SUSAN L. ZEUTSCHEL	*	**NO. 2000-CA-0384**
VERSUS	*	**COURT OF APPEAL**
SUSAN HANEMANN AND ALLSTATE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-17633, DIVISION "M-16"
HONORABLE PIPER GRIFFIN, JUDGE PRO TEMPORE
* * * * * *
JAMES F. MC KAY, III
JUDGE
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay, III, Judge Michael E. Kirby)

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AFFIRMED

Both the plaintiff, Susan Zeutschel, and the defendants, Susan Hanemann and Allstate Insurance. Co., appeal the judgment of the trial court in plaintiff's favor and against the defendants. The jury found Ms. Hanemann to be negligent in causing the accident, that her negligence was the sole cause of the accident, and that her negligence was more probable than not the cause of the plaintiff's injuries. The jury awarded the plaintiff $10,000 for past medical expenses, $5,000 for future medical expenses, $10,000 for pain and suffering, $5,000 for mental anguish but no monetary award for permanent disability. It is from this judgment that both plaintiff and defendants now appeal

STATEMENT OF FACTS

On June 26, 1996, the plaintiff was driving westbound in the center lane on I-10 between Jefferson Davis Parkway and Carrollton Avenue. A vehicle had broken down in the center lane of the interstate and was impeding the flow of traffic. Ms. Zeutschel was forced to slam on her brakes and bring her vehicle to a complete stop. Ms. Hanemann, who was in

the left lane, moved into the center lane and suddenly rear-ended Ms. Zeutschel causing moderate damage to Ms. Zeutschel's vehicle. The plaintiff alleges that as a result of this accident she suffered headaches, pains throughout her legs, lower back pain and neck pain albeit, at the scene of the accident she told the investigating officer that she was not injured.

Five days after the accident the plaintiff saw Dr. Hamsa who treated her with pain medication. After a six-month gap she treated with Dr. Butler who prescribed physical therapy two times a week for four to six weeks. During this time she continued to work as a legal secretary/assistant, and continued to perform gardening as a sideline business for numerous customers.

On June 22, 1998, the plaintiff returned to Dr. Butler complaining of pain from a fall off of a sidewalk curb, which caused her to land on both knees. She reported an increase in back pain following this fall. On June 29, 1998, she began treatment with Dr. Ehrenberg, a chiropractor. The plaintiff's medical bills prior to the June of 1998 fall were approximately $4,500. The plaintiff's medical bills in connection with her chiropractic care were approximately $20,000.

The plaintiff had a cervical MRI performed in 1994, prior to the subject accident, and a second cervical MRI performed in 1996, after the accident. Dr. Butler opined that neither cervical MRI revealed any herniations. According to Dr. Butler, the physical condition of the cervical disc appeared to have pre-existed the 1996 accident and in any case the 1996 cervical MRI showed no nerve root impingement. Dr. Butler also found that a1996 lumbar MRI revealed significantly dehydrated discs at L4-5 and L5-6. He diagnosed this as a natural part of the aging process. He did not say if the discs reflected in the 1996 MRI were caused by the accident. A second lumbar MRI performed in 1997 revealed no significant changes. Dr. Butler diagnosed a condition known as peripheral neuropathy based upon plaintiff's complaints of numbness in both legs below her knees. According to Dr. Butler, this condition was not related to any disc disease in her lumbar spine and usually not caused by a trauma but were caused by aging. He did say that by plaintiff's subjective complaints of her neck problems, the symptoms could be related to her accident. Dr. Butler suggested epidural steroid injections as one possible treatment, but plaintiff refused.

At trial, Dr. Hamsa testified that based on the 1996 lumbar MRI

findings he diagnosed her with a herniated disc at L5/S1 and L4/L5 levels, which he related to the 1996 auto accident. He likewise recommended injections as a treatment alternative but never recommended surgery. Plaintiff refused the injections.

STANDARD OF REVIEW

In reviewing the factual findings of a trial court, an appellate court is limited to a determination of manifest error. Arceneaux v. Domingue, 365 So.2d 1330 (La. 1978) writ denied 374 So.2d 660 (La.1979); Stobart v. State through Dept. of Transp. and Development, 617 So.2d 880 (La. 1993). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Id. at 883. The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Id. at 882. The reviewing court may not disturb reasonable evaluations of credibility and reasonable inferences of fact when viewed in light of the record in its entirety even though it feels its evaluations are more reasonable. Id. The Louisiana Supreme Court has also recognized that "[t]he reason for this well-settled principal of review is based not only upon the trial court's better capacity to evaluate live witnesses as compared with the appellate court's access only to a cold record, but also upon the proper

allocation of trial and appellate functions between the respective courts. Canter v. Koehring Co., 283 So.2d 716 (La. 1973). Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Id.

DISCUSSION

In the instant case, the plaintiff raises four assignments of error for our review, while the defendants raise three. The plaintiff asserts that the jury erred in: 1) awarding less that the total amount of medical expenses; 2) awarding an unreasonably low and inadequate amount for pain and suffering; 3) in not awarding damages for permanent disability; and 4) in awarding an unreasonably low amount for future medical expenses. The defendants contend that the trial court erred in its award of medical expenses because the plaintiff failed to prove all medical expenses were reasonable and related to the subject accident. They also argue that the jury award for pain and suffering was too high. Finally, the defendants assert that the evidence does not support an award of future medicals.

The defendants present an issue for our review, which we will consider first. The defendants assert that the jury erred in not finding that the evidence supported the allocation of a percentage of negligence on the driver of the stopped vehicle. The issue of fault and percentages was a fact issue to

be determined by the jury. If a rear end collision occurs, the following motorist is presumed negligent. State Farm Mutual Auto. Ins. Co. v. Hoerner, 426 So.2d 205, 208 (La. App. 4 Cir. 1982), writ denied, 433 So.2d 154 (La. 1983). Further, a motorist is required to maintain reasonable vigilance or "to see that which he should have seen" and to exercise reasonable care. Id. However, a person who is caught in a sudden emergency, not of his own making, is not expected to exercise the same degree of care and caution as a person who has ample opportunity for the full exercise of judgment or reason. Clement v. Griffin, 91-1664, 92-1001, 93-0592-0597 (La. App. 4 Cir. 3/3/94) 634 So.2d 412, writ denied, 94-0717, 0777,0789,0791,0799,0800 (La. 5/20/94) 637 So.2d 478-479.

In the instant case, Ms. Hanemann collided with the rear end of Ms. Zeutschel's vehicle, which was stopped in the middle lane of the interstate because of a broken down vehicle. Ms. Hanemann changed lanes into the middle lane, which was stopped because of this broken down vehicle. Ms. Hanemann's failure to keep a proper lookout and maintain control of her vehicle was a cause in fact of the accident. Although the obstruction in the flow of traffic created the dangerous situation, this does not excuse Ms. Hanemann from the consequences of her negligence nor lessen the severity of its effects. Ms. Zeutschel was obviously in the same position but did not

rear-end the car in front of her. The jury apportioned 100% of the fault to Ms. Hanemann. We find no error in the jury finding Ms. Hanemann negligent and apportioning her 100% fault for the accident to her.

The plaintiff in her first assignment of error contends that the trial court erred in awarding less that the total amount of medical expenses. The plaintiff introduced medical bills in the amount of $22,869 which allegedly arose out of the injuries she sustained as a result of the June 26, 1996 automobile accident. The defendants contend that a mere introduction of these bills is not evidence that they were related to the injuries suffered in the accident and that the plaintiff is not entitled to a full recovery of these expenses. The plaintiff claims that she suffered injuries to legs, neck, and lower back due to the June 26, 1996 automobile accident. In the case at bar one of the plaintiff's treating physicians, Dr. Hamsa testified that the plaintiff's MRI done in 1996, within five months of the car accident, showed herniation and that a previous MRI done in 1994, showed no herniation. He opined that the injuries were a result of the car accident.

In a personal injury suit, the plaintiff bears the burden of proving a causal relationship between the injury, which she claims she sustained, and the alleged accident. Maranto v. Goodyear Tire and Rubber Co., 94-2603 (La. 2/20/95) 650 So.2d 757; American Motorist Insurance Co. v. American

Rent-All, Inc., 579 So.2d 429 (La. 1991). 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 at 679; Mart v. Hill 505 So.2d 1120 (La. 1987); Jones v. Peyton Place, 95-0574 (La. App. 4 Cir.5/22/96) 675 So.2d 754.

A plaintiff can be assisted in her burden of proof through the presumption that her injury was caused by the alleged accident if before the accident she was in good health, but commencing with the accident the symptoms of the disabling condition appeared and continuously manifested themselves afterwards, provided that the medical evidence shows there to be a reasonable possibility of causal connection between the accident and the disabling condition. Maranto, at 780; Housley v. Cerise, 579 So.2d 973 (La. 1991). However, a subsequent accident operates to defeat the presumption of causation. Turner v. Cleveland Trust Co., 95-2488 (La. App. 4 Cir. 5/22/96), 686 So. 2d 871, 879, writ denied, 96-1531 (La. 7/27/96) 679 So 2d 1350.

The evidence in this case establishes that the plaintiff sought medical treatment following the accident from Drs. Hamsa and Butler. Dr. Hamsa never prescribed physical therapy. Dr. Butler did recommend physical

therapy two times a week for four to six weeks; the plaintiff went to physical therapy ten times. On June 22, 1998, the plaintiff returned to Dr. Butler complaining that she had fallen from a curb when her leg gave out and she landed on her knees. Following, this fall, on June 29, 1998 she saw Dr. Harold Ehrenberg a chiropractor. According to the plaintiff, she incurred approximately $20,000 in chiropractic bills from the first date she saw Dr. Ehrenberg through the date of the trial. The defendants contend that based on facts that there was an eight month lapse in treatment and the intervening fall from the curb after which the plaintiff commenced chiropractic treatment, it is reasonable to conclude the chiropractic bills which she incurred were not necessitated by the 1996 motor vehicle accident. Generally, a plaintiff seeking recovery of personal injury damages must prove by a preponderance of the evidence both the existence of an injury and a causal connection between the injury and the accident which he claims caused the injury. Lewis v. State, Through DOTD, 94-2370, (La. 4/21/95), 654 So.2d 2311,2313. All of the plaintiff's medical bills prior to seeing Dr. Ehrenberg in June of 1998, were the bills of Drs. Butler, Nutik and Hamsa and the MRI tests totaled $4,500. The jury awarded the plaintiff $10,000 in past medicals despite the $22,869 she was claiming. The jury heard the evidence and concluded that only some of the chiropractic bills were

attributable to the auto accident. Under the manifest error standard we find no error in the amount of the jury's past medical award.

The plaintiff in her second assignment of error contends that the jury award of $10,000 for pain and suffering and $5,000 for mental anguish were unreasonably low.

> The discretion vested in the trier of fact is "great" even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of facts could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1261 (La. 1993).

In the instant case on the day of the accident the plaintiff told the investigating officer that she was not injured. When she first saw Dr. Hamsa five days after the accident she did not complain of lower back pain. She specifically told Dr. Hamsa that she was seeing him for a pre-existing condition. He did not take x-rays nor did he recommend physical therapy.

Dr. Butler initially examined the plaintiff on August 20, 1997, and her complaints appeared to be subjective. On the basis of her complaints he recommended the plaintiff undergo physical therapy two times a week for four to six weeks. She attended therapy ten times. Furthermore, the plaintiff

refused to undergo cervical injections recommended by Dr. Hamsa in December of 1996. Dr. Butler offered the plaintiff an epidural steroid injection, which she also rejected.

The jury obviously felt that any pain the plaintiff was experiencing was not that severe. The plaintiff's own testimony establishes her pain and suffering was not significant enough to affect her hobbies and side job as a gardener. In deposition Dr. Hamsa admitted that he did not recommend that the plaintiff restrict her activities in any way as of February 19, 1997. In fact, Dr. Hamsa encouraged the plaintiff to do physical activities, such as walking and bike riding, and to continue her gardening activities but restricting her shoveling. The plaintiff continued to work as a legal assistant, as well as continuing her gardening business. When the evidence of the plaintiff's lifestyle following the accident is viewed, together with the limited medical treatment the plaintiff received, the jury award is adequate and clearly without error.

In plaintiff's third assignment of error she argues that the jury erred in failing to award her damages for permanent disability. Likewise this assignment of error is subject to the manifest error standard.

The plaintiff argues that the jury awards of some past medical expenses, some future medical expenses and general damages for pain

suffering and mental anguish were based on the testimony of Dr. Hamsa. She contends that Dr. Hamsa's testimony at trial placed her permanent disability at 6%. Contrarily, the defendants argue that the testimony of Dr. Butler is what the jury relied on to determine what her true disability was and what was the actual cause of her meager disability. Dr. Butler testified that, " the 10 to 15 % disability rating is with respect to both her neck and low back, and has nothing to do with any previous trauma. It is strictly due to anatomical structure problem with her neck and back". He also opined that the physical condition of her cervical disc was degenerative and had existed or began the degenerative process long before the June, 1996 accident. Finally, Dr. Butler testified, "The disability rating assigned is made as a result the structural changes of the spine and have nothing to do with whether any trauma caused those changes."

Therefore, applying the manifest error standard to the instant matter it is clear that the jury weighed the testimony of the various witnesses and examined the evidence presented at trial and drew the conclusion that Ms. Zeutschel was not permanently disabled from performing her daily functions. For these reasons, we find no error in the jury's decision not to award the plaintiff damages for permanent disability.

Finally, the plaintiff argues that the jury erred in awarding $5,000 for

future medical expenses. This Court held in Hoskins v. Plaquemines Parish Government, 97-0061 (La. App. 4 Cir. 12/1/97) 703 So.2d 207, 211, writ denied, 98-0270,0271 (La. 4/3/98) 717 So.2d 1129, that the proper standard to determine whether a plaintiff is entitled to future medical expenses is proof by a preponderance of the evidence that the future medical expenses will be medically necessary. Our colleagues in the second circuit in Hinton v. Wal-Mart Stores, Inc., 33-557 (La. App. 2 Cir. 6/21/2000) 764 So.2d 203, 204, stated that an award for future medical expenses is in large part speculative. Even so, it must be established with some degree of certainty.

In the instant case the plaintiff refers to Dr. Hamsa indication that the cost of surgery would be $30,000. However, at trial Dr. Hamsa testified that he never recommended that Ms. Zeutschel undergo surgery. Ms. Zeutschel admitted at trial that Dr. Butler never recommended that she have surgery only that it was an option. The degree of certainty that she will need future medical expenses for some undetermined medical procedure was never clearly established. What is clear is that surgery is not in Ms. Zeutschel's horizon for injuries sustained as a result of the 1996 auto accident.

The evidence establishes that the bulk of the medical expenses the plaintiff incurred by the plaintiff were for the one hundred and fourteen chiropractic treatments she received after she fell onto her knees from a curb

and not attributable to the auto accident. The jury clearly rejected the plaintiff's arguments and applied a preponderance of the evidence standard in awarding their general damage award, which appears to reflect this view. The jury relied on the evidence presented and concluded that there was some residual injury from the auto accident that would require some future medical treatment. Our jury system is sacrosanct. We would require far more compelling facts than those presented by both the plaintiff and the defendants before we could be persuaded to substitute our judgement for that of the jury. Accordingly, we will not disturb the jury's judgment of a $5,000 award to the plaintiff for future medical expenses.

CONCLUSION

Our review of the record convinces us that the jury's findings are reasonable in the light of the record. Accordingly, we affirm the judgment of the trial court.

AFFIRMED