

**NOT DESIGNATED FOR PUBLICATION**

WHA  
SUS  
PNE

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 0668

**KAREN GILBERT**

**VERSUS**

**LIBERTY MUTUAL FIRE INSURANCE COMPANY  
& SWAIN D. MUNSON**

**Judgment Rendered: DEC 22 2016**

**Appealed from the  
Nineteenth Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Docket Number C621534**

**Honorable Robert D. Downing, Judge Pro Tempore,  
and Donald R. Johnson, Judge, Presiding**

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Swain Munson**

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**BEFORE: WHIPPLE, C.J., GUIDRY AND McCLENDON, JJ.**

## **WHIPPLE, C.J.**

In this personal injury action, plaintiff, Karen Gilbert, appeals the trial court's judgment rendered in accordance with the jury's verdict, awarding her general damages but no damages for past or future medical expenses. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

On May 23, 2012, Gilbert was involved in a motor vehicle accident when she was stopped in traffic on Industriplex Boulevard in Baton Rouge and was rear ended by a vehicle driven by Swain Munson. Thereafter, Gilbert filed a petition for damages, naming as defendants: Munson; Liberty Mutual Fire Insurance Company, Munson's automobile liability insurer; and Liberty Mutual Insurance Company, Munson's personal umbrella liability insurer (collectively referred to as "Liberty Mutual"), alleging that she suffered personal injuries as a result of the accident.<sup>1</sup>

Following a jury trial, at which Liberty Mutual stipulated to liability, the jury rendered a verdict finding that Gilbert was injured as a result of the accident but awarding her only \$5,000.00 in general damages for past physical pain and suffering and zero for past medical expenses.<sup>2</sup> From the trial court's judgment in accordance with the jury's verdict and the subsequent denial of post-trial motions, Gilbert appeals, contending in five assignments of error that the jury erred in awarding general damages but no special damages for the aggravation of her back injuries or for her temporomandibular joint dysfunction (TMJ) and, further, that the trial court

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<sup>1</sup>Gilbert also named as a defendant, but later dismissed, her own uninsured/underinsured motorist carrier.

<sup>2</sup>At the trial, Gilbert stipulated that she would limit all liability of Munson to the applicable insurance policy limits.

erred in denying her Motion for Judgment Notwithstanding the Verdict, or Alternatively, Motion for Additur.

### DISCUSSION

In a suit for damages, it is the plaintiff's burden to prove the damage she suffered as a result of the defendant's fault. Wainwright v. Fontenot, 2000-0492 (La. 10/17/00), 774 So. 2d 70, 77. Thus, the plaintiff bears the burden of proving, by a preponderance of the evidence, a causal relationship between the injury sustained and the accident. 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. Howard v. United Services Automobile Association, 2014-1429 (La. App. 1<sup>st</sup> Cir. 7/22/15), 180 So. 3d 384, 394, writ denied, 2015-1595 (La. 10/30/15), 179 So. 3d 615.

A tortfeasor is liable only for damages caused by his negligent act. He is not liable for damages caused by separate, independent, or intervening causes. Thus, the plaintiff has the burden of proving that her injuries were not the result of separate, independent, and intervening causes. Howard, 180 So. 3d at 394-395; Kelley v. General Insurance Company of America, 2014-0180 (La. App. 1<sup>st</sup> Cir. 12/23/14), 168 So. 3d 528, 543-544, writ denied, 2015-0157, 2015-0165 (La. 4/10/15), 163 So. 3d 814, 163 So. 3d 816.

As such, the onus was on Gilbert to affirmatively establish, by a preponderance of the evidence, that her pain and suffering was caused by the accident at issue, thus entitling her to general damages. See Wainwright, 774 So. 2d at 77. Similarly, Gilbert also had the burden of proving that the accident caused her to incur the medical expenses for which she seeks reimbursement. See Kelley, 168 So. 3d at 543-544.

The jury's award herein of \$5,000.00 in general damages for past pain and suffering and zero for medical expenses demonstrates that the jury clearly did not believe that Gilbert suffered more than short-lived pain or discomfort related to the accident or that the accident caused her to incur any of the expenses associated with her subsequent medical treatment. Based on our review of the record before us, we find a reasonable factual basis exists for these findings by the jury. Thus, we conclude that these findings were not manifestly erroneous.

In considering this case, the jury was presented with photographs of the damage to Gilbert's automobile, depicting some scratches on the bumper and the repair estimate of less than \$500.00. Further, Gilbert was able to leave the scene of the accident in her vehicle, which the jury apparently viewed as a minor rear-end collision. Moreover, Gilbert indicated to the responding officer that she was not injured, and she did not seek medical attention in the days following the accident.

Rather, Gilbert's first doctor's visit following the accident was on June 6, 2012, approximately two weeks after the accident in question, which was a previously scheduled visit with Dr. Henry Eiserloh, III, Gilbert's treating orthopedic surgeon for her long-standing back problems, which are detailed at length in the record. With regard to her history of back problems, the record demonstrates that prior to the accident, i.e., in October 2008, following complaints of back pain radiating into the right buttock and leg, Gilbert underwent a minimal access transforaminal lumbar interbody fusion at the L4-5 level, which involved the removal of the disc and the placement of rods and screws. However, she received marginal relief for only a few months following the surgery. She was then treated by a pain management doctor and attempted to manage her pain with prescription medication.

The record further demonstrates that Gilbert sought treatment from Dr. Eiserloh beginning in June of 2011, relating a seven- to eight-year history of back and leg pain, with complaints on that visit of back pain extending into the right buttock and down into the right lower leg. Testing revealed that the October 2008 surgery did not result in a solid fusion, and there was also a malposition of a screw within the L3-4 facet joint that essentially destroyed the joint at that level. Thus, in order to fully treat her back problems, Dr. Eiserloh performed an anterior lumbar interbody fusion redo at the L4-5 level and a posterior lumbar interbody fusion at the L3-4 level.

Despite this second procedure resulting in a successful graft, Gilbert again experienced pain following the October 2011 surgery. Specifically, at the November 2, 2011 visit, Gilbert's chief complaints were back and leg pain, including pain in the right thigh and left knee. Thereafter, at the March 1, 2012 appointment, less than three months before the accident at issue, Gilbert reported to Dr. Eiserloh that she had severe low back pain with a burning and aching pain in the left buttock, rating her pain as a 9 out of 10. This pain continued at the April 9, 2012 appointment, with Gilbert rating her pain as a 5 out of 10. On that visit, she reported pain in her back, hip and left buttock. Additionally, Gilbert acknowledged that on March 7, 2012, she reported to her treating physical therapist that she had low back pain into both hips and buttocks, and at the April 24, 2012 physical therapy visit approximately one month before the accident in question, she reported stabbing pain in her left thigh.

Further, due to her pain level, Gilbert stopped working in March 2012, after having attempted to return to work part-time following the October

2011 surgery, and she had not returned to work as of the May 23, 2012 accident at issue.

Moreover, as stated above, following the May 23, 2012 accident, Gilbert did not seek immediate medical attention. Rather, she returned to Dr. Eiserloh for a regularly scheduled visit on June 6, 2012, rating her back and leg pain as a 7 out of 10. On that June 6, 2012 visit, Dr. Eiserloh noted that Gilbert's condition had "deteriorated **over the last several months.**" (Emphasis added). Moreover, despite Gilbert's testimony that she told Dr. Eiserloh on that visit that she had just recently been involved in a motor vehicle accident, his office notes make no mention of the accident on that date or for any other office visit. While Dr. Eiserloh did testify that at some point during his treatment of Gilbert, she mentioned the accident to him, he could not say when in fact she relayed that information to him. Additionally, when Gilbert began treating with Dr. John Braswell on August 16, 2012, at the referral of Dr. Eiserloh for pain management, she relayed the history of her two back surgeries but did not mention the May 23, 2012 accident. Rather, the only mention in his records of the May 23, 2012 accident was a notation by his physician's assistant in the August 12, 2013 office notes that Gilbert had mentioned that she had been rear-ended on May 23, 2012. Gilbert acknowledged at trial that she mentioned the accident at the August 12, 2013 visit to make sure it was noted in the record for the purpose of this claim.

Regarding causation, Dr. Eiserloh, as Gilbert's treating orthopedic surgeon, testified that he could not say more probably than not that the May 23, 2012 accident was responsible for any of Gilbert's injuries or any medical expenses associated with his treatment of her. Moreover, while acknowledging that her complaints of pain radiating into her leg as of the

June 6, 2012 visit, a symptom that appeared to have resolved as of the December 19, 2011 visit, could have been an aggravation of her symptoms as a result of the May 23, 2012 accident, he further testified that those changes could have possibly been a spontaneous recurrence of her symptoms from her continuing deterioration.

In sum, Dr. Eiserloh testified that he could not say more probably than not that Gilbert's symptoms were the result of the May 23, 2012 car accident versus her continuing, long-standing back problems, in light of the lack of any documentation in his records as to the date of the accident. Moreover, he agreed that the most likely cause of her continued problems after the October 2011 surgery he performed was the original failed fusion.

With regard to Dr. Braswell's opinion as to causation, when asked whether, assuming that Gilbert's radiculopathy had resolved before the accident and then returned after the accident, it was more probable than not that the May 23, 2012 accident caused Gilbert's symptoms that necessitated his treatment, Dr. Braswell responded yes, to the extent there was a temporal relationship. However, he qualified his answer "with a caveat that a patient like this also could have spontaneous return" of her symptoms. Dr. Braswell agreed that Gilbert's radiculopathy could have been caused by either the automobile accident or by her ongoing back problems. Additionally, Dr. Braswell acknowledged that if, in fact, Gilbert thought the accident was severe enough to cause her symptoms, he probably would have expected her to tell him about the accident on her first visit with him on August 16, 2012.

Regarding Gilbert's TMJ claim, Dr. Dale Politz, Gilbert's treating dentist and son-in-law, treated Gilbert for TMJ beginning on January 13, 2014, over nineteen months after the accident at issue. At that time, Gilbert reported to him that her jaw problems had been going on for only "a couple

of weeks.” Moreover, at trial, Gilbert acknowledged on cross-examination that in her answers to interrogatories (which were mailed to defendants on August 6, 2013), she did not mention anything about jaw pain and that she did not contend that the jaw pain was part of this claim until her deposition taken on January 14, 2014, the day after she began treatment for TMJ with Dr. Politz.

Nonetheless, despite the nineteen-month gap between the accident and his treatment, Dr. Politz opined that the TMJ was caused by the May 23, 2012 accident. Dr. Politz noted that he had seen Gilbert on June 27, 2012, for a cleaning, and at that time, Gilbert mentioned to him that she had been in a car accident and that she had some discomfort on the left side of her face. Moreover, while she did not mention jaw pain on any subsequent visits prior to the January 13, 2014 visit, he noted that studies from the late 1980s or early 1990s indicated that manifestation of TMJ symptoms may take up to eighteen months after a traumatic event.

In weighing all of this evidence, the jury was clearly required to make credibility determinations on disputed issues at trial, including Gilbert’s symptoms and activity level before and after the accident, her participation in a class action lawsuit against the doctor who performed her first back surgery, and inaccuracies in her deposition testimony. Based on our review, we conclude that the record provides a reasonable factual basis to support the jury’s rejection of Gilbert’s claims that the May 23, 2012 accident caused any significant exacerbation of her long-standing back problems, such as to necessitate any medical treatment, or caused the TMJ for which she was treated nineteen months after the accident.

Rather, it is quite clear from the jury’s award of only \$5,000.00 in general damages for past physical pain and suffering and its refusal to award



any amounts for past medical expenses that the jury found the accident did not cause any significant aggravation to (and did not require any additional medical treatment other than what she was already undergoing for) Gilbert's ongoing back condition and related symptoms and did not cause her TMJ. Given that these findings were largely based on credibility determinations and weighing of conflicting evidence by the jury, we find no manifest error in these factual determinations of causation by the jury. See generally Howard, 180 So. 3d at 395-396, and Harris v. Delta Development Partnership, 2007-2418 (La. App. 1<sup>st</sup> Cir. 8/21/08), 994 So. 2d 69, 78-82.

Finally, based on our review of the record, we likewise find no merit to Gilbert's contention on appeal that the trial court erred in denying her Motion for Judgment Notwithstanding the Verdict, or Alternatively, Additur. Rather, we find that reasonable persons could have arrived at the same verdict given the evidence presented to the jury, such that the trial court was not manifestly erroneous in denying the motion for JNOV. See Gray v. Safeco Insurance Company of America, 2013-0210, pp. 13-14 (La. App. 1<sup>st</sup> Cir. 11/1/13), 2013 WL 5915247, at \* 8 (unpublished), writ denied, 2013-2790 (La. 2/14/14), 132 So. 3d 966. Further, based on the jury's reasonable factual determinations as to causation, we find no abuse of the trial court's discretion in its obvious determination that the jury's award for damages was not so inadequate as to warrant the granting of Gilbert's alternative motion for additur. Thus, we find no error in the trial court's denial of Gilbert's Motion for JNOV, or Alternatively Additur. See Gray, 2013-0210 at p. 15, 2013 WL 5915247, at \*9.

## **CONCLUSION**

For the above and foregoing reasons, the trial court's December 15, 2014 judgment in conformity with the jury's verdict is hereby affirmed.

Costs of this appeal are assessed against plaintiff, Karen Gilbert.

**AFFIRMED.**