

NOT DESIGNATED FOR PUBLICATION

**TRIMEKIA WARE AND
TERRY BAZILE**

*

NO. 2003-CA-2178

*

COURT OF APPEAL

VERSUS

*

FOURTH CIRCUIT

**KENNETH ALEXANDER,
VENTURE TRANSPORT, INC.
AND GULF INSURANCE
COMPANY**

*

STATE OF LOUISIANA

*

*

* * * * *

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-60, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge**

* * * * *

Judge Terri F. Love

* * * * *

(Court composed of Judge James F. McKay III, Judge Terri F. Love, Judge
Max N. Tobias Jr.)

Tamara Kluger Jacobson
2609 Canal Street
5th Floor
New Orleans, LA 70119

-and-

Robert G. Harvey, Sr.
2609 Canal Street
5th floor
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

S. Daniel Meeks

Patrice W. Oppenheim
REICH, MEEKS & TREADAWAY, L.L.C.
3850 North Causeway Boulevard
Two Lakeway Center, Suite 1000
Metairie, LA 70002

COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

This personal injury case arises from a motor vehicle accident. After a bench trial, the trial judge found both parties were liable apportioning 65% fault to the defendant. The defendant lodges this appeal asserting the trial court erred in determining damages. For the reasons assigned below, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 4, 2000, the plaintiff, Trimekia Ware (“Ware”), was operating a 1999 Pontiac Grand Am eastbound on Interstate-10, with plaintiff, Terry Bazile (“Bazile”), as her guest passenger. The defendant, Kenneth Alexander (“Alexander”), was also traveling eastbound on Interstate-10, and was operating an eighteen-wheeler that was owned by his employer, Venture Transport, Inc., and insured by Gulf Insurance Company.

Mike Lollar (“Lollar”), an independent eyewitness to the accident, testified that Ware was traveling in the far right lane and Alexander was traveling in the far left lane when the vehicles simultaneously attempted to enter the center lane. Lollar further testified that Ware was slightly ahead of

Alexander when the vehicles switched to the center lane. He did not recall if either driver used their turn signal.

In contrast, Ware insisted that she was in the center lane the entire time, made no lane changes, and did not observe the eighteen-wheeler until just prior to the incident.

Alexander agreed with Lollar, but maintained he did use his turn signal prior to changing lanes. Alexander testified that as he was changing from the left to the center lane, he saw Ware's vehicle dart out in front of his vehicle. Alexander continued, stating that he did not know whether there was contact between the vehicles. Even though Alexander saw the Ware vehicle spinning toward the median, he did not believe he was involved. He further testified that he failed to stop in the interest of safety.

Lollar corroborated the fact that there was an impact between the vehicles. Photographs produced at trial revealed damage to the left rear quarter panel and bumper of the Ware vehicle. There was no noticeable damage to the eighteen-wheeler.

Initially, Ware received medical care from Dr. Norman Ott, an internist, immediately after the accident. She presented complaining of back pain, neck pain, chest pain, headaches, and general body aches. Dr. Ott diagnosed Ware with traumatic headache, cervical/trapezius strain,

thoracolumbar strain, and an impact to the chest. Ware returned one month later complaining of left upper-arm soreness. She re-iterated her pain to Drs. Andrew Kucharchuk, Tayana Stefanovic, Jeffrey F. Cattorini, and Gayle Voth over the year following the accident. Ultimately, Dr. Voth found soreness to touch over the left front shoulder, front bone structures, and the AC joint, but could not determine whether it was developmental or post-traumatic. A November 2001 MRI showed a small tear without retraction on the left shoulder. Dr. Voth did not recommend surgery. At the time of trial, Ware was still under medical treatment.

The defendants' orthopedic surgeon, Dr. Chad Millet, examined Ware and found tendonitis, but no tear in her left shoulder. He further opined that Ware did not specifically complain of left shoulder pain until approximately one year after the accident; therefore he did not relate the shoulder injury to the accident.

Bazile was involved in a previous motor vehicle accident only one month prior to the accident in question. He was still under the treatment of Dr. Ott for headaches and back pain at the time of the instant incident. Dr. Ott opined that the second accident aggravated Bazile's previous symptoms. Dr. Kucharchuk treated Bazile for the presented symptoms and found significant improvements. No longer than two months after the accident,

Bazile sought no further treatment and continued to work.

After a bench trial on the merits, the trial court apportioned fault 65% to Alexander and 35% to Ware. Ware was awarded \$75,000.00 in general damages and \$25,142.75 in past medical expenses. Bazile was awarded \$4,000.00 in general damages and \$3,149.00 in past medical expenses. He was not awarded his entire past medical expenses. Specifically, Bazile's therapy and return visit to Dr. Ott following the second accident were reduced by 50%, apportioning half to the prior accident. Future medical expenses were not awarded to either plaintiff. The defendants subsequently lodged this appeal asserting the trial court erred in awarding general damages and medical expenses to Bazile and Ware.

ANALYSIS

The defendants assert the trial court erred in the amount of general damages and medical expenses awarded to both Ware and Bazile. Appellants argue that Ware and Bazile failed to show that their injuries were a result of the accident and, further, that they lacked credibility. Appellants do not assign error to the trial court's finding of liability.

Throughout our review of the damages, we are mindful that factual findings of a trial court are subject to the manifest error standard of review on appeal. *Stobart v. State Through DOTD*, 617 So.2d 880, 882 (La. 1993).

The standard for appellate court review of a trial court's award of general damages was discussed by the Louisiana Supreme Court in *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La. 1993). The Court stated:

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. Reasonable persons frequently disagree about the measure of damages in a particular case. It is 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 that the appellate court should increase or reduce the award.

See also, Reck v. Stevens, 373 So.2d 498, 501 (La. 1979).

The discretion afforded the trier of fact to assess special damages is narrower or more limited than the discretion to assess general damages. Some special damages, such as medical and related expenses, are easily measured. A plaintiff pleading a special damage must produce some evidence by which that loss can be reasonably measured. *Eddy v. Litton*, 586 So.2d 670, 675 (La. App. 2nd Cir. 1991). *See also, Kelty v. Brumfield*, 96-0869 (La. App. 4 Cir. 3/12/97), 691 So.2d 242.

In the present case, Ware's injuries and treatment, as well as the corresponding medical expenses, are clearly supported by the medical evidence introduced at trial. After reviewing medical reports from numerous doctors, the trial court concluded that Ware's shoulder pain was related to

the accident. The trial court specifically found that Ware's early complaints of upper arm pain were more probably than not related to the tear in the shoulder. Although the independent medical examiner contradicted this finding, we must defer to the opinion of the trial court in accepting the medical evidence presented by Ware. Considering Ware's injuries and length of treatment, we conclude that the award of \$75,000 in general damages is not beyond that which a reasonable trier of fact could assess in this particular case.

As to Bazile, we have thoroughly reviewed the record and have concluded that the \$4,000.00 in general damages awarded to Bazile is not unreasonable considering the standard set fourth in *Youn, supra*. Dr. Ott opined that Bazile had suffered an aggravation of the injuries he sustained in the previous accident. Dr. Kucharchuk diagnosed Bazile with cervical spine and lumbar spine strain. Other than questioning Bazile's credibility, appellants did not refute the findings of Drs. Ott and Kucharchuk. We also take note of the fact that the trial court reduced Bazile's award of medical expenses after considering the fact that his injuries from the two accidents may have overlapped. We find that award to be proper.

When findings of fact are based upon determinations regarding the credibility of witnesses, the manifest error standard demands great deference

to the trier of fact, because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989). It is clear from the transcript in the present case that credibility was made an issue at trial, and the trial court had an opportunity to consider the demeanor of the witnesses. Applying the *Rosell* standard, we must defer to the trial court in accepting the testimony of Ware and Bazile as to their testimony in support of their injuries.

Accordingly, after a thorough review of the record, we find no abuse of discretion in the trial court's award of general damages to Ware and Bazile. Specifically, the amounts awarded were reasonable and supported by the medical evidence produced at trial. Furthermore, our reading of the medical evidence presented in this case indicates that both Ware and Bazile proved entitlement to the medical expenses awarded by the trial court.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED