

NOT DESIGNATED FOR PUBLICATION

IDA WILLIAMS, MARIO * **NO. 2002-CA-1177**
GRECO AND JACOB B. *
LAMBERT * **COURT OF APPEAL**

VERSUS * **FOURTH CIRCUIT**

DEBRA FORSTER AND * **STATE OF LOUISIANA**
ALLSTATE INSURANCE *
COMPANY *

*

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 99-15494, DIVISION "M-7"
Honorable C. Hunter King, Judge

JUDGE MAX N. TOBIAS, JR.

(COURT COMPOSED OF JUDGE CHARLES R. JONES, JUDGE TERRI
F. LOVE, JUDGE MAX N. TOBIAS, JR.)

ANTHONY J. RUSSO
DEAN J. FAVRET
FAVRET, DEMAREST, RUSSO & LUTKEWITTE
1515 POYDRAS STREET
SUITE 1400
NEW ORLEANS, LA 70112
COUNSEL FOR PLAINTIFFS/APPELLEES

NAT G. KIEFER, JR.
KIEFER & KIEFER
2121 AIRLINE DRIVE

SUITE 508
METAIRIE, LA 70001
COUNSEL FOR DEFENDANTS/APPELLANTS

JUDGMENT AMENDED; AFFIRMED AS AMENDED.

This lawsuit arose out an automobile accident that occurred on 8 November 1998 at the intersection of Convention Center Boulevard and Canal Street in New Orleans. Both drivers claimed to have the green light at the time of the collision. The trial court rendered judgment in favor of Ida Williams in the amount of \$49,475.64, together with interest and costs, although Ms. Williams died before the trial. The defendants, Debra Forster and her insurance company, Allstate Insurance Company, appeal from that judgment. In addition, the plaintiffs answered the appeal, seeking an increase in the award for general damages. For the following reasons, we amend the amount of special damages awarded by the trial court and amend the judgment to substitute Ms. Williams' survivors as parties plaintiff. In all other respects, we affirm the judgment.

On 8 November 1998, at approximately 7:30 a.m., Ms. Williams, a cab driver, was operating a 1991 Ford vehicle owned by Mario Greco. She

was traveling westbound on Convention Center Boulevard. When Ms. Williams was about one-half block from the intersection of Convention Center Boulevard and Canal Street, she observed the light on Convention Center Boulevard turn from red to green. Ms. Williams proceeded into the intersection where she struck broadside a vehicle operated by Ms. Forster. Ms. Forster claimed that she entered the intersection on a green light while traveling north on Canal Street when the vehicle driven by the plaintiff struck her.

Ms. Williams was treated for her injuries until 8 October 1999. The following day, she was in another automobile accident and subsequently settled that claim for \$17,500.00.

Following a bench trial, the trial court found Ms. Forster liable for the accident and awarded the decedent \$45,000.00 in general damages and \$4,475.64 in special damages. In its incorporated reasons for judgment, the trial court relied upon the testimony of the lone independent eyewitness and Ms. Williams' deposition testimony in finding that Ms. Williams had the green light, and therefore, the right of way, at the time of the accident.

The defendants have identified four assignments of error. First, they

argue that the trial court committed manifest error by relying on the deposition testimony of a witness who admitted that he did not actually see the accident or either car enter the intersection. Second, they contend that the trial court erred by finding Ms. Forster solely liable; they assert the trial court should have assessed Ms. Williams with at least 50% fault for the accident. Third, the defendants argue that the trial court awarded the plaintiffs excessive damages. Finally, the defendants assert that the trial court erred by failing to apply a credit of \$17,500.00 for Ms. Williams' settlement of a lawsuit arising out of a subsequent accident because she sustained damages that could not be rationally apportioned from those sustained in the instant accident.

The plaintiffs have answered the appeal seeking an increase in the amount of general damages awarded by the trial court. In addition, the plaintiffs ask that the judgment be modified to reflect their substitution as party plaintiffs following the death of Ms. Williams.

We first note that the liability aspects of this matter, as well as most of the medical evidence, was submitted at trial through depositions and other documentary evidence. The only live witnesses at the bench trial were the

plaintiff's brother, Daniel Green, and defense witnesses, Dr. Barry Bordonaro and Nicholas Lorusso, a physical therapist. In any event, the manifest error, clearly wrong standard must be applied even where the evidence before the trier of fact consists solely of written reports, reports and depositions. *Virgil v. American Guarantee & Liability Ins. Co.*, 507 So. 2d 825, 826 (La. 1987).

To determine whether the trial court committed manifest error, we have reviewed the entire record. In her deposition, Ms. Williams testified that she was traveling west on Convention Center Boulevard about one-half block from the Canal Street intersection when she saw the traffic signal turn from red to green in her favor. Soon after she entered the intersection, her vehicle struck the car driven by Ms. Forster.

Ms. Forster testified that she was traveling north on Canal Street and had just entered the intersection with Convention Center Boulevard on a green light when her vehicle was struck from the right by Ms. Williams' cab. Ms. Forster stated that she saw Ms. Williams' vehicle "charging" toward the intersection at which time she applied her brakes, but was unable to avoid the collision. Ms. Forster testified that her son, who was a passenger in her

vehicle at the time of the accident, also stated that she had the green light.

The only disinterested person present at the time of the accident was Henry Alphonso, a parking lot attendant, who was about 200 feet from the intersection. He testified that as soon as he heard the impact of the vehicles, he immediately looked towards Canal Street and saw that the cab had the green light. He stated that he was close enough to the scene where he could see everything at one time. Mr. Alphonso reported the same information to the investigating officer who soon arrived at the scene and prepared the accident report.

The trial court's reasons for judgment reflect that it placed great weight on the testimony of Mr. Alphonso in determining that the plaintiff had the green light at the time of the accident. This finding of fact is supported by evidence in the record and, therefore, cannot be clearly wrong or manifestly erroneous. *Stobart v. State, Department of Transportation & Development*, 617 So. 2d 880 (La. 1993). Therefore, we find the first assignment of error to be without merit.

We further reject the defendants' contention that the trial court erred in failing to assess Ms. Williams with some degree of fault. The

apportionment of fault is a finding of fact that will not be set aside on appeal unless found to be manifestly erroneous or clearly wrong. *Dupree v. City of New Orleans*, 99-3651 (La. 8/31/00), 765 So.2d 1002. After reviewing the evidence, we find that the trial court's holding that Ms. Forster alone caused the accident is also supported by the record.

The next assignment of error concerns the award of general damages, which the defendants argue was abusively high. The abuse of discretion standard of review applies when an appellate court examines a fact finder's award of general damages. *Wainwright v. Fontenot*, 2000-0492, p. 6 (La. 10/19/00), 774 So. 2d 70, 74. For the following reasons, we do not find an abuse of discretion by the trial court.

One day after the accident, Ms. Williams saw Dr. Barry Bordonaro of Allied Adult and Child Clinic ("AACC"), who diagnosed her injuries as a cervical strain, lumbar strain, bilateral shoulder strain, and chest contusions. Ms. Williams was treated conservatively with the use of medication and physical therapy. Radiologist, Dr. Landar S. Pearce, who read Ms. Williams' subsequent lumbar MRI, testified that it was more probable than not that a herniation at the L3-4 level was either caused or aggravated by the

8 November 1998 accident.

Ms. Williams was also seen three times by Dr. Courtney L. Russo, an orthopedic surgeon, who testified that as a result of the accident, Ms. Williams suffered a lumbrosacral sprain with a protruding disc and slight herniation at the L3-4 and L4-5 levels. He attributed a 3-5% permanent impairment to Ms. Williams' body as a whole and predicted that she would continue to suffer lower back and radicular pain on a regular basis.

On 8 October 1999, Dr. Russo last saw Ms. Williams for injuries sustained in the 8 November 1998 accident. Despite her discharge from treatment, he still noted muscle spasms in her lumbar spine with a limited range of motion, although he testified that Ms. Williams had clinically reverted almost to where she was physically before the first accident.

The defendants point out evidence in the record reflecting that Ms. Williams herself reported to personnel at the AACC that by 8 October 1999, she had fully recovered from the neck and back injuries suffered in the 8 November 1998 accident. In addition, they contend that the weight of the medical evidence supports a finding that the changes seen in Ms. Williams' lumbar MRI were degenerative in nature and not caused by the subject

accident. They rely on the testimony of Dr. James Butler, an orthopedic surgeon, who performed an IME on Ms. Williams on 3 November 1999. He testified that Ms. Williams' complaints were not consistent with a herniated disc at the L3-4 level and that her MRI did not reveal any disc herniations. In addition, the MRI was reviewed by Dr. Edward Soll, a radiologist, who testified that the films revealed only degenerative disc disease at L3-4, L4-5, and L5-S1. He expressly disagreed with any findings of disc herniations.

The record reflects that the trial court was presented with conflicting evidence as to the cause and extent of Ms. Williams' injuries. Therefore, the court did not abuse its discretion in awarding her the sum of \$45,000.00 in general damages. The defendants presented cases that awarded general damages of \$15,000 to \$20,000 for soft tissue injuries treated for one to two years. Even the plaintiffs concede that the lowest amount awarded by other courts for a herniated disc and/or aggravation of a prior herniated disc is \$50,000.00. Consequently, we do not find an award of \$45,000.00 to be an abuse of discretion. Therefore, this assignment of error by the defendants is without merit; the plaintiffs' argument that the general damage award should be increased is likewise rejected.

We do, however, find merit in the defendants' argument that the trial court erred by including bills for medical services and prescriptions for the 9 October 1999 accident in its award of special damages in the amount of \$4,475.64. Although the plaintiffs itemized Dr. Russo's medical bills as totaling \$1,510.00, Dr. Russo testified that only \$670.00 of his medical bills related to the first accident. In addition, the trial court awarded recovery for prescription receipts in the amount of \$445.64, although only \$290.49 related to the first accident. Therefore, we reduce the amount of special damages by \$995.15 (\$840.00 + \$155.15) and amend the judgment to reflect special damages in the total amount of \$3,480.49.

Finally, we reject the defendants' assertion that they should receive a credit for \$17,500.00, the amount that Ms. Williams received in settling her 9 October 1999 accident. Because we find that general damages award of \$45,000.00 does not constitute an abuse of discretion based on the evidence before us, a credit is not supported by the record or the jurisprudence.

Accordingly, we amend the judgment to substitute Clarence Green, Jr., Daniel Green, Elizabeth Reed Green, and Hope Franklin, as parties plaintiff in place of the decedent, Ida Williams. In addition, we amend the judgment and award special damages in the amount of \$3,480.49. In all other respects, the judgment is affirmed.

JUDGMENT AMENDED; AFFIRMED AS AMENDED.