

NOT DESIGNATED FOR PUBLICATION

DENZIL COLE AND SHERRY * NO. 2001-CA-2337
COLE * COURT OF APPEAL
VERSUS * FOURTH CIRCUIT
NORTH AMERICAN FIRE * STATE OF LOUISIANA
AND CASUALTY INSURANCE * COMPANY, METRY CAB
SERVICE, INC. AND JAMES * LAURENT
*** * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-13070, DIVISION “K”
Honorable Louis A. DiRosa, Judge Pro Tempore
*** * * * ***

Judge Terri F. Love
*** * * * ***

(Court composed of Judge Steven R. Plotkin, Judge James F. McKay III,
Judge Terri F. Love)

PLOTKIN, J., DISSENTS WITH WRITTEN REASONS

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AFFIRMED

Canal Indemnity Company appeals the judgment of the trial court awarding plaintiff Denzil Cole \$35,000 for injuries that he sustained in a car accident. For the following reasons, we affirm.

FACTS AND PROCEDURAL

On August 15, 1997, plaintiff, Denzil Cole (“Mr. Cole”) and his wife, Sherry Cole (“Mrs. Cole”), were in a car accident. They were traveling on I-10 going toward Baton Rouge. As the car in front of him proceeded to stop, Mr. Cole also applied his brakes. However, Mr. James Laurent (“Mr. Laurent”), who was driving a cab behind Mr. Cole, failed to stop and rear-ended his vehicle. Mr. Cole’s 1996 Jeep Grand Cherokee sustained minimal damage, resulting in a repair estimate of only \$22.63. On July 27, 1997, Mr. and Mrs. Cole filed suit against Mr. Laurent, Metry Cab Service Inc. and American Life Casualty Insurance Company and Canal Indemnity Company (“Canal”) for negligence. Prior to trial, Metry Cab Service, Inc. was

dismissed on summary judgment and Mrs. Cole's claims were settled. The trial was conducted on June 19, 2001, and the trial court judge awarded Mr. Cole \$35,000 with a credit for the underlying insurance policy of \$25,000.

Canal presents three issues for this Court to review: 1) whether Denzil Cole met his burden of proof in establishing an injury resulting from the August 15, 1997 accident, 2) whether a reasonable factual basis exists for finding Plaintiff sustained injuries arising out of the August 15, 1997 accident and 3) whether a reasonable factual basis exists supporting a damage award in the amount of \$35,000.

The appellate court's review of factual findings is governed by the manifest error—clearly wrong standard. The two-part test for the appellate review of a factual finding is: 1) whether there is a reasonable factual basis in the record for the finding of the trial court, and 2) whether the record further establishes that the finding is not manifestly erroneous. *King v. Sewerage and Water Bd. Of New Orleans*, 99-0382, p. 3 (La. App. 4 Cir. 11/24/99), 747 So.2d 200, 202; *Mart v. Hill*, 505 So.2d 1120 (La. 1987). Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *King*, 747 So.2d 200, 202.

First, we note that Mr. Cole's claim for damages is not defeated because he may have had a pre-existing condition. It is hornbook law that a tortfeasor takes a plaintiff as he is found. *Griffin v. Louisiana Sheriff's Auto Risk Assn.*, 1999-2944, p. 13 (La. App. 1 Cir. 6/22/01), 2001 WL 699749. The tortfeasor is responsible for the injuries he caused, and any aggravation caused by the tortfeasor to a pre-existing condition. *Thibodeaux v. Wal-Mart Stores, Inc.*, 98-0566, p. 4 (La. App. 1 Cir. 4/1/99), 729 So.2d 769, p. 772. Thus, Canal's contentions that Mr. Cole suffered neck and back problems before the accident are immaterial. Our sole concern is whether Canal is responsible for the accident and whether the accident served to either create or worsen a condition which was already present.

Nonetheless, Canal is correct in arguing that the trial court judge should have considered the intervening accidents and in this case, he did. See *King*, 747 So.2d 200. Mr. Cole was involved in two subsequent accidents on December 1, 1997 and January 15, 1998. The December 1 accident was a minor rear-end collision. In the January 15 accident, an 18-wheeler ran into the side of Mr. Cole's vehicle. In order to recover for injuries suffered in the August 15 accident, Mr. Cole must show a causal relationship between the accident and the subsequent injuries. *Washington v. Bellard*, 602 So.2d 223, 226 (La. App. 3 Cir. 1992); *American Motorist*

Ins. Co. v. American Rent-All, Inc. 579 So.2d 429, 433 (La. 1991). He must prove the causal connection by showing that the injuries were more probably than not caused by the accident. *Washington*, 602 So.2d 223, 226 (La. App. 3 Cir. 1992). Mr. Cole was fifty-four years old at the time of the accident. He testified that after his vehicle was rear-ended, his car surged forward and he immediately felt pain in his neck and a burning sensation in his arm. Ten days after the accident, in August of 1997 he saw his family physician, Dr. Michael Buck, who referred him to Dr. Vanda Davidson, an orthopedic surgeon. Dr. Davidson diagnosed Mr. Cole as suffering a probably herniation at the C5-6 intervertebral discs, tendinitis of the left shoulder and a low back strain. Dr. Davidson then referred Mr. Cole to Dr. Patton, a neurosurgeon. Dr. Patton diagnosed Mr. Cole as having a C6 radiculopathy and that this injury was secondary to a ruptured disc at C5-6. After evaluating Mr. Cole a second time, he changed his diagnoses and testified that he thought Mr. Cole was probably suffering from cervical spondylosis, a degenerative disease. He recommended that Mr. Cole receive physical therapy and after receiving such, Dr. Patton testified that Mr. Cole had begun feeling better. Mr. Cole also saw Dr. Rayland Beurlet, an orthopedic specialist in November of 1997, who diagnosed him as having a left C6 radiculopathy, distal nerve entrapment syndrome at the wrist and rotator

syndrome. Dr. Beurlot also testified that he would attribute Mr. Cole's disc and distal nerve injuries to the August 15 accident.

After considering the evidence presented, the trial court determined that the August 15 accident was the cause of Mr. Cole's present injuries. Based upon our review of the record, we cannot say that the trial judge was in error for reaching this conclusion. There was a measure of inconsistent testimony, as is typical in any trial when several physicians testify. Nonetheless, there was evidence in the record to support the conclusion reached by the trial judge. This court cannot say that the judge's interpretation of the facts is less believable or acceptable than an alternative opposing viewpoint. It is well established that a fact finder's reasonable determinations should not be disturbed when there exists a conflict in testimony. *King*, 747 So.2d 200, 202. In light of the evidence presented, the trial court's decision was reasonable, and we find that it did not commit error in this regard.

Canal further alleges that Mr. Cole was untruthful in relaying his complaints and medical history to his physicians and at trial; therefore, any diagnoses rendered by the physicians was flawed because they were based upon Mr. Cole's subjective complaints. Consequently, Canal argues that the trial judge erroneously relied upon the testimony of the physicians and, thus,

rendered an award in favor of Mr. Cole. Canal's argument that the trial court should not have relied upon the testimony of Mr. Cole is underscored by the judge's written reasons for judgment. In it, he clearly mentions the fact that he did not consider Mr. Cole's testimony to be very credible. In discussing the varying medical opinions, the trial judge stated:

The diagnosis above were all considered possibilities and are at odds with the findings of Dr. Patton. The plaintiff's testimony on these points was unimpressive and the Court believes that his present day testimony is extremely colored by the dramatic change in his physical condition that resulted from the very severe accident of January 17, 1998.

Thus, the trial judge was fully aware of the questionable veracity of Mr. Cole's testimony and fully took this into consideration when rendering his judgment. In addition, as reflected by his mention of the January 17 accident, the trial judge further took into consideration Mr. Cole's additional intervening accidents in determining the appropriate amount to award Mr. Cole for his injuries. Upon considering these factors, he reached the conclusion that an amount of \$35,000 was sufficient to compensate Mr. Cole for the injuries that he sustained. The standard for review of damage awards is whether, after an articulated analysis of the facts, the court finds the trial judge abused his/her discretion. *Davis v. Louisiana Power & Light Co.*, 00-13, p. 7 (La. App. 5 Cir. 5/17/00), 762 So.2d 229, 236; *Bostwick v. M.A.P.P.*

Industries, Inc., 97-791 (La. App. 5 Cir. 12/30/97), 707 So.2d 441, 448.

Thus, in reviewing the trial court's award of damages, we are guided by the precept that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Miller v. Southern Baptist Hospital*, 2000-1352, 0. 17 (La. App. 4 Cir. 11/21/01), 806 So.2d 10, 22; *Rosell v. ESCO*, 549 So.2d 840, 849.

Upon review of the record, we fail to find that the trial court committed manifest error in awarding Mr. Cole \$35,000 for the injuries that he sustained.

Therefore, we find that the trial court was not in error for finding in favor of Mr. Cole and against Canal in the amount of \$35,000. For the reasons assigned herein, we affirm the judgment of the trial court.

AFFIRMED