

NOT DESIGNATED FOR PUBLICATION

ESTAVAN CARTER * **NO. 2003-CA-1323**
VERSUS * **COURT OF APPEAL**
PRIME INSURANCE * **FOURTH CIRCUIT**
SYNDICATE, INC., * **STATE OF LOUISIANA**
SYLVESTER BOOTS AND *
SADDLES, INC. AND RONALD *
SYLVESTER *
*
* * * * *

APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2002-53708, SECTION "A"
Honorable Charles A. Imbornone, Judge
* * * * *
Judge Patricia Rivet Murray
* * * * *

(Court composed of Judge Patricia Rivet Murray, Judge Michael E. Kirby,
Judge Max N. Tobias, Jr.)

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AFFIRMED

This is a personal injury case arising out of a minor collision between a taxicab and a truck. Estavan Carter, the taxicab driver, commenced this action against Ronald Sylvester, the truck driver. Also named as defendants were Mr. Sylvester's company, Sylvester Boots and Saddles, Inc.; and their insurer, Prime Insurance Syndicate, Inc. Liability in this case was conceded; the sole issues were causation and damages. From a judgment in Mr. Carter's favor, the defendants appeal. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On October 30, 2001, Mr. Carter, a taxicab driver, pulled into the taxicab stand in front of the Ritz-Carlton Hotel and parked his cab behind Mr. Sylvester's truck. Mr. Sylvester's truck was illegally stopped in the taxicab stand to make a delivery to the hotel. Mr. Carter blew his horn, but the truck did not move. As Mr. Carter started to exit his cab to see if anyone was in the truck, Mr. Sylvester backed his truck into Mr. Carter's cab. According to Mr. Sylvester, he did not see the cab parked behind him. He admitted that he backed into Mr. Carter's cab, but described the impact as a minor one. He testified that when the impact occurred he had not yet placed his foot on the accelerator; he had simply placed the truck into reverse. Mr. Carter, on the other hand, described the impact as lifting the front of his cab,

and he described being thrown back, or “pinned” against his seat.

As a result of the impact, Mr. Carter claimed property damage to his cab and personal injury to his back and neck. This suit followed against Mr. Sylvester, his company, and their insurer. As noted, at trial liability was conceded; the sole issues were causation and quantum.

Mr. Carter, who was seventy years old at the time of the accident, testified that he had preexisting back and neck injuries as a result of three prior accidents. In 1962, he was seriously injured while working as a longshoreman when an 1800-pound object fell on his chest. As a result of that injury, he had back surgery in 1965 to remove one disc. Between the 1962 accident and the current 2001 accident, he was involved in two other motor vehicle accidents. As a result of both those other accidents, he indicated that he irritated his preexisting neck and back injury. Thereafter, he testified that he had good days and bad days and that he learned how to manage his pain by driving his cab fewer hours when necessary.

Although Mr. Carter acknowledged that before the October 2001 accident his neck and back pain was “a continuing thing,” he testified that following the accident his pain became more constant. He further testified that he could not drive his cab for several (five or six) days after the accident and that for a period of several months thereafter he was unable to drive his

cab as many hours per day as he did before the accident. He testified that he saw Dr. Simmons the day after the accident, complaining of back pain.

Dr. Simmons testified by deposition that he first saw Mr. Carter on October 31, 2001. He testified that he detected spasms in Mr. Carter's back and prescribed both physical therapy and medication. Dr. Simmons further testified that he treated Mr. Carter conservatively until June 2002 when he discharged him. Dr. Simmons' initial diagnosis was cervical and lumbosacral strain, both of which he causally related to the October 30, 2001 accident. When questioned regarding Mr. Carter's preexisting back and neck injuries, Dr. Simmons opined that the greater (majority) portion of Mr. Carter's pain was causally related to the accident and that the accident exacerbated his preexisting condition. He further opined that it took Mr. Carter about six or seven months to recover from the back injury and about five or six months to recover from the neck injury.

Following the bench trial, the trial court rendered judgment in favor of Mr. Carter, awarding \$9,000 in general damages and \$3,770 in special damages. From that judgment, defendants appeal.

STANDARD OF REVIEW

A plaintiff in a personal injury case 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. The plaintiff satisfies this burden if expert medical and lay testimony is presented establishing that it was more probable than not that the claimed condition was caused by the accident. *Jones*, 95-0574 at p. 13, 675 So. 2d at 763; *Maranto v. Goodyear Tire & Rubber Co.*, 94-2603 (La. 2/20/95), 650 So. 2d 757. Whether the accident caused the plaintiff's injuries is a factual question, which should not be reversed on appeal absent manifest error. *See American Motorist Ins.Co. v. American Rent-All, Inc.*, 579 So. 2d 429, 433 (La. 1991).

An interplay often arises between the manifest error and the abuse of discretion standards of review. *Guillory v. Insurance Co. of North America*, 96-1084, p. 1, n. 1 (La. 4/8/97), 692 So. 2d 1029, 1036 (Lemmon, J., concurring). Explaining that interplay, former Justice Lemmon aptly stated:

The “much discretion” standard applies to the amount of the award of general damages. But there are often factual issues in a review of an award of general damages, such as whether a certain condition was caused by the tort. Of course, most issues decided by courts are mixed fact-law questions, and the fact determinations are reviewed under the manifest error standard.

Id. Under the manifest error rule, a “reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of

fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.” *Canter v. Koehring Co.*, 283 So. 2d 716, 724 (La. 1973).

When the trier of fact (in this case, the judge) has made a general damage award and the defendant contends on appeal that the award is excessive, the “abuse of discretion” standard of review applies. The rationale behind the application of that standard is that “awards of general damages, at least as to the amount awarded for injuries proved to have been caused by the tort, cannot be calculated with mathematical certainty.” *Guillory*, 96-1084 at p. 1, 692 So. 2d at 1036 (Lemmon, J., concurring) (citing *Viator v. Gilbert*, 253 La. 81, 216 So. 2d 821 (1968)); *Cone v. National Emergency Services, Inc.*, 99-0934, p. 8 (La. 10/29/99), 747 So. 2d 1085, 1089 (citing *Youn, supra*, and noting that the abuse of discretion standard is difficult to express and necessarily is “non-specific”); La. Civ. Code art. 1999.

A reviewing court’s initial inquiry 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. Because “[r]easonable persons frequently disagree about the measure of general damages in a particular case,” a

reviewing court may disturb a general damage award on appeal only when “the award is, in either direction, 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.” *Youn*, 623 So. 2d at 1261. Only after the appellate court determines that the trial court clearly abused its discretion in awarding damages to a particular injured party in a personal injury case, may the appellate court resort to looking at prior awards in cases with generically similar medical injuries for purposes of determining the highest or lowest point at which damages are reasonable. *Reck v. Stevens*, 373 So. 2d 498, 501 (La. 1979). In sum, 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.” *Youn*, 623 So. 2d at 1261.

DISCUSSION

On appeal, defendants do not dispute the trial court’s finding that the accident in question caused an irritation or aggravation to Mr. Carter’s preexisting neck and back injuries; rather, they dispute the trial court’s general damage award, contending it is factually unsupported and legally unreasonable, or, in the alternative, excessive. Defendants emphasize that the sole evidence offered in support of the general damage award was Mr.

Carter's self-serving testimony that the accident "irritated" or aggravated his preexisting neck and back pain. Defendants contend that they should only be liable for the amount necessary to compensate Mr. Carter for the "aggravation of his preexisting condition." Stated otherwise, they claim that it was error for the trial court to find them liable for the full value of Mr. Carter's pain and suffering from October 30, 2001 (the date of the accident) through June 11, 2001 (the date of his discharge from treatment by Dr. Simmons).

Defendants argue that neither Mr. Carter, nor his treating physician, Dr. Simmons, offered any guidance on how to measure the incremental increase in pain that was caused by the October 2001 accident. Defendants stress Dr. Simmons' concession that he could not quantify the increase in pain Mr. Carter suffered because he did not examine Mr. Carter before the accident. They further stress Dr. Simmons' testimony that only Mr. Carter could make that assessment. Still further, they stress Mr. Carter's inability (or refusal) to provide any reasonable means of calculating the increase in his pain caused by the accident's aggravation of his pre-existing condition. Defendants thus contend that Mr. Carter failed to carry his burden of proof. It follows, defendants argue, that there was no factual basis for the trial court to measure this incremental increase in Mr. Carter's pain. Defendants thus

claim that the trial court's general damage award was manifestly erroneous.

Mr. Carter counters that during the year before the accident, he was not under a doctor's care and that he was able to drive his cab without any difficulty. Following the accident, Mr. Carter stresses that he was required to seek medical treatment for his increased back and neck pain. He further stresses that it took five to six months for him to return to his pre-accident condition. Mr. Carter still further stresses defendants' failure to call any witnesses to refute his claims. Finally, Mr. Carter cites the well-settled jurisprudential principles that a tortfeasor takes his victim as he finds him and that a tortfeasor's liability is not reduced by the fact that a preexisting condition partially caused his victim's injuries.

The jurisprudence, as Mr. Carter contends, does not permit a reduction in a tortfeasor's liability based on the fact that a preexisting condition partially caused his victim's injuries. As the Louisiana Supreme Court has held, "[t]he defendant's liability for damages is not mitigated by the fact that the plaintiff's pre-existing physical infirmity was responsible in part for the consequences of the Plaintiff's injury by the defendant. It is clear that a defendant takes his victim as he finds him and is responsible for all natural and probable consequences of his tortuous conduct." *Lasha v. Olin Corp.*, 625 So. 2d 1002, 1005 (La. 1993). Continuing, the Supreme Court in

Lasha held that “[w]hen the defendant’s tortious conduct aggravates a pre-existing condition, the defendant must compensate the victim for the full extent of the aggravation.” *Lasha*, 625 So. 2d at 1006. This principle is referred to as the *Lasha* rule.

Applying the *Lasha* rule, the court in *Skipper v. Berry*, 99-1433 (La. App. 3 Cir. 3/15/00), 762 So. 2d 56, rejected an argument similar to that posed by defendants in this case. The defendant in *Skipper* stressed that at the time of the accident the plaintiff was under a doctor’s care for pre-existing injuries with the same exact symptoms that the plaintiff claimed were caused by the accident at issue. Rejecting the defendant’s argument that given the preexisting symptoms the general damage award should have been reduced, the court reasoned:

The record establishes that Plaintiff had pre-existing lower back and leg pain and he received treatment on four occasions. According to his treating physician, Plaintiff had made substantial improvement prior to the accident, but the accident caused a 100% relapse. Before the accident, [the treating physician] estimated that Plaintiff’s treatment would have been completed after two additional visits. Following the accident, Plaintiff was forced to undergo twenty-one additional visits. Considering these facts and the rules set forth in *Reck* and *Lasha*, we find that the trial court did not err in holding Defendants liable for the full extent of the aggravation.

Skipper, 99-1433 at pp. 6-7, 762 So. 2d at 61. The defendant in *Skipper* was thus held liable for the entire course of subsequent medical treatment and the

accompanying pain and suffering.

Although Mr. Carter was not under a doctor's care at the time of the accident, he acknowledged that he had continuing problems from his prior neck and back injuries. As the trial court put it, Mr. Carter had "constant problems" and had "prior injuries." Nonetheless, under the *Lasha* rule, defendants were required to take Mr. Carter, who had a history of neck and pack pain before the October 30, 2001 accident, as it found him. The record reflects that as a result of this accident Mr. Carter sustained at least a six-month aggravation of his prior back injury and at least a five-month aggravation of his prior neck injury. We further take note of the fact that Mr. Carter is over seventy years old. Given the particular circumstances of this particular case, we cannot say the trial court abused its much discretion in awarding \$9,000 in general damages to this particular plaintiff.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. Costs of this appeal are assessed against the defendants, Ronald Sylvester; Sylvester Boots and Saddles, Inc.; and Prime Insurance Syndicate, Inc.

AFFIRMED

