

NOT DESIGNATED FOR PUBLICATION

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| TASHENA MASH | * | NO. 2006-CA-1531 |
| VERSUS | * | COURT OF APPEAL |
| MIGUEL A. CRUZ, JORGE CRUZ, SR., AND ALLSTATE INSURANCE COMPANY | * * | FOURTH CIRCUIT STATE OF LOUISIANA |

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**APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 04-57003, SECTION "B"**

Honorable Angelique A. Reed, Judge

*** * * * ***

Judge Patricia Rivet Murray

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(Court composed of Judge Patricia Rivet Murray, Judge Terri F. Love, Judge Roland L. Belsome)

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AFFIRMED

Defendants, Miguel Cruz and Allstate Insurance Company, suspensively appeal the trial court's judgment awarding damages to the plaintiff, Tashena Mash. For the reasons that follow, we affirm.

FACTS AND PROCEEDINGS BELOW

On September 20, 2004, a collision occurred at the intersection of North Broad Street and A.P. Tureaud Avenue between a vehicle driven by Miguel Cruz, with Jose Cruz as a guest passenger, and a vehicle driven by Tashena Mash, with Yvonne Mash as a guest passenger. Tashena Mash filed suit against Miguel Cruz and his insurer, Allstate, in First City Court for the City of New Orleans on December 28, 2004, alleging that she had been injured as a result of the negligence of Mr. Cruz in disregarding a red traffic light. The matter was tried on April 3, 2006, with the parties stipulating to the existence of an Allstate policy providing coverage with limits of \$10,000. On May 22, 2006, the trial court rendered a written judgment finding the negligence of Miguel Cruz to be the sole cause of the accident, and awarding \$10,998.00 in personal injury damages (limited to the \$10,000 policy limit against Allstate) and \$1,170.17 in property damages in favor of the plaintiff against defendants. Defendants filed this suspensive appeal.

ISSUES

Defendants raise three issues on appeal. The first is that the trial court committed reversible legal error by refusing to admit into evidence the deposition of Yvonne Mash. Alternatively, defendants argue that the trial court committed manifest error by failing to find that Tashena Mash disregarded a red traffic signal, which conduct resulted in the accident; and further by finding that Tashena Mash proved by a preponderance of the evidence that her injuries were caused by the accident.

DISCUSSION

Exclusion of Deposition

At trial, the defendants attempted to introduce the pretrial deposition testimony of Yvonne Mash, the passenger in Tashena Mash's vehicle, to refute Tashena Mash's testimony that she had the green light to proceed across the intersection. The trial court excluded the deposition on the basis that defendants had not shown Yvonne Mash was unavailable to be called as a witness at trial. The defendants then proffered two pages of Yvonne Mash's deposition. On appeal, defendants argue that it was unnecessary for them to show Yvonne Mash was unavailable as a witness because she was a party to the consolidated lawsuit.

La. C.C.P. art. 1450 A (2) provides, in pertinent part:

A. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, insofar as admissible under the Louisiana Code of Evidence applied as

though the witnesses were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

* * * * *

(2) “The deposition of a party...may be used by an adverse party for any purpose.”

Therefore, if Tashena Mash was represented at or notified of the taking of Yvonne Mash’s deposition, and if Yvonne Mash was a party (both at the time her deposition was taken and at the time defendants sought to introduce it), the trial court should have admitted her deposition into evidence regardless of her availability for trial. See *Hoerner v. ANCO Insulations, Inc.*, 00-2333, pp. 41-42 (La. App 4 Cir. 1/23/02), 812 So.2d 45, 73.

However, on the basis of the record, we cannot say the trial court committed legal error by refusing to admit the deposition, because the record does not support defendants’ contention that Yvonne Mash was a party. Specifically, the record does not contain Yvonne Mash’s petition, nor any order consolidating her action with that of the plaintiff; nor does it contain any judgment or order dismissing the claims of Yvonne Mash. Moreover, because defendants proffered only two pages of the deposition, the proffer includes no indication as to whether Tashena Mash was represented at the deposition. Therefore, in view of the record, we decline to disturb the trial court’s ruling.

Failure to Find the Plaintiff at Fault

Defendant's argument that the trial court committed manifest error by failing to find that Tashena Mash was at fault in causing the accident is based primarily upon Yvonne Mash's deposition testimony, the exclusion of which we decline to reverse. In addition, defendants' argument is predicated on Miguel Cruz's testimony (by video deposition) that he had the green light and defendants' bare assertion that Tashena Mash, who testified live, was not credible.

Under the manifest error standard of review mandated by *Rosell v. ESCO*, 549 So.2d 840 (La. 1989), credibility judgments are the province of the factfinder; when confronted with conflicting testimony, reasonable evaluations of credibility and reasonable inferences of fact are not to be disturbed upon review. *Id.* at 844. In the instant case, we do not find that it was unreasonable for the trial court to believe Tashena Mash's testimony over that of Miguel Cruz. Therefore, we do not find that the trial court committed manifest error by concluding that Miguel Cruz was solely responsible for the accident.

Causation

Defendants' third assignment of error is that the evidence was insufficient to support the trial court's finding that the plaintiff's personal

injuries were caused by the accident in question. Plaintiff's evidence in support of causation consisted of her own testimony and the medical records showing her treatment for back and neck pain following the accident.

According to those records, Dr. Kenneth Williams treated the plaintiff for cervical and lumbar strains/sprains from September 21, 2004 (the day after the accident) until he discharged her on March 10, 2005. The medical records, however, do not contain any indication that plaintiff's pain was caused by this accident other than the patient history, which reflects what the patient herself told Dr. Williams concerning the reason for her initial visit.

To counter the plaintiff's evidence, defendants introduced medical records showing the plaintiff had been treated by Dr. Michael Howard for a similar back injury following a prior accident, which occurred on April 11, 2002. Plaintiff testified that her 2002 back injury was resolved before the collision with Miguel Cruz, and that she had been discharged by the physician who had treated her for that injury. Defendants attempted to impeach this testimony by pointing out that the records of Ms. Mash's last visit to Dr. Howard on December 10, 2002, do not reflect that the patient was discharged; instead, Dr. Howard's notes state that Ms. Mash was given prescription pain medication, was advised to continue therapy and to schedule an MRI of the cervical and lumbar/sacral spine, and finally, was

instructed to return to Dr. Howard's office in eight weeks.

On appeal, the defendants argue that the plaintiff failed to meet her burden of proving causation by a preponderance of the evidence. See *Harvey v. Cole*, 00-1849, p.9 (La. App. 4 Cir. 1/23/02), 808 So.2d 771, 779 (citations omitted). Specifically, defendants argue the plaintiff lacked medical testimony to prove that her injuries were more probably than not caused by the trauma of the accident. *Id.*

It is sufficient to prove causation if the medical evidence shows that the nature of the accident, when combined with other facts of the case, raises a natural inference through human experience that a causal connection exists. *Ludbom v.L. J. Earnest, Inc.*, 579 So.2d 1174, 1179 (La. App. 2d Cir. 1991). In the instant case, the trial court had to weigh the plaintiff's own testimony that her prior injury was resolved against medical records indicating she was supposed to return to Dr. Howard, but never did. Considering that approximately twenty-one months elapsed between the plaintiff's last visit to Dr. Howard and the instant accident, the trial court could have reasonably inferred from the evidence that the plaintiff ignored Dr. Howard's advice to return for further treatment because she was no longer experiencing pain. Moreover, although the plaintiff lacked expert medical testimony, we note that the defendants also did not introduce expert

medical testimony showing that the plaintiff's injuries were not caused by the accident. In view of the entire record, therefore, we find no manifest error in the trial court's determination that the plaintiff met her burden of proving causation by a preponderance of the evidence.

CONCLUSION

Accordingly, for the reasons stated, we affirm the judgment of the trial court.

AFFIRMED