NOT DESIGNATED FOR PUBLICATION

DEBORRAH MUNCH	*	**NO. 2004-CA-1136**
VERSUS	*	**COURT OF APPEAL**
NICHOLAS BACKER AND UNITED SERVICES AUTOMOBILE ASSOCIATION	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
	*	

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-9442, DIVISION "F-10"
Honorable Yada Magee, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris, Sr., and Judge Edwin A. Lombard)

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MAY 31, 2006

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AFFIRMED

This is a personal injury action arising out of a rear-end automobile accident. Plaintiff Deborrah Munch commenced this action against the rear-ending motorist, Nicholas Backer and his insurer, United Services Automobile Association ("Defendants") for the injuries she sustained. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The facts regarding the rear-end collision at issue are virtually undisputed. The collision occurred on April 20, 2000, at approximately 5:30 p.m. when Mr. Backer was driving to a parking lot for a concert at the Contemporary Arts Center in New Orleans, Louisiana. Specifically, Mr. Backer was driving a 1994 Ford Explorer on Magazine Street when he struck Ms. Munch's vehicle in the rear, and knocked Ms. Munch's vehicle into the car in front of it. Although the police were notified of the accident, they never came to the scene.

Ms. Much filed the instant suit on June 15, 2000, against the Defendants alleging that she sustained injuries to her head, eyes, neck, spine, requiring her to undergo four surgical procedures; to-wit: (i) an anterior cervical disc fusion, (ii) a lumbar IDET procedure with annuloplasty, (iii) a carpal tunnel release of her right wrist, and (iv) a carpal tunnel release of her left wrist.

A jury trial commenced in March 2004. At the conclusion of opening statements, Ms. Munch moved for a directed verdict on liability, to which the defendants had no objection, and a directed verdict on liability was granted. Thereafter, the case proceeded to trial on the issues of medical causation and quantum.

At the conclusion of the trial, the jury returned a verdict finding that the accident was a cause in fact of Ms. Munch's injuries, and awarded Ms. Munch damages as follows:

Past Medical Expenses	$2,431.33
Past & Future Lost Wages/Impaired Earning Capacity	$2,000.00
Physical and Mental Pain and Suffering, Mental Anguish, and Past and Future Disability, Loss of Enjoyment of Life	$3,000.00
TOTAL DAMAGES	

$7,431.33

Ms. Much now appeals this final judgment.

In her appellate brief, Ms. Munch asserts four assignments of error: (1) the trial court erred when it prevented Ms. Munch from exercising a peremptory challenge to three jurors based on *Batson/Edmonson*; (2) the trial court improperly instructed the jury; (3) the jury committed error when it failed to apply the *Housley* presumption of causation; and (4) the jury committed error in its award of damages.

ISSUE ONE: WHETHER THE TRIAL COURT ERRONEOUSLY PREVENTED PLAINTIFF FROM EXERCISING A PEREMPTORY CHALLENGE TO THREE JURORS BASED ON BATSON/EDMONSON?

Ms. Munch argues that the trial court was wrong and committed manifest error when it refused to allow her to exclude jurors with peremptory challenges. Ms. Munch alleges that during the course of jury selection, there were three jurors who she wished to exclude from the jury by exercising peremptory challenges. Ms. Munch argues that she articulated reasonable, race neutral non-preferential reasons for utilizing these challenges. Specifically, Ms. Munch wished to utilize a peremptory challenge for: (1) Ms. Marconi-Haessig because she was a grammar school teacher (as was the Defendant), and because she told the court that she would be distracted because she needed to be in her classroom for LEAP

testing; (2) Edgar Smith because he was insured by USAA (the same company named as a Defendant in these proceedings), and because he knew and did artistic work for defense counsel's son (who was also counsel of record); and (3) Brenda Hornyan because she was a member of the University of New Orleans staff and Ms. Munch obtained a degree from the University of New Orleans.

After hearing the reasons for the peremptory challenges, the trial judge found that Ms. Munch "struck them all (the three jurors) because they are white." At that time, counsel announced that he would like to take a writ. The trial court judge offered him the opportunity to apply for a writ after seating the jury and during the afternoon hours. However, Ms. Munch's counsel did not apply for a writ and decided to proceed with the trial.

This Court has consistently held that an application for an immediate writ is the proper procedure for appellant review of a *Batson* ruling. See *Holmes v. Great Atlantic and Pacific Tea Co*, 622 So.2d 748, 760 (La. App. 4 Cir. 7/15/93); *White v. Touro Infirmary*, 93-1617 (La. App. 4 Cir. 2/11/94) 633 So.2d 755, 760; and *Phillips v. Winn Dixie Stores, Inc.*, 94-0354 (La. App. 4 Cir. 2/23/95) 650 So.2d 1259, 1263. In *Holmes v. Great Atlantic and Pacific Tea Co.*, this Court explained the basis for its decision that the issue

must be presented by a writ application:

> Lastly we note that plaintiff could have taken a writ on this matter at the time of voir dire instead of proceeding to trial and later raising it as an issue on appeal. The reputed error committed is the result of an interlocutory ruling, not a final judgment. Accordingly the proper remedy in a civil trial is a writ, not an appeal after the judgment is final. Indeed, it is only common sense that if a writ is taken on a civil voir dire Batson challenge, then this court can review and determine at the time if an error has been made. To proceed to trial when there may be an error which can nullify the entire proceeding not only gives one party two bites at the apple, but also is a tremendous waste of judicial time and resources. Judicial economy, procedural due process, and equal protection all mandate that *Batson* challenges to civil trials must be reviewed on writ. We note that via emergency writ procedures and appellate court stay orders, a *Batson* challenge handled by writ need not cause the loss of a trial date.

Holmes, 629 So.2d at 760.

In the instant case, the record reflects that Ms. Munch's counsel made his objection in the trial court and was specifically given the opportunity to take a writ, but declined to do so. Under these circumstances, we will not now entertain Ms. Munch's complaint about jury selection.

ISSUE TWO: WHETHER THE TRIAL JUDGE CORRECTLY INSTRUCTED THE JURY ON THE LAW APPLICABLE TO THE FACTS OF THE CASE?

1. The Falsus in Uno, Falsus in Omnibus Argument:

Ms. Munch argues that the trial court

erroneously instructed the jury as follows:

> If you should find that a witness has testified falsely as to a material fact, then you have the right to reject the entire testimony of the witness, or to reject only part of the testimony, based upon how you are impressed with the truthfulness of the witness.

At that time, Ms. Munch's counsel objected to the giving of the instruction and stated as follows:

> We believe that that is an improper statement of the law, and is, in effect, an attempt to give a charge falsely; an ominous charge which was prohibited by the Supreme Court in *State v. Banks*, and which was cited with approval in the *Percara* case, …the Court noted that the maximum is a harsh and unrealistic rule, which should be applied with extreme caution. We think that it is not a proper statement of the law, and should [not] have been given to the jury.

In considering an argument of improper jury instruction, the court should consider the entirety of the charges and determine if they adequately provide the correct principles of law applicable to the issues as framed by the pleadings and the evidence, and whether they provide adequate guidelines for the jury. *Clark v. Jesuit High School of New Orleans*, 96-1307, p. 7 (La.App. 4 Cir. 12/27/96), 686 So.2d 998, 1002. Under the manifest error standard, this Court reviews jury instructions as a whole and in light of the circumstances of the case. *Boh Bros. Const. Co. v. Luber-Finer, Inc.*, 612 So.2d 270, 273 (La.App. 4 Cir.

12/29/92). A trial court is given broad discretion in wording its jury instructions and will not be reversed as long as the charge correctly states the substance of the law. *Barbe v. A.A. Harmon & Co*., 94-2423 p. 7 (La.App. 4 Cir. 1/7/98), 705 So.2d 1210, 1216.

While giving the jury instructions, the trial judge discussed the law affecting credibility. Specifically, the trial judge stated:

> You need not accept all of the testimony of a witness as being true or false. You may accept and believe those parts of a witness' testimony that you consider logical and reasonable, and reject those parts of the testimony that seem impossible or improbable.
>
> * * *
>
> If you find that a witness has testified falsely as to a material fact, then you have the right to reject the entire testimony of the witness, or to reject only part of the testimony, based upon how you are impressed with the truthfulness of the witness.

In this case, we have reviewed the instructions and find that they adequately state the substance of the law and, in light of the jury verdict, did not prejudice Ms. Munch. We find no merit to this assignment of error.

2. The Effect of Misleading a Doctor Argument:

Ms. Munch argues that the trial court erroneously instructed the jury as follows:

> When an injured person intentionally misleads her doctor, she does so at her peril.

At that time, Ms. Munch's counsel objected to the giving of the instruction and stated as follows:

> In regard to defendant's Request for Special Charge #6, you also gave the charge that said that when an injured person intentionally misleads his doctor, he must suffer the consequences of any confusion or doubt that is associated with his injury or treatment.
>
> We would object to the giving of this charge, in that there has been no evidence that anyone intentionally misled their doctor, nor has there been any testimony concerning confusion or doubt. We believe that this is a confusing charge, and that it shouldn't be given; that, at best, it might state health law, but is not something that should be given as a jury charge.

In this case, it is evident from the record that Ms. Munch did in fact misrepresent her medical history to her doctors on several occasions. Given the vast discretion afforded the trial court with regard to jury instructions and reviewing the instructions as a whole, we find no reversible error.

3. <u>The Effect of Misleading a Doctor Argument:</u>

Ms. Munch argues that the trial court erroneously instructed the jury as follows:

> The burden of proving the existence of any injury, as well as the causal connection between the injury and the accident, rests with the plaintiff. Such proof must be shown by a reasonable preponderance of the evidence. A mere possibility is insufficient.

* * *

> Because the defendants deny a relationship between the automobile accident and certain medical conditions and later surgeries, I charge you that the plaintiff must establish by a preponderance of the evidence the connection between the accident and the conditions and injuries. Mere possibilities, and even unsupported probability, are insufficient. There can be no recovery for any subsequent problems where only a possibility of a relationship exists between the accident and the problems and/or injuries.

At that time, Ms. Munch's counsel objected to the giving of the instruction and stated as follows:

> Your Honor, in regard to plaintiff's objections to the charges that were given, there was, or Your Honor gave Defendants' Request for Special Charge #2, which states, "Because the defendants deny a relationship between the automobile accident and current medical conditions and later surgeries, I charge you that the plaintiff must establish by a preponderance of the evidence the connection between the accident, and the conditions, and surgeries. Mere possibilities and even unsupported probabilities are insufficient"; that there can be no recovery for any subsequent problems, where only the possibility of a relationship exists between the accident and the problems and/or surgeries.
>
> We object to the giving of that charge. As Your Honor has done in the presumption of causation, which Your Honor properly gave, Hossley [Housley] does, in fact, allow the jury to award damages for causation if there is a reasonable possibility given; the other requirement of the Hossley [Housley] charge. So we think that Charge #2 is confusing, and shouldn't have been given.

The trial judge has the duty to charge the jury on the law applicable to the facts of the case. In this case, the trial judge instructed the jury on the

general law of causation, the plaintiff's burden of proof, the *Housley* presumption, an aggravation of a pre-existing condition, and a subsequent aggravation of an injury. Again, given the vast discretion afforded the trial court with regard to jury instructions and reviewing the instructions as a whole, we find no reversible error.

ISSUE THREE: WHETHER THE JURY COMMITTED ERROR IN FAILING TO APPLY THE HOUSLEY PRESUMPTION OF CAUSATION?

A plaintiff is entitled to the presumption that her injuries resulted from an accident if she was in good health prior to the accident, and following the accident the symptoms of her disabling condition appeared and manifest themselves continuously afterwards, provided that the plaintiff has provided medical evidence showing a causal connection between the accident and the disabling condition. *Housley v. Cerise*, 579 So.2d 973, 980 (La.1991). The issue of whether plaintiff is entitled to the benefit of the *Housley* presumption is factual and is subject to the manifest error standard of review. *Cooper v. United Southern Assurance Co*., 97-250, p. 24 (La. App. 1 Cir. 9/9/98), 718 So.2d 1029, 1041. If the jury's findings are reasonable in light of the record viewed in its entirety, the court of appeal may not reverse.

In order to receive the benefit of this presumption, Ms. Munch had the

burden of proving three elements: (1) her good health prior to the automobile accident; (2) continuously manifesting symptoms following the accident; and (3) medical evidence connecting the accident with the injuries. In this case, there was evidence that prior to the accident at issue, Ms. Munch had a history of headaches, a pre-existing degenerative disc disease in her neck and back, and had a problem with her right hand and wrists that necessitated an x-ray five months before the accident. Further, during the first four months following the accident, Ms. Munch saw Dr. Dyess only three times over a period of five weeks, and saw Dr. Vogel only twice. Thereafter, Ms. Munch did not receive any medical care and treatment for over four months. The record reveals that Ms. Munch did not purchase any medications from June 9, 2000 until February 22, 2001. Additionally, there is evidence in the record of subsequent incidents that may have produced injury to Ms. Munch's neck, back and wrists; specifically, the May 18, 2001, automobile accident, and the July 21, 2001 tumble down a flight of stairs. Accordingly, we find that there was evidence of prior problems and conditions, an absence of continuity of treatment, and the existence of subsequent injury-causing incidents for the jury to reject Ms. Munch's contention that the *Housley* presumption should be applied. **ISSUE FOUR: WHETHER THE JURY COMMITTED ERROR IN ITS AWARD OF DAMAGES?**

The trial court awarded Ms. Munch $2,431.33 in past medical expenses, $2,000.00 for past and future lost wages and $3,000.00 for physical and mental pain and suffering, mental anguish, past and future disability, and loss of enjoyment of life. In brief, Ms. Munch contends that the damages awarded inadequately compensate her for all of her injuries.

A trier of fact has much discretion in the assessment of damages in tort cases. La. C.C. art. 2324.1. 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 an 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 an appellate court should increase or reduce the award. *Youn v. Maritime Overseas Corp*., 623 So.2d 1257 (La.1993). The primary considerations in the assessment of damages are the severity and duration of the injured party's pain and suffering. *In re Medical Review Panel Bilello,* 621 So.2d 6, 9 (La.App. 4 Cir. 5/27/93).

After reviewing the record, we conclude that the jury did not abuse its broad discretion in awarding damages. The jury's verdict supports its finding that Ms. Munch sustained a soft tissue injury that produced symptoms for a period of four to five months. The jury, which heard live the testimony of the plaintiff and the witnesses, was in the best position to determine the proper quantum of damages. Based upon the record of the trial court, we cannot conclude that there was an abuse of discretion.

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

AFFIRMED