NOT DESIGNATED FOR PUBLICATION

DENNIS K. WARREN, II	*	**NO. 2002-CA-1506**
VERSUS	*	**COURT OF APPEAL**
KELLEY FULLER AND ALLSTATE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-1749, DIVISION "M-7"
Honorable C. Hunter King, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

This is a personal injury action arising out of a rear-end collision. Dennis Warren, II, commenced this action against the rear-ending motorist, Kelley Fuller, and against Allstate Insurance Company in its dual capacity as the rear-ending motorist's insurer and as his own underinsured motorist carrier. As a result of the collision, Mr. Warren claimed that he re-injured his neck and his back. Although Ms. Fuller and Allstate stipulated to liability and to medical expenses, they contested causation and damages.

On May 22, 2002, a bench trial was held. At trial, the sole witness called to testify was Mr. Warren. The following documentary evidence was introduced: (1) Ms. Fuller's deposition; (2) photographs of the vehicles; (3) the Allstate policy insuring Ms. Fuller; and (4) Mr. Warren's medical reports, records, and related bills. Finding in favor of Mr. Warren, the trial court rendered judgment against Ms. Fuller and Allstate in its dual capacity and awarded damages in the lump sum of $20,000 ($1,747 in stipulated medical expenses and $18,253 in general damages). In so doing, the trial court incorporated in its judgment the following reasons:

> "Testimony showed that plaintiff sustained injuries to his cervical and lumbar in prior accidents, but was in recovery before the 28th day of August, 2000. After the accident on 28th

> day of August, 2000, Mr. Warren began experiencing cervical and lumbar pain. The evidence and testimony showed that plaintiff, Mr. Warren, was recommended to have an MRI but failed to do so because of inadequate funds. Plaintiff's testimony also indicated that he is still experiencing pain."

The trial court also made an express finding that Mr. Warren's testimony was credible. From that judgment, Ms. Fuller and Allstate appeal. We affirm.

STATEMENT OF THE FACTS

The basic facts regarding the stipulated rear-end collision are undisputed. The accident occurred on the afternoon of August 28, 2000 on the Westbank Expressway in New Orleans. Mr. Warren was stopped in deadlocked traffic when the vehicle he was driving was rear-ended by a vehicle driven by Ms. Fuller. Mr. Warren stated that the impact jolted him back and forth in his seat, but he was restrained by his seatbelt. The property damages to his vehicle totaled approximately $500. Mr. Warren testified that he told the investigating officer he did not need medical assistance.

Shortly after the accident Mr. Warren testified that he began to experience back and neck pain similar to that he experienced as a result of a prior motor vehicle accident that occurred on December 19, 1995. As a result of that prior accident, Mr. Warren testified that sustained back and neck injuries for which he treated with Dr. Bruce Razza from 1995 until

1998. During that interval, Dr. Razza performed two back surgeries on him: a partial discectomy and a bone fusion at L5-S1 with two titanium cages. He testified that he last saw Dr. Razza sometimes in 1998 and that he had not treated for either his back or neck for almost two years before the instant accident. Although Mr. Warren acknowledged having some residual back pain before the August 2000 accident, he testified it was tolerable and that he had successfully returned to work. Indeed, at the time of the accident, he was en route to his job as a bellman at a local hotel.

On the day of the accident, Mr. Warren testified that he did not go to work. Instead, that night he went to the Memorial Medical Center emergency room complaining of back pain. He was prescribed medication and released with instructions to follow-up with his physician. Two days after the accident, he saw Dr. Stewart Altman; two weeks after the accident, he saw Dr. Razza. Mr. Warren explained that he saw Dr. Altman solely because he was unable to get an immediate appointment with Dr. Razza.

According to Dr. Altman's August 31, 2000 report, Mr. Warren was a twenty-nine year old who presented complaining of neck and back pain following an automobile accident. Dr. Altman diagnosed him with cervical and lumbosacral sprain, gave him a prescription, and restricted him to light duty with no lifting over ten pounds. Dr. Altman related his symptoms to

the accident. This was the only time Dr. Altman treated Mr. Warren.

On September 12, 2000, Mr. Warren presented to Dr. Razza with complaints of significant worsening of his low back and left leg conditions, recurrence of neck and left shoulder girdle symptoms, and the occurrence of right leg symptoms. Dr. Razza opined that the recent August 28, 2000 accident, by history, aggravated Mr. Warren's pre-existing neck and back conditions that had improved by conservative measures and by surgical intervention. Dr. Razza noted that the x-rays showed the titanium cages from the prior back surgery to be intact. According to Dr. Razza's report, the last time he saw Mr. Warren was on May 21, 1998 at which time Mr. Warren had some residual posterior column symptoms in the lumbar spine. Dr. Razza prescribed medication, physical therapy, and other conservative treatment measures, including a trial of a micro-TENS unit. Dr. Razza opined that Mr. Warren was currently disabled from gainful employment until his symptoms could be reduced.

On December 19, 2000, Mr. Warren again saw Dr. Razza. In his report for that date, Dr. Razza noted that Mr. Warren had made no improvement and that his symptoms had not gone down to the pre-existing level. Dr. Razza further noted that "[a]s soon as he stands up, he feels severe pain in his back and he feels like the back and legs want to give way. He

demonstrates this in the office today." He still further noted that Mr. Warren had tried the micro-TENS unit, but it had not helped. He further reported that the neck and back exam remained positive and the low back had increased tenderness and spasm. Dr. Razza's impression was that Mr. Warren had aggravated his pre-existing neck and back conditions. As to the back, Dr. Razza indicated that it was likely Mr. Warren suffered an aggravation of the posterior column of his lumbar spine at L5-S1, which would explain his signs and symptoms. He recommended continued conservative treatment and facet blocks. Finally, Dr. Razza opined that an updated cervical and lumbar MRI was needed to rule out any additional disc injury.

Because of his financial situation, Mr. Warren never had the cervical and lumbar MRI done. Likewise, due to lack of funding, Mr. Warren discontinued treating with Dr. Razza.

DISCUSSION

The sole assignment of error asserted by Ms. Fuller and Allstate is that the trial court's general damage award was excessive. In a tort case, the

plaintiff has the burden of proving by a preponderance of the evidence that the accident more probably than not caused the claimed disabling condition. *Jones v. Peyton Place, Inc.*, 95-0574, p. 12 (La. App. 4 Cir. 5/22/96), 675 So. 2d 754, 763. This burden is satisfied if medical evidence is presented establishing that it is more probable than not that the claimed condition was caused by the accident. 95-0574 at p. 13, 675 So. 2d at 763. "`[A] defendant takes his victim as he finds him and is responsible for all natural and probable consequences of his tortuous conduct.'" *Wainwright v. Fontenot*, 2000-0492, p. 5 (La. 10/17/2000), 774 So. 2d 70, 74 (citing *American Motorist Ins. Co. v. American Rent-All, Inc.*, 579 So. 2d 429, 433 (La. 1991)).

The assessment of damages by the trier of fact is a factual determination entitled to great deference on review. *Wainwright*, 2000-0492 at p. 6, 774 So. 2d at 74. When the trier of fact has made a general damage award and the defendants are challenging that award as excessive, the "abuse of discretion" standard of appellate review applies. The abuse of discretion standard is difficult to express and necessarily is "non-specific." *Cone v. National Emergency Services, Inc.*, 99-0934, p. 8 (La. 10/29/99), 747 So. 2d 1085, 1089 (citing *Youn v. Maritime Overseas Corp.*, 623 So. 2d 1257 (La. 1993)). General damage awards, at least as to the amount awarded for

injuries proved to have been caused by the tort, cannot be calculated with mathematical certainty. *Guillory v. Insurance Co. of North America*, 96-1084, p. 1 (La. 4/8/97), 692 So. 2d 1029, 1036 (Lemmon, J., concurring) (citing *Viator v. Gilbert*, 253 La. 81, 216 So. 2d 821 (1968)).

An appellate court's initial inquiry in reviewing a general damage award is whether the particular effects of the particular injuries on the particular plaintiff are such that there has been an abuse of the "much discretion" vested in the trier of fact (judge or jury). *Youn*, 623 So. 2d at 1260. Only after such an abuse of discretion is found is it appropriate for an appellate court to resort to prior awards and then only for purpose of determining the highest or lowest point that is reasonably within that discretion. *Id.* In determining whether such an abuse of discretion has been shown, an appellate court must view the relevant evidence in the light offering the most support to the trial court's judgment. *Youn*, 623 So. 2d at 1261. Applying these standards, the jurisprudential theme that has emerged is that "the discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages." *Id*

In this case, Ms. Fuller and Allstate argue that it was established at trial that Mr. Warren had returned to his pre-accident status sometimes

between December 19, 2000, when he last saw Dr. Razza, and the date of trial. They further argue that since the only evidence presented to establish Mr. Warren's pain continued beyond the four-month treatment period was his own testimony, his recovery should be limited to that four-month treatment period. Characterizing Mr. Warren's injury as a four-month aggravation of a prior neck and back injury, they argue that the trial court's award of $4,563.25 per month of active treatment (total $18,253) was clearly excessive. Citing *Dolmo v. Williams*, 99-0169 (La. App. 4 Cir. 9/22/99), 753 So. 2d 844, they seek a reduction of the general damage award in this case to $2,500 a month or $10,000 in total for the four months of treatment.

Mr. Warren counters that this argument is flawed in that it presupposes his injury lasted only for the four months that he treated. He stresses that he testified that he was still in pain at the time of trial, which was about twenty-one months after the accident, and that Ms. Fuller and Allstate failed to introduce any medical or other evidence to contradict his testimony. He further stresses that he had undergone two prior back surgeries before this accident and for that reason it was reasonable for the trial court to find he was still in pain at the time of trial. Finally, he emphasizes that the trial court found him credible and that finding was supported by the record and by his attempts to return to work.

The attempt by Ms. Fuller and Allstate to limit the award of general damages to the period of active treatment is misplaced. Although Mr. Warren only treated for four months, he testified that the reason he discontinued treatment was not because Dr. Razza discharged him, but because of his inability to afford further treatment and diagnostic testing. Indeed, the trial court questioned him on this specific point. The trial court was in the best position to judge the sincerity of Mr. Warren's testimony concerning the severity and duration of his pain. The trial court found Mr. Warren's testimony that at the time of trial he was still in pain to be credible. Such credibility determinations are factual findings governed by the well-settled manifest error standard of review. *Canter v. Koehring Co.,* 283 So. 2d 716, 724 (La. 1973).

Although Mr. Warren rated his back pain as a two on a scale of one to five both before the accident and at the time of trial, he also testified that he had not returned to his pre-accident status in various respects. First, Mr. Warren testified that although his pain was tolerable while he was sitting in the courtroom, he further testified that it was not the same as before the accident. He explained that "after my surgery and after I went through my therapy throughout the years, it was on a – it was getting better. But now as of August, it's the same thing all over again. Now only – even on the right-

hand side." Similarly, when asked about the impact of the accident on his lifestyle, Mr. Warren responded that before the accident Dr. Razza had indicated he might be able to begin playing tennis again after undergoing physical therapy. Following the August 2000 accident, he indicated that he had to start all over. Mr. Warren also testified that since the accident he no longer is able to take long road trips with his social club.

Although Mr. Warren was not asserting a loss wage claim, he testified regarding the effect of the accident on his ability to return to work. He stated that before the accident he was able to successfully manage working despite some residual back pain, but after the accident he was unable to work. Since the accident, he testified that he attempted on a few occasions to return to his job as a bellmen, but he was unable to do so because he could not handle lifting luggage and walking up and down stairs. He also testified that he attempted to work at other jobs--a graphic artist, automotive technician, and automotive parts salesman--but was forced to quit these jobs because of his fatigue and back pain.

Given the evidence presented, the trial court's finding that Mr. Warren was credible and apparent finding that he sustained more than a four-month soft tissue injury was not manifestly erroneous. Considering the extent to which the trial court found Mr. Warren's aggravation of his back and neck

injury was caused by the accident in question and considering the impact of the effect of that injury on his lifestyle, we are unable to say that the general damage award is abusively high.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed. The costs of this appeal are assessed against Ms. Fuller and Allstate.

AFFIRMED