the defendant must show that some other particular incident could have caused the injury in question. **Maranto v. Goodyear Tire & Rubber Co.**, 94-2603 (La. 2/20/95), 650 So.2d 757, 761.

In this matter, Mr. Barr did not present any expert *testimony* to establish his entitlement to future medical expenses. However, he testified at trial and introduced into evidence certified medical records from Lake After Hours, from the Department of Veteran Affairs hospital (VA Hospital), and from Dr. Jon Perenack, a board certified plastic surgeon at Williamson Cosmetic Center. Mr. Barr also introduced several photographs of his face, evidencing the injuries to his nose. Mr. Barr contends, and the trial court agreed, that the certified records, together with his uncontroverted testimony that he did not suffer from any of the injuries complained of herein prior to the subject incident, were sufficient to meet his burden of proof. Mr. Schexnayder contends, however, that Mr. Barr's testimony at trial indicated that Mr. Barr had previously injured his nose. Specifically, Mr. Schexnayder refers to Mr. Barr's testimony, when he was asked:

> Q. Ever been injured before? What I'm talking about is injuries related to like you're claiming in this accident. Ever injured your nose before?
>
> A. No, no, not like this.

Although Mr. Schexnayder contends that the medical records do not relate the incident to Mr. Barr's injuries, we point out that the incident is noted in all of the medical records. The record shows that on the day of the altercation, Mr. Barr went to Lake After Hours in Baton Rouge. The Lake After Hours report refers to

a human bite and that "[patient] states he was attacked by an enraged driver that jumped through his window and bit his nose. [Patient] has open wounds and swelling to his nose." Mr. Barr testified that although he did not have stitches, the tissue in his nose was glued back together and kept in place with steristrips. He was also given antibiotics, pain medication, and an ointment. He further stated that it was recommended that he get a hepatitis and an AIDS test.

Mr. Barr also testified that he had no health insurance and next sought treatment at the VA Hospital in New Orleans approximately fourteen months later, on October 31, 2013. He stated that although the pain "comes and goes" every now and then, when it hurts, it burns to the point of tears. The VA Hospital records indicated that he was "referred for parasthesias to nose after sustaining a human bite to nose during a 'road rage' altercation in August 2012." The report further provided that since the event, "he states that: tingling, numbness, burning [sensations], and if he rubs his nose this causes burning [and] bleeding." The VA Hospital's diagnosis was "Regional Pain Syndrome from nerve trauma." Mr. Barr testified that although he was advised at the VA Hospital that he needed surgery, he was also advised that the Department of Veteran's Affairs would not cover the cost of the surgery.

Thereafter, on February 14, 2014, Mr. Barr saw Dr. John Parenack at Williamson Cosmetic Center. Mr. Barr testified that Dr. Parenack recommended surgery not only for the nerve damage and for the lining of his nose, as the VA Hospital had recommended, but that Dr. Parenack also recommended a laser-type surgery "to get rid of the teeth marks" on his nose. The records from Williamson Cosmetic Center show that Mr. Barr complained that his nose was bitten by another male sixteen months previously. The records further indicate that Mr. Barr suffered a "post-traumatic nasal deformity and internal/external nasal valve collapse [and] scarring."

No evidence has been presented indicating that there was any intervening accident or a particular incident that would cast doubt on Mr. Barr's claim that his injuries were caused by the altercation at issue. Further, we find that Mr. Barr's

answer of "not like this" when questioned as to whether he had previously injured his nose, without more, is simply insufficient to establish that Mr. Barr's injuries were caused by something other than Mr. Schexnayder's actions. Additionally, the photographs introduced into evidence, as pointed out by the trial court, were of a graphic nature showing the severity of the bite and depicting "an obvious injury" with "bleeding and swelling to [Mr.] Barr's nose and face." Considering the medical records, photographs, and the lack of evidence or indication that Mr. Barr had any other accident or specific incident involving his nose, we cannot say that the trial court lacked a reasonable basis to conclude that the injuries to Mr. Barr's nose referenced in the medical records were related to the incident on August 13, 2012. Thus, we find that the medical records, photographs, and testimony were sufficient to establish causation. Accordingly, we find no manifest error in this factual finding of the trial court.

In his last assignment of error, Mr. Schexnayder contends that Mr. Barr failed to establish that he suffered physical and mental pain, as well as the necessity of future medical expenses. With regard to his physical and mental pain, Mr. Barr testified that although the pain was intermittent, when it occurred it brought him to tears. He also stated that the injuries affected his sleep, and, although he did not have a hepatitis or an AIDS test, he was worried regarding same for approximately six months after the incident. Furthermore, Mr. Barr presented evidence of future medical procedures that he will have to undergo to repair his nose.

Like any other damages, future medical expenses must be established with some degree of certainty. The plaintiff must establish that it is more probable than not that these expenses will be incurred. **Degruise v. Houma Courier Newspaper Corp.**, 95-1863 (La. 11/25/96), 683 So.2d 689, 693-94. See also **Doucet v. Doug Ashy Bldg. Materials, Inc.**, 95-1159 (La.App. 3 Cir. 4/3/96), 671 So.2d 1148, 1152-53. In this matter, the certified medical records from Dr. Perenack at Williamson Cosmetic Center were introduced into evidence. The records indicated that Mr. Barr's "nose was [bitten] by [a] male" sixteen months

previously and that his "nose is tender." The records also indicated a "trap door depressed scar" and a "notch in soft tissue triangle." Dr. Perenack commented that Mr. Barr suffered a "post-traumatic nasal deformity and internal/external nasal valve collapse [and] scarring," and he recommended "(1) Open septorhinoplasty [and] (2) Staged CO_2 laser resurfacing." The records also included three surgical proposals with costs for each, totaling $12,000.00.[5] All the procedures specifically dealt with the repair of Mr. Barr's nose. Further, as the trial court observed, "over two (2) years after the incident at issue, there was an obvious deformity and/or scar on [Mr. Barr's] nose [that] undoubtedly, resulted from the incident at issue, a clear indication to this court that [Mr. Barr] is in need of further medical care." Considering the medical records and testimony, as well as the nature and severity of the injuries to Mr. Barr's nose, we cannot say that the trial court manifestly erred in making an award for physical and mental pain and for future medical expenses.[6]

OUTSTANDING MOTIONS

Finally, we address several motions filed by both parties. On June 10, 2015, and June 11, 2015, Mr. Schexnayder filed a motion for leave to file a reply brief. Mr. Barr opposed the motion. The record shows that Mr. Schexnayder was granted an extension of time until March 20, 2015, to file his original brief. On March 25, 2015, Mr. Schexnayder submitted an appellant brief, but it was not filed because it was noncompliant. Thereafter, on April 2, 2015, this court issued a Notice of Abandonment to Mr. Schexnayder pursuant to Rule 2-8.6 of the Uniform Rules of the Louisiana Courts of Appeal. Also on April 2, 2015, Mr. Schexnayder filed his appellant brief. Rule 2-12.6 of the Uniform Rules provides that an "appellant may file a reply brief, if he has timely filed an original brief." Because Mr. Schexnayder

---

[5] Specifically, the costs for the rhinoplasty was $6,700.00 and for the laser treatments totaled $5,300.00.

[6] We note that Mr. Schexnayder only appeals the award of future medical expenses and not the amount of the award.

failed to file a timely original brief, we deny his motion for leave to file a reply brief.

Mr. Barr has filed a Motion for Sanctions for a Frivolous Appeal pursuant to LSA-C.C.P. art 2164.[7] In response, Mr. Schexnayder opposed the motion and also filed a motion to strike Mr. Barr's motion, contending that Mr. Barr's motion contains false, misleading, insulting, and discourteous language.

An appellee may not demand damages for frivolous appeal against the appellant unless the appellee either answers the appeal or files an independent appeal. See LSA-C.C.P. art. 2133A[8]; **Interdiction of DeMarco**, 09-1791 (La.App. 1 Cir. 4/7/10), 38 So.3d 417, 430-31. An answer to appeal must be filed not later than fifteen days after the return day or the lodging of the record, whichever is later. LSA-C.C.P. art. 2133A.

Mr. Barr's motion for sanctions is in the nature of an answer to the appeal. However, we need not determine whether the motion is equivalent to an answer because the motion was not filed timely. The record in this case was lodged on February 13, 2015, and the return date for the appeal was March 2, 2015. However, the motion was not filed until June 15, 2015, more than three months after the return date and well past the fifteen days allowed. Therefore, Mr. Barr's motion for sanctions for frivolous appeal is not properly before us and will not be

---

[7] Louisiana Code of Civil Procedure art. 2164 provides:

> The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

[8] Louisiana Code of Civil Procedure art. 2133A provides:

> An appellee shall not be obliged to answer the appeal unless he desires to have the judgment modified, revised, or reversed in part or unless he demands damages against the appellant. In such cases, he must file an answer to the appeal, stating the relief demanded, not later than fifteen days after the return day or the lodging of the record whichever is later. The answer filed by the appellee shall be equivalent to an appeal on his part from any portion of the judgment rendered against him in favor of the appellant and of which he complains in his answer. Additionally, however, an appellee may by answer to the appeal, demand modification, revision, or reversal of the judgment insofar as it did not allow or consider relief prayed for by an incidental action filed in the trial court. If an appellee files such an answer, all other parties to the incidental demand may file similar answers within fifteen days of the appellee's action.

considered. See **National Equity Life Ins. Co. v. Eicher**, 93-0611 (La.App. 1 Cir. 3/11/94), 633 So.2d 1351, 1356.

CONCLUSION

For the above and foregoing reasons, we affirm the October 30, 2014 judgment of the trial court. Additionally, we deny Mr. Barr's motion for sanctions for a frivolous appeal and deny Mr. Schexnayder's motions to file a reply brief and to strike. Costs of this appeal are assessed to Mr. Schexnayder.

JUDGMENT AFFIRMED; MOTION FOR SANCTIONS FOR FRIVOLOUS APPEAL DENIED; MOTION TO FILE REPLY BRIEF AND MOTION TO STRIKE DENIED.

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0267

CLIFFORD BARR

VERSUS

RAY JOSEPH SCHEXNAYDER AND ABC INSURANCE COMPANY

THERIOT, J., concurring and assigning reasons.

I concur with the result reached by the majority, however, I disagree with the finding that any error regarding the trial court's ruling on the issue of liability in favor of Mr. Barr in response to his "motion for directed verdict" was harmless.

To the extent that motions for involuntary dismissal are procedurally proper and applicable in the context of reconventional demands, the text of La. C.C.P. art. 1672(B) must be read in light of the reconventional demand. Thus, according to La. C.C.P. art. 1672(B), the defendant in reconvention's motion for involuntary dismissal would be properly requested "after the plaintiff [in reconvention] has completed the presentation of his evidence... on the ground that upon the facts and law, the plaintiff [in reconvention] has shown no right to relief."

In this case, Mr. Barr moved for an involuntary dismissal (improperly stylized as a "motion for a directed verdict") after Mr. Schexnayder had introduced all of his evidence in support of his claims, which were based upon common issues

of liability. According to the record, the only witness to testify after Mr. Barr moved for involuntary dismissal was Mr. Barr himself. Mr. Schexnayder, the plaintiff in reconvention, presented no additional evidence. In sum, it appears Mr. Barr properly moved for involuntary dismissal on the issue of liability after Mr. Schexnayder's presentation of his evidence. The trial court did not commit legal error by granting Mr. Barr's motion, in light of the evidence, on the grounds that the law and facts did not afford Mr. Schexnayder any right to relief. Consequently, this is not a case of "harmless error". I find it to be a case of no error at all, and would affirm the trial court's ruling accordingly.