NOT DESIGNATED FOR PUBLICATION

ROBERT SEVALIA, JR.	*	**NO. 2000-CA-2486**
VERSUS	*	**COURT OF APPEAL**
WILLIAM JUPITER AND ALLSTATE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 97-6452, DIVISION "I-7"
Honorable Terri F. Love, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge David S. Gorbaty)

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JUDGMENT AMENDED AND RENDERED

Defendant William Jupiter appeals a judgment rendered against him for damages sustained by plaintiff Robert Sevalia, Jr., in an intersectional collision. For the following reasons, we amend the judgment and render.

FACTS:

On October 28, 1996, Robert Sevalia was driving his Buick Skylark river bound on Congress Street, on his way to work. William Jupiter was traveling west on Urquhart Street in his pickup truck. Mr. Jupiter testified that he saw the yield sign at the corner of Urquhart and Congress, but actually came to a complete stop because a van was blocking his view of oncoming traffic on Congress. After stopping and looking both ways, he proceeded into the intersection. Mr. Jupiter claimed that he did not see the Sevalia vehicle until it was about 20 feet away, at which time he could not move to avoid the collision. He believed that the Sevalia vehicle was moving fast because it came upon him very quickly. To the contrary, Mr.

Sevalia testified that he was traveling at about 25 miles per hour, and did not see the Jupiter vehicle until about 20 feet before impact. Mr. Sevalia claims that the Jupiter vehicle struck him broadside, fishtailed and hit the back of his vehicle. Mr. Jupiter claims that the Sevalia vehicle struck him on the driver's side of his truck. The accident report indicates that Mr. Jupiter was issued a citation for failure to yield.

Mr. Sevalia was transported to Charity Hospital by ambulance following the accident. He complained of neck, back and knee pain, and was x-rayed for these complaints. The inside of his mouth and lip were cut upon impact, and were stitched in the emergency room. Mr. Sevalia was released after several hours, with a prescription for muscle relaxers and instructions to use ibuprofen for pain.

Several days after the accident, Mr. Sevalia visited his personal physician and was referred to physical therapy. He attended therapy sessions from November 11, 1996, until January 29, 1997. From December 7 through the last session on January 29, Mr. Sevalia reported that he had minor pain, slight pain, or no pain. He complained of stiffness in the cervical and lumbar areas on December 23, but reported the next day that he

was improved. At his last session, he reported that his neck was much better, but that he still had a problem with his back. He also told the therapist that he had stopped taking pain medication.

Dr. John J. Watermeier, whose deposition testimony was introduced after trial, first saw Mr. Sevalia on November 25, 1996. Mr. Sevalia gave a history of being involved in a motor vehicle accident on October 28, 1996. He said he was struck by a pickup truck, hit his face and jaw on the steering wheel, and suffered cuts to his mouth and lip. He developed neck and back pain shortly after the accident. Mr. Sevalia had been attending physical therapy sessions, but had no relief. At the time of the first visit, Mr. Sevalia complained of daily, moderate, low back pain, with pain down his left leg. He had pain in his neck and was suffering from frequent headaches. He also had a sensation of his knee "giving away." Mr. Sevalia told the doctor about a prior back injury, a lumbar strain, several years before this accident.

A physical examination revealed tenderness of the cervical facet joints, a limited range of motion of the neck, moderate tenderness over the facet joint in his lower back, mild muscle spasm, and limited range of motion. The straight leg-raising test was painful on the left side. An

examination of Mr. Sevalia's knee

revealed a full range of motion, with some joint line tenderness. There was no swelling. X-rays taken that day revealed mild cervical arthritis, mild lumbar narrowing at the L-5 motion segment, and no problems with the knee. Dr. Watermeier related the findings to the October 28, 1996, accident. He diagnosed a cervical sprain, lumbar sprain and left knee sprain.

Dr. Watermeier recommended that Mr. Sevalia undergo both CT scans and MRIs of the neck, lower back and knee to determine if there was some internal derangement, herniation or nerve injury. The CT scan of the lumbar region, as interpreted by the radiologist, revealed a bulging or herniated disc at C3-C4. The CT scans of the knee and neck were normal. The MRI of the cervical spine revealed some degeneration of the C3-C4 and C4-C5 segments, but no evidence of disc abnormality. The MRI of the lumbar area indicated a small herniation at L5-S1. The knee was normal. Based on these tests, Dr. Watermeier diagnosed a cervical sprain, with a possible disc herniation, and a herniated disc at L5-S1. He placed no work restrictions on Mr. Sevalia.

Although told to return in four to six weeks, Mr. Sevalia did not see

Dr. Watermeier again until February 19, 1997. Mr. Sevalia reported occasional pain in his neck and back, with much improvement from the last visit. The physical examination revealed very good range of motion, with no muscle spasm. The doctor stated that the passage of time apparently healed most of his symptoms.

When cross-examined, Dr. Watermeier admitted that he was not aware of Mr. Sevalia's progress at physical therapy between the date of his first visit with the doctor, November 25, and the date of the diagnostic tests, December 30. The doctor stated that if he had known of Mr. Sevalia's reported improvement, he would have suggested that Mr. Sevalia hold off on the diagnostic tests. He testified that the herniations detected in the tests were not impinging on any nerves, and agreed that that could be the reason Mr. Sevalia's pain subsided. Dr. Watermeier's records did not reflect that he had prescribed a neck or back brace for Mr. Sevalia, although the bills from his clinic indicate that Mr. Sevalia purchased a neck brace for $350 and a back brace for $170.

Dr. Don Timpton, a dentist, saw Mr. Sevalia on November 14, 1996, for a routine examination and cleaning. Mr. Sevalia had specific complaints

of pain in a front tooth and jaw discomfort. Dr. Tipton related the complaints to the accident of October 28, because Mr. Sevalia never had trouble opening his jaw prior to this visit, and had not complained of sensitivity in that tooth before. Dr. Tipton diagnosed Mr. Sevalia's jaw problem as TMJ, a dysfunction of the temporomandibular joint, and fitted him for a night guard. He also performed a root canal on the sensitive front tooth. The dentist's records indicate that Mr. Sevalia was seen again in June for a regular cleaning, and reported that he still wore the night guard periodically.

Robert Sevalia testified that he was bedridden for a week following the accident because of the pain. He missed at least ten days of work, tried to return, but continued to miss work frequently. Dr. Shelby, his primary care physician, initially referred him to physical therapy. He claimed that he would feel better after a session, but that the pain would return. He saw Dr. Tipton for his tooth and jaw pain. He corroborated the dentist's testimony that a root canal was performed and that the dentist fitted him for a night guard. However, at trial Mr. Sevalia testified that he wore the guard for less than a month. He claimed that he wore a back and neck brace for months

after the accident, and, at the time of trial, still occasionally wore the back brace. When cross-examined about his reports of slight pain, minor pain or no pain to the physical therapist prior to his CT scan and MRI, Mr. Sevalia could not remember what he told the therapist. He admitted that he never told Dr. Watermeier anything about being improved. Mr. Sevalia claimed that if he did tell the therapist he was improved, it was because he was worried about the mounting medical bills, and decided to self-treat.

PROCEDURAL HISTORY:

Mr. Sevalia timely requested a trial by jury. On the day of trial, the judge held a pre-trial conference, at which time she assessed the value of the case at less than $50,000. The judge informed the parties that she intended to waive the jury, and instructed Mr. Sevalia's counsel to advise his client. The judge indicated that she would allow time for Mr. Sevalia's counsel to seek a supervisory writ from this Court should he not wish to waive the jury. After speaking with his client, Mr. Sevalia's counsel agreed to waive the jury.

After trial, the court found Mr. Jupiter 100% at fault for the accident, and awarded Mr. Sevalia $100,980.72, plus interest and costs. Mr. Jupiter

filed a motion for a new trial arguing that the trial court had not taken into consideration the fact that Mr. Jupiter's insurer had tendered the policy limits plus interest and costs into the court's registry, and that Mr. Sevalia had not objected to the striking of the jury. The trial court granted the motion for new trial, and rendered a new judgment for $49,979.88.

DISCUSSION:

In his first assignment of error, Mr. Jupiter claims that the trial court erred by finding him 100% at fault. He argues that the evidence demonstrated that Mr. Sevalia was speeding, and, therefore, also should have been found at fault.

It is the duty of the factfinder to determine fault. *Labouisse v. Orleans Parish Sch. Bd.*, 99-1684, p. 9 (La.App. 4 Cir. 3/15/00), 757 So.2d 866, 871, *writ denied* 2000-1070 (La. 5/26/00), 762 So.2d 1112. The factors considered to determine fault are factual in nature and, therefore, must be reviewed under the manifest error standard. *Socorro v. City of New Orleans*, 579 So.2d 931, 942 (La. 1991); *Labouisse, supra.*

In written reasons for judgment, the trial court stated that the accident occurred when Mr. Jupiter failed to yield to Mr. Sevalia. A yield sign

controlled the street on which Mr. Jupiter was traveling, and he was issued a citation for failure to yield. However, Mr. Jupiter argues that other evidence contradicts Mr. Sevalia's self-serving testimony that he was traveling at 25 miles per hour, and, therefore, the trial court should have disregarded his testimony on this issue. Specifically, Mr. Jupiter argues that the emergency room records indicate that Mr. Sevalia told the triage nurse he was traveling at about 40 miles per hour. Additionally, the police report indicates that Mr. Sevalia left approximately 20 feet of skid marks prior to impact.

We do not find this "contradictory" evidence sufficient to upset the trial court's factual finding. There is record evidence that Mr. Sevalia suffered a head trauma, and told the triage nurse that he may have blacked out after the incident. It is reasonable to assume that Mr. Sevalia was not totally coherent when he gave this information to the emergency room personnel. Mr. Sevalia admitted that he slammed on his brakes when he saw Mr. Jupiter's truck, thus leaving skid marks. However, there is no evidence in the record to assess the length of skid marks as compared to the speed being traveled. Thus, based on the record before us, we find no error in the trial court's assessment of fault.

Mr. Jupiter also argues that the trial court erred by awarding Mr. Sevalia excessive damages. He claims that the evidence proves that Mr. Sevalia suffered only a four-month soft tissue injury, and unnecessarily inflated his medical bills by having diagnostic tests performed after he had substantially recovered from his injuries.

An appellate court should not upset a trial court's award of general damages absent an abuse of discretion. The discretion vested in the trial court is "great," and even vast. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La. 1993). Only when an award is beyond that which "a reasonable trier of fact 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." *Id.*

The judgment from which Mr. Jupiter appeals awarded Mr. Sevalia $33,999.16 for pain and suffering, $14,681.84 for medical specials and $1,298.88 for lost wages, totaling $49,979.88.

It was Dr. Watermeier's opinion, based on the results of the CT scans and MRIs, that Mr. Sevalia suffered a bulging disc, with possible herniation, at C3-C4, and a herniated disc at L5-S1. There were no findings of nerve

root impingement, and surgery was not recommended. Mr. Sevalia missed a week of work following the accident, and used a total of 96 hours of sick /personal leave. He attended 19 physical therapy sessions from November 19, 1996, through January 29, 1997. Evidence also was presented that Mr. Sevalia had a slight TMJ problem that apparently resolved in less than one month. Mr. Jupiter did not produce any independent evidence to refute the medical evidence such as an examination by an independent doctor.

In *Buras v. Neipman*, 98-2703 (La.App. 4 Cir. 5/12/99), 735 So.2d 841, this Court reduced a trial court award of $50,000 to $30,000 for a woman who suffered injuries in a rear-end collision. The Court found no objective evidence of a back injury, and determined that plaintiff had suffered at most a four to five month soft tissue strain overlying cervical degenerative disc disease. Plaintiff did not experience any disability after the treatment period. Nonetheless, the Court held that based on the particular facts of the case as applied to that particular plaintiff and a review of awards in similar cases, an award of $30,000 was the maximum the plaintiff should receive.

Based on the documented medical evidence and the testimony of Mr.

Sevalia and his wife, we cannot say that the trial court abused its discretion in awarding approximately $34,000 for pain and suffering. The award bears a reasonable relationship to the elements of the proved damages. Although this Court could determine that a lesser award is more appropriate, we cannot conclude from the entirety of the evidence, viewed in the light most favorable to Mr. Sevalia, that the award made is one of those "exceptional cases where such awards are so gross as to be contrary to right reason." *Youn, supra* at 1261, *citing Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir. 1987).

In addressing the second element of this assignment of error, we likewise find that the trial court did not abuse its discretion when it awarded the full amount of medical costs incurred. A tortfeasor is required to pay for overtreatment or unnecessary treatment unless it is proven that the victim incurred the treatment in bad faith. *White v. Wal-Mart Stores, Inc.*, 32,621 (La.App. 2 Cir. 3/3/00), 753 So.2d 995, *writ denied* 2000-1222 (La. 6/23/00), 765 So.2d 1041; *Spangler v. Wal-Mart Stores, Inc.*, 95-2044 (La.App. 1 Cir. 5/10/96); 673 So.2d 676; *Ogeron v. Prescott*, 93-926 (La.App. 5 Cir. 4/14/94); 636 So.2d 1033.

Mr. Sevalia admitted that he did not tell Dr. Watermeier about improvements in his condition between his first visit to the doctor and the date on which the tests were performed. However, he did not see Dr. Watermeier again until February 19, 1997. We do not find any evidence in the record that Mr. Sevalia acted in bad faith.

In his last assignment of error, Mr. Jupiter claims that the general damages award must be reduced to comply with the jurisdictional limits of $50,000. He argues that because Mr. Sevalia stipulated that the value of his case was less than $50,000, and agreed to strike the jury, the total award must be less than $50,000. Further, because his liability carrier already tendered the policy limits of $10,000, plus interest and costs ($10,502), the most an excess judgment against him can be is $39,498.

We disagree with Mr. Jupiter's assessment that the plaintiff stipulated that the value of his case was less than $50,000. According to the transcript of the pre-trial hearing, the judge inquired into the facts of the case. Based on the answers received, she decided to strike the jury. Mr. Sevalia's attorney, after consulting with his client, stated, **"Your Honor, even though we strongly disagree with Your Honor's ruling, my client is willing to go**

forward with the judge trial at this time." Our interpretation of this statement is that Mr. Sevalia did not agree that the value of his case was less than $50,000, but did agree to go forward with the judge trial. However, the judgment granting Mr. Jupiter's motion for new trial and reducing the original judgment specifically states, "[t]he plaintiff stipulated damages were less than $50,000 and waived the jury." Mr. Sevalia did not seek supervisory writs on that issue, nor did he file an appeal or an answer to Mr. Jupiter's appeal. In his reply brief he argues that the trial court erroneously granted the motion for new trial filed on behalf of Mr. Jupiter, and, therefore, erroneously reduced the original award of $100,980.72. However, allegations made in a reply brief are not sufficient to modify, revise or reverse a judgment. Louisiana Code of Civ. Proc. art. 2133A provides in part:

> 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**. . . . 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. (emphasis added)

Thus, Mr. Sevalia is not entitled to the relief he seeks. As such, we agree with Mr. Jupiter that the total judgment cannot exceed $50,000, and, therefore, he is entitled to a credit for the payment made by his insurer.

Accordingly, we amend the judgment to award Mr. Sevalia a total of $39,498, exclusive of costs and interest. The costs of this appeal are to be borne equally by the parties.

JUDGMENT AMENDED AND RENDERED