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| **SANDY GREEN, TONI GREEN, CYNTHIA SMALL, WIFE OF/AND GARY SMALL, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, BREEANE DENEY** | * | **NO. 2001-CA-1528** |
| | * | **COURT OF APPEAL** |
| | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
| **VERSUS** | * | |
| **BARRY LAUGHLIN AND TRAVELERS INSURANCE COMPANY** | * | |
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-17070, DIVISION "I-7"
HONORABLE KIM M. BOYLE, JUDGE PRO TEMPORE
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**JUDGE MICHAEL E. KIRBY**
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(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge Max N. Tobias, Jr.)

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The defendants, Barry Laughlin and Travelers Insurance Company, appeal the judgment in favor of the plaintiffs in an automotive accident. Specifically, they seek a reduction in the damages awarded.

## STATEMENT OF THE FACTS

On December 16, 1998, an accident occurred on Jefferson Highway near its intersection with Plantation Road in the Parish of Jefferson, State of Louisiana. Sandy Green, the plaintiff, was operating a 1993 Plymouth van and proceeding straight on Jefferson Highway in the left lane. The defendant, Mr. Laughlin, in a Freightliner (eighteen-wheeler) truck that he owned and operated, was traveling south on Clearview and entered west-bound traffic on Jefferson Highway, in order to make a left turn at Plantation Road. As the plaintiff's vehicle came off the Clearview overpass in the left lane, plaintiff alleges that the defendant was merging onto Jefferson Highway and making a left turn from the far right lane and cut into him. Despite engaging and maintaining his brakes, the plaintiff's vehicle struck

the eighteen-wheeler. The defendant denies he had begun his left turn and asserts he had his left blinker on and had slowed his vehicle to yield to west-bound traffic, when he was struck from the rear by the plaintiff. The defendant received a ticket for an improper left turn.

Immediately after the accident, the plaintiff did not report to the police officer that he was hurt. However, he did begin treating with physicians for complaints of pain in his lower back, his head and his left shoulder. Surgery was recommended for his shoulder and lower back. The plaintiff had surgery on his left shoulder on November 2, 1999, and had a positive result. On February 4, 2000, he had back surgery, which he stated helped alleviate some of his pain. A dentist prescribed a TMJ splint for headaches and he also saw a neuropsychologist, for headaches.

The trial court found the defendant ninety (90%) percent at fault for the accident and the plaintiff ten (10%) percent at fault. The trial court found specifically that, "while the defendant was primarily responsible for the accident in question, the plaintiff had an opportunity to avoid the accident, and therefore, has some comparative fault."

The trial court found further that "under the relevant legal standard in Louisiana, the defendant's conduct was a cause-in-fact of the resulting harm, and that the defendant breached his duty owed to the plaintiff, such that

damages were sustained."

The trial court awarded a total of $492,583.39 ($145,000 for the surgery; $55,000 for the arthroscopic shoulder surgery; $40,000 for the TMJ; $18,742 for past lost wages; $170,000 for future loss of earning capacity; and $63,841.39 for medical specials). The trial court reduced the award by ten (10%) percent based upon the plaintiff's comparative fault and the plaintiff was entitled to recover interest from the date of judicial demand as well as the costs of these proceedings pursuant to Louisiana Code of Civil Procedure article 1920.

## STATEMENT OF THE LAW

The appellate court standard of review for a factual finding of a trial court is that of manifest error, or the clearly wrong standard. *Newman v. Fernwood Transportation,* 2000-1036 (La.App. 4 Cir. 4/25/01), 785 So.2d 1026; *Mistich v. Volkswagen of Germany, Inc.* 95-0939 (La. 1/29/96), 666 So.2d 1073. However, if a trial court's findings of fact are not reasonable in light of the record reviewed in its entirety, then a court of appeal may reverse. *Stobart v. State, Through Dept. of Transp. & Development*, 617 So.2d 880 (La. 1993).

**LIABILITY**

The defendant/appellant assigns two errors to the trial court as concerns liability. First, the defendant argues the trial court was manifestly erroneous in failing to conclude that the defendant acted reasonably under the circumstances at the time of the 1998 accident. Second, the defendant argues the trial court was clearly wrong in failing to assign more than 10% fault to plaintiff when the record clearly shows that plaintiff failed to heed the visible warnings of the impending collision and failed to even attempt to avoid the collision.

As concerns his first argument the defendant cites the following evidence in the record: the distance between the Clearview entrance to Jefferson Highway and the turn onto Plantation Road is extremely short; the traffic coming from Clearview onto Jefferson must yield to and merge with west-bound traffic on Jefferson; the traffic entering Jefferson from Clearview must cross two lanes of west-bound Jefferson Highway traffic in order to turn left onto Plantation Road; the traffic entering Jefferson from Clearview must yield to and merge with west-bound Jefferson traffic which is traveling over an overpass; and the traffic turning south onto Plantation Road from Jefferson Highway must avoid four concrete dividers which form the boundary of the intersection at Jefferson Highway and Plantation Road.

While these facts were undisputed, the trial court based its findings on the testimony of the plaintiff as opposed to that of the defendant. Specifically, we refer to plaintiff's testimony that the defendant cut in front of him without warning, e.g., without even a left turn signal. This is completely contradictory to defendant's testimony, in which he stated that he had his left turn signal on, but was not in the process of making a left turn. Where testimony is contradictory, and there exist more than one permissible view based on the physical evidence, we are not at liberty to upset such a finding. The trial court was in a better position to determine credibility because it witnessed the demeanor and expressions of the witnesses. Moreover, the fact that the investigating police officer issued a citation to the defendant lends credibility to the testimony of the plaintiff.

Because the findings of the trial court are permissible views and do contain some support in the record, we must affirm the trial court's findings as concerns liability. *Newman v. Fernwood Transportation, supra.*

**DAMAGES**

The defendant argues that plaintiff did not prove the causal connection between his injuries and the accident on December 16, 1998. A tortfeasor is only liable for damages caused by his negligent act; he is not liable for

damages caused by separate, independent or intervening causes of damage. *Brumfield v. Guilmino*, 93-0366 (La. App. 1 Cir. 3/11/94), 633 So.2d 903.

The record establishes that plaintiff was involved in several accidents other than the one at issue in this suit, i.e., the 1998 accident. In 1994, plaintiff was involved in a motor vehicle accident, in which he suffered low back pain. However, there is evidence in the record that the plaintiff recovered from this accident, since his last doctor's visit for this injury was three years before the 1998 accident in question here.

On April 17, 1999, plaintiff suffered a serious ankle injury while playing basketball. The plaintiff was admitted to the Touro Emergency Room on April 19, 1999, and the record reveals that he was diagnosed with a right ankle tendon rupture and a splint was placed on his right ankle. Thereafter, plaintiff sought treatment at Tulane Hospital & Clinic on May 10, 1999, complaining of pain with prolonged sitting and standing from pain in his right heel. An MRI was done on his right ankle on May 17, 1999, which showed a chronic rupture subacute on the right heel. On June 4, 1999, Dr. James Butler at Tulane prescribed the use of a fracture walker for the plaintiff, and requested that plaintiff return for treatment within three to four weeks, which plaintiff failed to do. When plaintiff saw Dr. Wilmot Ploger on June 8, 1999, just four days later, for shoulder and back pain

allegedly related to the December 1998 accident, plaintiff failed to mention that he had injured his ankle while playing basketball or sought treatment for that injury.

The medical records and plaintiff's testimony show that plaintiff told Dr. Norman Ott in March of 1999 and Dr. F. Allen Johnston in April of 1999 that he was still having pain in his back and shoulder. Nevertheless, the pain was not enough to prevent him from playing basketball in April of 1999. Plaintiff further testified at trial that he received an epidural injection from Dr. Johnston on April 7, 1999, which plaintiff claims failed to alleviate his back and shoulder pain. Nevertheless, two weeks later, plaintiff was playing sports. Plaintiff had no explanation for the contradictions between his words and actions on cross-examination.

Plaintiff was involved in yet another accident after the December 1998 accident. On January 10, 2000, plaintiff was a passenger in a motor vehicle accident which caused between $6,000 and $8,000 in property damage to plaintiff's vehicle, according to plaintiff's own testimony. Plaintiff sought treatment from Dr. Rudolph Vaclav Hamsa only two days later, but failed to mention that he had been involved in another accident. Dr. Hamsa testified at trial that he would have expected the plaintiff to have brought this information to his attention at the January 12, 2000 visit. Dr.

Hamsa stated that he assumed that plaintiff's failure to inform him of the January 2000 accident implies that plaintiff was not injured. However, Dr. Hamsa also admitted that plaintiff failed to inform him of the 1994 motor vehicle accident and the 1999 basketball injury, which the Court and Dr. Hamsa learned at trial did in fact cause injury to the plaintiff.

The medical records of Drs. Ott, Ploger, Hamsa, and Roberta Bell clearly show that these four individuals specifically asked plaintiff if he had any other injury, and that plaintiff falsely answered in the negative. At trial, plaintiff could not explain why he misinformed his treating doctors regarding these other injuries.

The plaintiff's treating physician, who was informed at trial about plaintiff's other accidents, was Dr. Hamsa. And it was the defendants, through the introduction of evidence, who informed Dr. Hamsa. Dr. Hamsa testified that it is possible that the 1999 ankle injury could have negatively affected plaintiff's previous spinal injury, but he did not have enough information to give a definite opinion. Because none of the plaintiff's treating physicians had all the information regarding his medical history, their opinions about the December 1998 accident are not based upon a solid foundation, and are therefore viewed as circumspect.

The plaintiff failed to inform his treating physicians about the serious

ankle injury. This act of concealment, taints the plaintiff's expert medical testimony, especially as to future loss of earnings. Because the grave ankle injury was an independent cause of damage, we will reduce the award because the ankle injury was the proximate cause of at least some of the plaintiff's future loss of earning capacity. *Brumfield v. Guilmino*, *supra.*

**ECONOMIC DAMAGES**

The plaintiff called Dr. Thomas Dalton to testify as to the plaintiff's alleged lost wages and future loss of earning capacity. The plaintiff's counsel asked Dr. Dalton to calculate plaintiff's past and future lost wages based upon assumptions of hours worked by plaintiff. These assumptions were contradicted by the testimony of Ms. Sandra Cossé, the Administrative Staff Specialist of plaintiff's employer, Domino Sugar, and by the employment records of the company. Because the plaintiff's assumptions are not supported by the evidence in the record, we reduce the awards for past and future lost wages in the amounts given. We substitute the following rationale and awards.

**PAST LOST WAGES**

Dr. Dalton used the plaintiff's 1998 base salary from the plaintiff's

W-2 forms to compute the plaintiff's lost wages and loss of earning capacity. Dr. Dalton was asked to calculate the plaintiff's lost wages for the period from November 2, 1999 to May 8, 2000, when the plaintiff missed work allegedly as a result of the 1998 accident. The plaintiff's counsel also asked Dr. Dalton to make certain assumptions in calculating plaintiff's lost wages which lacked evidentiary support. For example, these assumptions were that the plaintiff said he worked forty (40) hours per week of regular time in 1998 and that he worked an average of 24 hours per week of overtime in 1998. All of plaintiff's assumptions were over-stated when compared with the employment records of Domino Sugar.

Dr. Dalton did not review any documents from Domino Sugar, plaintiff's employer, to determine the number of hours plaintiff worked before and after the 1998 accident. Instead, Dr. Dalton relied exclusively on figures provided by plaintiff. Using assumptions provided by the plaintiff, Dr. Dalton arrived at a sum of $8,878, as the past lost wages for the overtime from January 1, 2000 to May 8, 2000. The trial court awarded total lost wages, using plaintiff's assumptions, of $18,742.00.

Ms. Sandra Cossé was called by defendants to testify as to the employment records of plaintiff's employer. Ms. Cossé testified that the average number of hours of regular time worked by plaintiff were 37.25

hours per week in 1998, in contrast to the 40 hour week posited by plaintiff's counsel. The employment records were unchallenged by plaintiff. When Dr. Dalton was asked to calculate lost wages from January 1, 2000 to May 8, 2000 using an average of 37 hours of regular time worked per week, Dr. Dalton testified that the past lost wages for regular time would be $9,125.

Ms. Cossé further testified that the employment records of Domino Sugar showed that plaintiff worked an average of only 21 hours of overtime per week in 1998, rather than the 24 hour average posited by plaintiff's counsel. Again, this evidence was not challenged by plaintiff. When Dr. Dalton was asked to calculate lost wages from January 1, 2000 to May 8, 2000, using an average of 21 hours of overtime per week, Dr. Dalton testified that the past lost wages for overtime would be $7,768. According to Dr. Dalton, the total of the past lost wages using the figures provided by Ms. Cossé was $16,893.

Therefore, we amend the trial court's award of past lost wages, by reducing it to the sum of $16,893.

**FUTURE LOSS OF EARNING CAPACITY**

Dr. Dalton was additionally asked by plaintiff's counsel to assume

that plaintiff worked an average of 24 hours per week in overtime prior to December 1998, and decreased thereafter to an average of 14 hours per week in overtime for a loss of 10 hours per week. Dr. Dalton performed calculations based on this assumption to determine plaintiff's future loss of earning capacity and stated that the loss was $215,930, based on plaintiff working to the age of 61. Plaintiff again introduced no evidence to support these numbers other than his own self-serving testimony.

The assumed facts used in Dr. Dalton's opinion on future loss of earning capacity are also invalid. Sandra Cossé testified that the records of Domino Sugar reflect that plaintiff worked an average of 21 hours per week in overtime in 1998 and an average of 14 hours per week in overtime in 2000, a loss of only 7 hours per week. Plaintiff again did not refute the employment records referenced in Ms. Cosse' s testimony. When Dr. Dalton was asked by defendant to assume a loss of six hours per week of overtime throughout plaintiff's working life, Dr. Dalton stated the amount was $129,558.

Ms. Cossé's testimony further provided evidence that Domino Sugar does not guarantee overtime work to its employees and in fact offers very little overtime work until the last month of the year. Despite this fact, the record shows that plaintiff worked over thirty (30) hours of overtime during

several weeks of 2000, following his return to work in May of 2000. As such, plaintiff's contention that he cannot work as much overtime after the 1998 accident is contradicted by the evidence.

The facts Dr. Dalton used to form his opinion regarding plaintiff's past lost wages and future loss of earning capacity were incorrect. The trial court's award of $170,000 for future loss of earning capacity is not supported by the evidence. To determine the plaintiff's future loss of earning capacity, we begin with the figure that is supported by Domino Sugar employment records, i.e., $129,558. Next we reduce that amount further, because it is clear from the record that plaintiff's post-1998 accident ankle injury (the basketball injury) was the proximate cause of his absence from work for several months and is also the cause of some of his future loss of earning capacity. Therefore, we reduce the award for future loss of earning capacity to $100,000.

**CONCLUSION**

For the reasons outlined above, we reduce the plaintiff's total award to **$420,734.39** ($145,000 for the surgery; $55,000 for the arthroscopic shoulder surgery; $40,000 for the TMJ; $16,893 for past lost wages; $100,000 for future loss of earning capacity; and $63,841.39 for medical specials). This award is reduced by ten (10%) percent based upon the

plaintiff's comparative fault. The other parts of the trial court's judgment are affirmed.

**AMENDED, AND AS AMENDED AFFIRMED**