STEFANIE TREMBLAY, WIFE OF/AND RONNIE TREMBLAY, SR., INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILD, RONNIE TREMBLAY, JR. AND LINDA AUTHEMENT, WIFE OF/AND JAY AUTHEMENT, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILD, JAYLIN AUTHEMENT	*	**NO. 2005-CA-0956**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	* * * * * * *	

VERSUS

ALLSTATE INSURANCE COMPANY AND SHELLEY BECKER BOCK

APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 97-465, DIVISION "C"
Honorable Wayne Cresap, Judge
* * * * * *

Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge Dennis R. Bagneris, Sr., Judge Leon A. Cannizzaro, Jr. and Judge Roland L. Belsome)

ARMSTRONG, C.J., CONCURS
MURRAY, J., CONCURS IN PART AND DISSENTS IN PART FOR THE REASONS ASSIGNED BY J. BELSOME
CANNIZZARO, J., CONCURS IN PART AND DISSENTS IN PART
BELSOME, J., CONCURS IN PART AND DISSENTS IN PART

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AFFIRMED IN PART; REVERSED IN PART;JUDGMENT RENDERED

Allstate Insurance Company appeals the decision of the district court awarding Appellees, Stefanie Tremblay, $42,715 in damages, her minor child, Ronnie Tremblay Jr., $4,140 in damages and Jaylin Authement $40,305 in damages[1]. We affirm in part and reverse in part.

On November 4, 2001, Sefanie Tremblay, Jaylin Authement and Ronnie Tremblay, Jr. were traveling in an automobile operated by Mrs. Tremblay when her automobile collided with Shelly Bock's automobile. Mrs. Tremblay was traveling southbound on Paris Road and Ms. Brock was traveling down a side street approaching Paris Road. Ms. Brock proceeded through a stop sign, crossed two lanes of traffic and struck Mrs. Tremblay's vehicle. No one required emergency care.

The district court awarded the Appellees as follows: Stefanie Tremblay $40,000 for general damages and $2,715 for special damages; Stefanie Tremblay and Ronnie Tremblay, Sr., on behalf of their minor child, Ronnie Tremblay, Jr., $4,000 for general damages and $140 for special damages; and Linda Authement and Jay Authement, on behalf of their minor child Jaylin Authement, $37,000 in general damages and $3,305 in special damages. It is from this judgment that Allstate appeals.

Assignments of Error

[1] The actual award was given to Linda Authement and Jay Authement on behalf of their minor child Jaylin Authement. Jaylin was 14 at the time of the accident.

Allstate offers the following five assignments of error: (1) The trial court erred in failing to find any fault on the part of Stephanie Tremblay because the uncontridicted evidence shows that Mrs. Brock had preempted the intersection when she was struck by Mrs. Tremblay's vehicle; (2) the trial court erred in awarding $4,000 to the Tremblays for pain and suffering for Ronnie Tremblay, Jr. because there was insufficient evidence at trial to support such an award; (3) the trial court abused its discretion in awarding $40,000 to Stefanie Tremblay for general damages; (4) the trial court abused its discretion in awarding $37,000 to Jaylin Authement; and (5) the trial court erred in awarding $1,590 for medical bills from Dr. Salvador Murra and Crescent City MRI for treatment rendered to Jaylin Authement because there was no evidence that those bills were incurred as a result of the accident giving rise to the current suit.

Standard of Review

Appellate courts review factual findings of the trial court or jury using the "manifest error" or "clearly wrong" standard. *Rosell v. ESCO,* 549 So.2d 840, 844 (La.1989). The Louisiana Supreme Court developed a two-part test for reviewing and reversing the factfinder's determinations. *Mart v. Hill,* 505 So.2d 1120, 1127 (La.1987). This bifurcated test states: 1) the reviewing court must find that the trial court's findings have no reasonable factual basis and 2) the record shows that the findings are wrong (manifestly erroneous). *Mart,* 505 So.2d at 1127. The reviewing court must view the record in its totality to determine if the factfinder was clearly wrong. *Stobart v. State, Through Dept. of Transp. and Dev.,* 617 So.2d 880, 882 (La.1993). The appellate court must determine if the factfinder's decision was a reasonable one. *Id.* This rationale stems from the fact that the trial court has a "better capacity to evaluate live witnesses." *Canter v. Koehring Co.,* 283 So.2d

716, 724 (La.1973). “[W]here two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong.” *Stobart*, 617 So.2d at 883. The majority of the issues presented in the case *sub judice* are factual questions and will be reviewed using the above standard. Errors of law are reviewed *de novo* by the appellate courts. *Balseiro v. Castaneda-Zuniga*, 04-2038, p. 6 (La.App. 4 Cir. 8/17/05); 916 So.2d 1149, 1153; *Norfleet v. Lifeguard Transp. Service, Inc.* 2005-0501 (La.App. 4 Cir. 5/17/06) 934 So.2d 846.

Assignment #1

Allstate maintains that the accident was caused by Mrs. Tremblay “in whole or at least in part” because Ms. Bock had nearly crossed the lane of travel prior to striking Mrs. Tremblay’s vehicle showing that she pre empted the intersection. Allstate relies on *Tillman v. Massey*, 445 So.2d 749, 752 (La. App. 4 Cir. 1/12/84) wherein this court concluded that “[t]he doctrine of pre-emption has a two-fold effect; it frees the pre-empting party of negligence and it imposes negligence on the party against whom it is claimed.” Allstate argues that Ms. Brock stopped at the stop sign, determined that it was safe to cross, and then proceeded only to cause damage to the passenger-side bumper of Mrs. Tremblay’s automobile.

Mrs. Tremblay testified that she saw Ms. Brock’s vehicle approaching the roadway and tried to avoid a collision. Ms. Bock testified that she could not recall whether she came to a complete stop, yet went on to testify that she stopped at the stop sign.

The record reflects that the weather was sunny and that there was nothing to obstruct Ms. Brock’s vision. We find that Allstate erroneously relies on *Tillman* because this Court also concluded in *Tillman* that “[i]n order for the doctrine of

pre-emption to apply to a motorist who has entered the intersection before the traversing vehicle, the one seeking to invoke this doctrine must show that he entered the intersection at a proper speed and sufficiently in advance of the vehicle on the intersecting street to permit him to cross without requiring emergency stop by the other vehicle". *Id.*

LSA-R.S 32:123B in pertinent part finds that:

> Except when directed to proceed by a police officer or traffic-control signal, every driver and operator of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the cross walk on the near side at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. **After having stopped, the driver shall yield the right of way to all vehicles which have entered the intersection from another highway or which are approaching so closely on said highway as to constitute an immediate hazard**.(emphasis added).

Ms. Brock's testimony does not support her argument that she pre-empted the intersection. Mrs. Tremblay saw her approaching and moved to avoid her. Ms. Brock had a duty to yield, even after she stopped at the stop sign, to allow Mrs. Tremblay to clear the roadway. This assignment of error is without merit.

Assignment #2

Allstate urges that the record is devoid of any evidence showing that Ronnie Authement, Jr. suffered $4,000 worth of pain and suffering. Allstate maintains that Ronnie, Jr. was seen three times by a physician and the Appellees, as plaintiffs in the case, were only asking for an award between $2,000 and $3,500 in general damages.

The Appellees argue that the award of $4,000 for pain and suffering of the two-year-old was sufficient because the testimony of his treating physician (James

Shoemaker, D.C.) coupled with the testimony of Mrs. Tremblay and Mrs. Authement was enough to support the award.

A Joint Trial Order filed in the district court on June 15, 2004 recommended a quantum for Ronnie Jr. The parties specifically quote *Krepps v. Hindelang*, 97-980 (La.App. 5 Cir. 4/15/98) 713 So.2d 519, 525 wherein the court increased a general damages award to $2,500 for a three-month old with a soft tissue injury to the neck.

The record contains testimony from Ronnie Jr.'s treating physician, Dr. Shoemaker, and from his family members. His medical bills were only $140. Dr. Shoemaker testified that "I saw him (Ronnie Jr.) a couple of days after the initial exam. Everything appeared to be good. There were no major complaints offered by the mother at that time. We did a little treatment with him. And then January 11th, a couple of months later, we did a final evaluation and he was released."

"The standard for appellate review of general damage awards is difficult to express and is necessarily non-specific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award." *Youn v. Maritime Overseas Corp*. 623 So.2d 1257, 1261 (La. 1993). "Nevertheless, the theme that emerges from *Gaspard v. LeMaire,* 245 La. 239, 158 So.2d 149 (1963) through *Coco v. Winston Industries, Inc.,* 341 So.2d 332 (La.1976), and through *Reck* to the present case 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. Reasonable persons frequently disagree about the measure of general 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." *Id*.

The district court erred in awarding Ronnie Jr. $4000 when the evidence fails to support that Ronnie Jr.'s injuries warrant that much. We rely on our cohorts from the Second Circuit and find that *George v. Allsatate Insurance Co.*, 32,899 (La. App. 2d Cir. 4/5/00); 758 So.2d 373, is parallel to the case at bar. In *George v. Allstate Insurance Co.* Jessica George, a ten-year-old girl, was diagnosed with minor neck and back injuries. She was treated by Dr. Spires on three occasions, did not seek further medical treatment for these injuries after her release by Dr. Spires and did not complain of pain at the time of trial. *Id* at 378.

The record reveals that Ronnie, Jr. may have suffered some minor injury as well as periodic crying, however, we find that an award of $500 is a sufficient amount of damages for the two-year-old.

Assignment #3

Allstate argues that an award of general damages of $40,000 to Stefanie Tremblay, in light of the evidence, is too high. Allstate maintains that Mrs. Tremblay sought medical treatment only twenty-one times over a fifteen-month period.

The Appellees argue that Mrs. Tremblay was still suffering from the automobile accident and was never discharged, but discontinued treatment after she became pregnant.

We rely once again on the standard of review presented in *Youn v. Maritime Overseas Corp*. 623 So.2d 1257 (La. 1993).

Mrs. Tremblay was treated by Dr. James Shoemaker until February 2003. She was diagnosed with cervical and thoracic injuries. Mrs. Tremblay

discontinued medical treatment when she became pregnant although Dr. Shoemaker suggested that she undergo an MRI. Dr. Shoemaker testified in a deposition that he indeed believed that the injuries suffered by Mrs. Tremblay were a result of the accident in question although Mrs. Tremblay had been in a previous car accident and had pre-existing lower back complaints. Dr. Shoemaker's deposition testimony and medical report indicate that Mrs. Tremblay complained of headaches, finger numbness, and back pain throughout the course of her treatment. It was not until October 4, 2004 that Mrs. Tremblay returned to Dr. Shoemaker after being involved in another accident. Dr. Shoemaker testified that he suggested Mrs. Tremblay should receive treatments for her injuries once a week, or "maybe more often then [sic] that." Mrs. Tremblay testified that she begin receiving treatments once every two weeks and then only once or twice per month. She totaled twenty-one visits to the doctor over a fifteen-month period. She also testified that during that time she underwent hernia surgery, but as to missed appointments, she simply stated, "I went as much as I possibly could go, and then I did what I could do at home and that's all that I had."

In *Sciambra v. Jerome Imports, Inc*. 2005-0260 (La.App. 4 Cir. 12/14/05) 921 So.2d 145, 153 we concluded that,

> [a]lthough Dr. Altman testified to his regular treatment plan, consisting of physical therapy three times a week for the first two weeks of treatment and twice a week thereafter, it is uncontroverted that the plaintiff attended only two therapy appointments. Since there was no evidence that financial or other considerations prevented the plaintiff from complying with this schedule, the jury reasonably could infer that he was not in such pain that he was moved to cooperate in the prescribed therapy protocol. The jury also heard and viewed evidence that the plaintiff failed to attend nine of his twenty-three scheduled appointments with Dr. Seltzer. The implication again is reasonable that his pain was not so severe as to cause him to cooperate with the treatment plans of his treating physicians. From the evidence adduced at trial, we cannot say that a reasonable jury

> could not have concluded that $26,000 was reasonable compensation for the plaintiff's past and present physical pain.

However, in *Friedmann v. Landa* 573 So.2d 1255 (La.App. 4 Cir. 1991) this court concluded that a $35,000 award for pain and suffering was not an abuse of discretion when the plaintiff underwent treatment for approximately eight months for a cervical sprain.

In the parties' Joint Trial Order, the parties stipulate that the injuries sustained by Mrs. Tremblay "would fall between $15,000 and $35,000." We cannot conclude that the district court abused its discretion in such a way that that award of $40,000 to Mrs. Tremblay "shocks the conscience" enough to reverse. Although this court finds that case law supporting that general damages awarded to Mrs. Tremblay do not exceed $35,000, we will not micro manage the district court in such a way to reduce Mrs. Tremblay's damages by a mere $5,000.

Assignment of Error #4

The Appellants maintain that the district court also abused its discretion in rendering an award of $37,000 for general damages to Jaylin Authement. Ms. Authement suffered soft tissue injuries and was treated for her injuries from November 5, 2001 to March 14, 2003. The Appellants further maintain that Ms. Authement failed to mitigate her damages and that the testimony of Dr. Shoemaker reveals that Ms. Authement's sporadic complaints demonstrate uncertainty on her part as to her injuries and uncertainty as to whether Dr. Shoemaker properly assessed that her injuries were a result of the accident in question.

Ms. Authement testified that she hurt her arm, neck and back in the collision. She was discharged by Dr. Shoemaker a couple of times, but returned, as

she deemed necessary, complaining of pain. Ms. Authement was unable to participate in dance classes and physical education during school.

A review of the record reveals that Dr. Shoemaker's testimony supports the award of $37,000 in accordance with *Friedmann v. Landa* 573 So.2d 1255 (La.App. 4 Cir. 1991). Once again, although $35,000 seems adequate, we cannot conclude that the district court abused its discretion in awarding Ms. Authement $2,000 more after hearing the testimony and reviewing the medical reports. An award for damages must be reviewed in a light most favorable to the party who prevailed at trial. *Harvey v. State, Dept. of Transportation and Development*, 2000-1877, p. 10 (La.App. 4 Cir. 9/26/01), 799 So.2d 569, 576, *writ denied,* 2002-0003 (La.3/15/02), 811 So.2d 910. An appellate court may not overturn an award for damages unless it is so out of proportion to the injury complained of that it shocks the conscience. *Id.* at 11, 799 So.2d at 577. In fact, the fact-finder has vast discretion in determining a general damages award. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993); *Moore v. Kenilworth/Kailas Properties* 2003-0738 (La.App. 4 Cir. 2004) 865 So.2d 884, 890.

On appeal, we will not disturb the award of $37,000 in general damages for Ms. Authement.

Assignment #5

Ms. Authement underwent an MRI performed by Dr. Salvador Murra and incurred a medial expense of $1,590, which the Appellants maintain was not related to Dr. Shoemaker's diagnosis nor injuries as a result of the accident.

Dr. Shoemaker testified that:

> …I spoke with the mother on April 29th, with a note that we were referring her (Ms. Authement) to Dr. Murra for evaluation of symptoms. July 8th, I reviewed the MRI studies from Dr. Murra. Patient was feeling better in all areas, no numbness reported. There was minimal cervical spine reduction, trapezius paravertebral muscle contraction still.

This argument is confusing. It is clear from the record that Dr. Murra performed an MRI and that one was ordered and evaluated by Dr. Shoemaker. The Appellants seem to be of the opinion that since the MRI showed no serious injury, it was an unnecessary expense. The Appellant further attempts to confuse this Court by maintaining that since no one could relate the findings of the MRI to the accident definitely, the bill is unwarranted.

This assignment lacks merit and the record supports the district court's award to Ms. Authement for the medical expense associated with the MRI.

Decree

For the foregoing reasons, we affirm the finding of fault by the district court as to Mr. Brock. We further affirm the award for general damages as to Stefanie Tremblay and Jaylin Authement. We reverse the award for general damages as to Ronnie Tremblay, Jr. to $500 and affirm the medical expenses incurred as a result of an MRI by Jaylin Authement.

AFFIRMED IN PART;
REVERSED IN PART;
JUDGMENT RENDERED