

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0088

A. KELL MCINNIS

VERSUS

LAMIESHA BONTON, ALLSTATE INSURANCE COMPANY, AND
USAA CASUALTY INSURANCE COMPANY

Judgment Rendered: SEP 21 2017

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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. 623,627

Honorable Donald R. Johnson, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

*CH
Holdridge J. concurs for the reasons assigned*

HIGGINBOTHAM, J.

This personal injury suit arises out of a minor automobile accident. Plaintiff appeals a trial court judgment rendered in accordance with a jury verdict, where the jury unanimously found that the accident did not cause plaintiff any damages. The trial court's judgment dismissed all of the plaintiff's claims against the sole remaining defendant, plaintiff's own uninsured/underinsured motorist (UM) carrier.

FACTS AND PROCEDURAL HISTORY

On November 28, 2012, Mr. A. Kell McInnis was stopped in heavy traffic on Perkins Road near Acadian Thruway in Baton Rouge, Louisiana. Mr. McInnis's vehicle was hit from behind by a vehicle driven by Ms. Lamiesha Bonton, who admitted that she was momentarily distracted while checking on her crying child and she did not realize that Mr. McInnis's vehicle had stopped. While the damage to both vehicles was minor, Mr. McInnis described the impact as a jolt that rocked him back in his seat. Mr. McInnis did not report being injured immediately after the accident; however, his neck, shoulder, and back began to hurt during the early morning hours the following day. Mr. McInnis, who was almost 66 years old at the time of trial, had a long history of neck and back pain that had resulted in the need for physical therapy, epidural steroid injections (ESIs), three back surgeries, and one neck surgery over the years prior to the accident. Because he was primarily concerned about damage to his recent neck fusion, he scheduled an appointment for two weeks after the accident, on December 10, 2012, with his orthopedic spine surgeon, Dr. Henry Louis Eiserloh, III, who had been treating Mr. McInnis for neck and back pain that predated the accident. After the accident, Mr. McInnis continued to be treated by Dr. Eiserloh, undergoing several ESIs, physical therapy, and two surgical procedures on his low back.

As a result of the accident, Mr. McInnis filed a petition for damages against Ms. Bonton and her liability insurer, Allstate Insurance Company, as well as his own

UM and medical payments insurer, USAA Casualty Insurance Company. Prior to trial, Mr. McInnis settled his claims with Ms. Bonton's primary insurer, Allstate, for its \$25,000.00 policy limits, and USAA unconditionally tendered \$75,000.00 to Mr. McInnis under its UM coverage, along with another \$5,000.00 under the medical payment provision of its policy. After it was stipulated that Ms. Bonton was solely at fault for the accident, the only remaining issues for trial were causation, the extent of Mr. McInnis's injuries and/or aggravation of pre-existing injuries, and damages. The case proceeded to a jury trial solely against USAA. The jury's unanimous verdict was that Mr. McInnis did not sustain damages as a result of the accident. The trial court signed a judgment in accordance with the jury's verdict and dismissed all of Mr. McInnis's claims against USAA.¹ The trial court also denied Mr. McInnis's motion for judgment notwithstanding the verdict (JNOV) and, alternatively, motion for new trial. This appeal ensued.

DISCUSSION

Mr. McInnis raises two assignments of error: (1) the jury's verdict was clearly inconsistent with the great weight of the evidence and law; and (2) the trial court erred in denying his motion for new trial.² Mr. McInnis argues that the overwhelming evidence supports a finding that the accident aggravated his pre-existing back injury. He further maintains that since the jury's verdict was contrary to the evidence and law, a new trial should have been granted by the trial court.

In contrast, USAA contends that the jury's verdict was reasonable in light of the conflicting testimony concerning Mr. McInnis's extensive pre-existing

¹ This court, *ex proprio motu*, issued a rule to show cause order concerning the original trial court judgment signed on June 22, 2016, because the outcome as to all defendants was not specified in the judgment. This court's order remanded the matter to the trial court for the limited purpose of allowing the trial court to sign a judgment addressing the apparent defect and then supplement the appellate court record. A supplemental judgment was signed on February 21, 2017, and the record was supplemented. The supplemental judgment clarified that all claims against all defendants have been dismissed; therefore, we maintain the appeal.

² Mr. McInnis does not assign error to the trial court's denial of his motion for JNOV.

degenerative back condition and the lack of objective findings of a new injury after the accident. USAA further asserts that since the jury's verdict was reasonable and supported by the evidence in the record, there are no grounds for a new trial.

In a trial where causation and credibility are major issues, a jury's findings of fact are entitled to great deference. **Guillory v. Insurance Co. of North America**, 96-1084 (La. 4/8/97), 692 So.2d 1029, 1032. An appellate court's review of factual findings is governed by the manifest error/clearly wrong standard of review. **Touchard v. Slemco Electric Foundation**, 99-3577 (La. 10/17/00), 769 So.2d 1200, 1204. It is a determination for the factfinder to discern whether a person has suffered an aggravation of a pre-existing condition. **Id.**, 769 So.2d at 1202. When there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. **Id.**, 769 So.2d at 1204; **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Moreover, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous. **Rosell**, 549 So.2d at 844. For the reviewing court, the issue to be resolved is not whether the factfinder was wrong, but whether the factfinder's conclusions were reasonable in light of the record reviewed in its entirety. **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993).

Before recovery can be granted for aggravation of a pre-existing condition, a causative link between the accident and the plaintiff's current status must be established. **Lamb v. Berry**, 35,347 (La. App. 2d Cir. 12/28/01), 803 So.2d 1084, 1086. The test for determining a causal relationship between an accident and subsequent injuries in a personal injury suit is whether the plaintiff proved through medical testimony that it was more probable than not that subsequent injuries were caused by trauma suffered in the accident. **Id.** The plaintiff is aided in establishing

this burden by the legal presumption that a medical condition producing disability is presumed to have resulted from the accident if, before the accident, the injured person was in good health, but the disabling condition manifested itself shortly after the accident. **Id.**; **Williamson v. St. Francis Medical Center, Inc.**, 559 So.2d 929, 932 (La. App. 2d Cir. 1990).

In this case, the jury was presented with two competing views regarding the nature, extent, and cause of Mr. McInnis's back condition. The jury obviously determined that Mr. McInnis had not met his burden of proving that the November 2012 accident was the cause of his degenerative back condition or any of his ongoing back pain that eventually led him to undergo additional back surgeries. Our review of the trial testimony, depositions, and physical evidence submitted at trial reveals that the record supports the jury's determination that Mr. McInnis did not carry his burden of proof on causation. The vast majority of the medical evidence showed no objective findings to indicate that Mr. McInnis's back condition and symptoms after the accident were caused by the accident or were any worse after the accident.

An expert in the field of neuroradiology, Dr. Curtis Ray Partington, testified in a video trial deposition that he had reviewed the magnetic resonance imaging (MRI) films of Mr. McInnis's back from before and after the accident date, and he stated that the films were "essentially identical." Dr. Partington was also of the opinion that the types of degenerative arthritic changes in Mr. McInnis's back can happen whether someone is involved in a car accident or not. Dr. Partington pointed out that the disc herniation and arthritis that was evident in Mr. McInnis's back "did not change at all between the [MRI] examinations done before his accident and after his accident." He concluded that the accident did not cause any change in Mr. McInnis's back condition.

The jury also heard testimony from a physical therapist, Dr. Seth Kaplan, who indicated that Mr. McInnis had been a patient of his physical therapy clinic for many

years, with a long history of back, neck, and hip problems and procedures spanning decades prior to the November 2012 accident. Dr. Kaplan stated that Mr. McInnis was being treated for a flareup of low back pain just before the time of the accident in the summer of 2012, and he was discharged in September 2012 when his overall condition had not changed. One month later, in October 2012, Mr. McInnis was scheduled for an ESI in his lower back, which gave him some relief right before the accident.

Mr. McInnis's testimony that physical therapy and ESI treatments no longer helped his back pain after the accident, seemingly was not enough to convince the jury that the accident had aggravated his pre-existing back condition. The jury heard a similar theory in Dr. Eiserloh's explanation that Mr. McInnis's back pain was controllable before the accident, but after the accident his symptoms were exacerbated. Dr. Eiserloh acknowledged that Mr. McInnis would have inevitably needed surgery in the future anyway, but maybe not as soon. He based his opinion on causation by relying on Mr. McInnis's symptoms as related to him by Mr. McInnis, which is a subjective finding. Even so, Dr. Eiserloh admitted that the pre-accident and post-accident MRI's did not reveal any objective findings of a change in Mr. McInnis's back condition, and Mr. McInnis's degenerative back condition would have eventually gotten worse even if he had not been in an accident.

Apparently, the jury credited Dr. Partington's and Dr. Kaplan's testimony, and decided to give their testimony more weight, while rejecting Mr. McInnis's version of the events and the explanations and opinions of his physician, Dr. Eiserloh. The jury may accept or reject a medical expert's opinion after weighing and evaluating medical testimony. See Merrells v. State Farm Mut. Auto. Ins. Co., 33,404 (La. App. 2d Cir. 6/21/00), 764 So.2d 1182, 1185. The jury is not bound to accept a plaintiff's perception, or any other witness' perception, of the nature and extent of his injuries. Stevenson v. Serth, 2014-846 (La. App. 5th Cir. 3/25/15),

169 So.3d 612, 616. Further, the jury can choose to reject all of the testimony of any witness or may believe and accept any part of a witness' testimony and reject any other part. **Id.** Because the record reveals a reasonable factual basis for the jury's determination that there was insufficient proof of a causal link between the accident and Mr. McInnis's degenerative back condition that led to his surgeries after the accident, we will not disturb the permissible factual conclusions drawn by the jury. Mr. McInnis's first assignment of error is without merit.

In his second assignment of error, Mr. McInnis claims that the trial court erred in denying his motion for new trial, because the jury's verdict was clearly contrary to the law and evidence. See La. Code Civ. P. art. 1972(1). The granting or denying of a motion for new trial is within the discretion of the trial court. **Davis v. Witt**, 2002-3102 (La. 7/2/03), 851 So.2d 1119, 1130. However, this discretion does not imply that the trial court may freely interfere with any verdict with which it disagrees. The discretionary power to grant a new trial must be exercised with considerable caution. **Id.** In a motion for new trial, the trial court may evaluate the evidence without favoring either party; it may draw its own inferences and conclusions, and evaluate witness credibility to determine whether the jury erred in giving too much credence to an unreliable witness. **Hunter v. State ex rel. LSU Medical School**, 2005-0311 (La. App. 1st Cir. 3/29/06), 934 So.2d 760, 764, writ denied, 2006-0937 (La. 11/3/06), 940 So.2d 653. The applicable standard of review is whether the trial court abused its discretion. See **Broussard v. Stack**, 95-2508 (La. App. 1st Cir. 9/27/96), 680 So.2d 771, 781. Moreover, new trials are not favored, especially when the jury verdict or judgment is supported by the record. **Id.** Thus, the jury's verdict should not be set aside if it is supportable by any fair interpretation of the evidence. **Hunter**, 934 So.2d at 765.

For the same reasons that we have already determined that the jury was not manifestly erroneous in finding Mr. McInnis's injuries were not causally connected

to the accident, we further find that the trial court did not err in denying Mr. McInnis's motion for new trial. The jury's and the trial court's conclusions are reasonable and well supported by the record that contained significant prior medical treatment for the same degenerative back condition, as well as evidence of a very minimal collision for the accident at issue. The jury's verdict was largely based upon credibility determinations and weighing of conflicting evidence, which we decline to disturb. The jury's verdict was not contrary to the law and evidence, and did not result in a miscarriage of justice. Therefore, the trial court did not err or abuse its discretion in refusing to grant a new trial.

CONCLUSION

For the above reasons, we maintain the appeal and affirm the trial court's judgment rendered in accordance with the jury's verdict. We also affirm the trial court's judgment denying the motion for a new trial. All costs of this appeal are assessed to plaintiff/appellant, Mr. A. Kell McInnis.

APPEAL MAINTAINED; AFFIRMED.

A. KELL MCINNIS

STATE OF LOUISIANA

VERSUS

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HOLDRIDGE, J., concurs.

GH
I concur in the result. I find that the jury's verdict was manifestly erroneous in holding that Mr. McInnis did not sustain any injuries or damages which were caused by the accident. However, after a *de novo* review of the record, I do not find that the total amount of the plaintiff's injuries, the aggravation of his pre-existing conditions, and his damages exceed the \$100,000.00 amount which he already received from the primary insurer and his UM insurer.