NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0016

KENNETH VALET, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILDREN, KHALIL VALET, KHAYLA VALET AND KHEELIN VALET

VERSUS

IMPERIAL FIRE AND CASUALTY INSURANCE COMPANY AND CASSANDRA KENDRICK

DATE OF JUDGMENT: November 3, 2006

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
(NUMBER 2003-004464 "E"), PARISH OF TANGIPAHOA
STATE OF LOUISIANA

HONORABLE BRENDA BEDSOLE RICKS, JUDGE

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Imperial Fire and Casualty Insurance
Company and Cassandra Kendrick

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: AMENDED AND, AS AMENDED, AFFIRMED IN PART; REVERSED IN PART

KUHN, J.

Defendants-appellants, Imperial Fire and Casualty Insurance Company (Imperial) and its insured, Cassandra Kendrick, appeal the trial court's judgment awarding damages to plaintiff-appellee, Kenneth Valet, individually and on behalf of his minor children, Khalil, Khayla, and Kheelin. As amended, the judgment is affirmed in part and reversed in part.

FACTS AND PROCEDURAL BACKGROUND

On the evening of January 9, 2003, after working all day, Ms. Kendrick picked up her boyfriend, Mr. Valet, and his three children in her truck and stopped at a convenience store on Highway 1048 near its intersection with Interstate 55 in Tangipahoa Parish. After purchasing several items, as Ms. Kendrick proceeded onto the Highway 1048 roadway, Mr. Valet warned her of an approaching vehicle. In her effort to avoid the vehicle, Ms. Kendrick's vehicle hit a street sign located in the roadway, bending the middle of the grille of her pickup truck. Because she was nervous and upset, Ms. Kendrick asked Mr. Valet to drive the truck to his residence. The next morning, a Tangipahoa deputy sheriff met Ms. Kendrick at Mr. Valet's residence and filled out an initial report based on their statements.

On December 18, 2003, Mr. Valet filed this lawsuit, naming Ms. Kendrick and her insurer, Imperial, as defendants. Defendants answered the lawsuit, generally denying liability. The matter was set for a bench trial the week of June 20, 2005, with a pretrial conference scheduled for 1 p.m. on that day.

On May 2, 2005, defendants filed into the suit record a notice of their intent to depose on May 19, 2005, medical health provider, Dr. Nicholas Cefalu, who had treated Mr. Valet and his children for their injuries. Mr. Valet filed a motion

on May 25, 2005, seeking to allow the live testimony of his health care provider.[1] The trial court granted this motion.

On June 13, 2005, defendants filed by facsimile a motion to exclude the testimony of Dr. Cefalu.[2] In their motion, defendants averred that at the May 19, 2005 deposition Dr. Cefalu had refused to testify about the treatment he had rendered to the Valets because of a dispute over the amount of his deposition fee. The trial court denied the motion.

The case was tried on June 21, 2005. On September 29, 2005, the trial court signed a judgment concluding that Ms. Kendrick and Imperial were "100% liable" to Mr. Valet. For his personal injuries, Mr. Valet was awarded $12,000 in general damages and $1,948.36 in special damages. For the personal injuries of his children, Mr. Valet was awarded $5,000 in general damages and $986.76 in special damages for his nine-year-old son, Khalil; $4,000 in general damages and $980.70 in special damages for his six-year-old daughter, Khayla; and $3,000 in general damages and $850.06 in special damages for his four-year-old son, Kheelin. Imperial's liability was limited to its policy limits of $10,000 per person/ $20,000 per accident. Dr. Cefalu's expert witness fee was set at $1,000, and defendants were cast with costs. Ms. Kendrick and Imperial appeal.

On appeal, defendants challenge the trial court's denial of the motion to exclude Dr. Cefalu's testimony, the admission of the health care provider's testimony at the trial on the merits, and the assessment of his in-court testimony as

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[1] La. Twenty-First District Court Rule 11-A states, "The testimony of health care providers shall be by deposition only. Any party desiring in-court testimony of a health care provider must obtain permission of the trial judge no later than fifteen (15) days prior to trial."

[2] The original motion was formally filed into the record on June 17, 2005.

court costs. They also urge that the trial court's reliance on Dr. Cefalu's testimony was manifestly erroneous, suggesting that the witness's testimony was totally lacking in credibility and not worthy of belief.[3]

DISCUSSION

Ms. Kendrick and Imperial complain that the trial court erred by ruling on their motion to exclude Dr. Cefalu's testimony since they did not receive notice of the setting prior to the hearing. They urge the court to consider the deposition evidence they proffered at the trial on the merits and, based on that evidence, to exclude Dr. Cefalu's testimony.

The record shows that on June 15, 2005, the trial court signed an order setting the motion for a hearing on June 20, 2005 at 9 a.m. The record is devoid of any evidence showing when the order setting the motion to exclude Dr. Cefalu's testimony was served on defendants. According to the transcript of the hearing, the trial court stated that defendants had failed to appear to defend their motion and, therefore, denied the relief they sought.

At trial, defendants noted their attorney was located in Shreveport and advised the court that they had not received notice of the hearing on the motion to exclude until after the hearing was held. The trial court stated:

> You never called to check to find out [when your rule was set], even though you served the rule and knew the trial was set for yesterday

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[3] Appellants also claim the trial court erred when it allowed evidence showing the accident occurred on January 9, 2003, because Mr. Valet's petition averred the accident occurred on January 10, 2003, the date of the Tangipahoa Sheriff Office's initial report. Enlargement of the pleadings where the wrong date was pleaded over a timely objection is harmless error since, having fully defended the claims against them regardless of the date of occurrence, defendants were not prejudiced. ***See Burrell v. Schlesinger***, 459 So.2d 1195, 1199-1200 (La. App. 4th Cir. 1984), ***writ denied sub nom. Burrell v. Tassin Pile-Driving Co., Inc.***, 463 So.2d 1320 (La. 1985); ***see also Motor Mach. and Supply Co. v. Delilah Towing Co., Inc.***, 321 So.2d 896, 901 (La. 1st Cir. App. 1975), ***writ refused***, 325 So.2d 279 (La. 1976).

> (sic), you never called to find out when your rule would be set. ... But, sir, it was your motion that you filed. ... Presumption should be that you would follow up to find out when your motion would be set.

A summary proceeding may be used for disposition of an issue which may be raised properly by contradictory motion or rule to show cause, such as defendants' motion to exclude Dr. Cefalu's testimony. See La. C.C.P. art. 2592. According to La. C.C.P. art. 2595, "*[u]pon reasonable notice* [,] a summary proceeding may be tried in open court or in chambers, in term or in vacation; and shall be tried by preference over ordinary proceedings, and without a jury, except as otherwise provided by law." (Emphasis added.)

The record contained a copy of the sheriff's return showing service on June 15, 2005, on the attorney for Mr. Valet. A deputy clerk for the clerk of court testified that notice appeared to have been mailed to defendants' attorney on June 15, 2005. Defendants' attorney represented to the trial court that he received the notice of the June 20, 2005 setting subsequent to the 9 a.m. hearing. We find that this record fails to demonstrate that defendants were provided reasonable notice of the hearing on the motion to exclude. Thus, the denial of the relief they requested without a hearing was error. ***See Scott v. Scott***, 92-2378, pp. 3-5 (La. App. 1st Cir. 6/24/94), 638 So.2d 1206, 1207-08.

At the trial on the merits the following day, the trial court denied defendants' attempt to introduce the May 19, 2005 deposition into evidence. In sustaining Mr. Valet's objection to the introduction of Dr. Cefalu's deposition, the trial court reasoned that the hearing on the motion to exclude would have been the proper time for defendants to offer the deposition. Defendants duly proffered the

May 19, 2005 deposition testimony which we will consider in light of their lack of reasonable notice of the hearing.

Defendants correctly point out that Dr. Cefalu did not testify about the treatment that he rendered to the Valets. The testimony pivoted around the amount of the fee Dr. Cefalu was entitled to receive for his deposition. The following exchange occurred at the deposition.

By counsel for defendants:

> [W]hat we're going to do is, we're going to go ahead and take your deposition, establish a factual basis, that is, how long the deposition takes and so forth, so that the Court can fix your fee and we'll pay whatever it is --

By the witness:

> Well, let me tell you about the factual basis. There will be no deposition. ... Now, I don't know if you think I just fell off a banana boat yesterday. This subpoena, right here, that we obviously saved, is not only humiliating, it's offensive. ...

By counsel for Mr. Valet:

> You didn't bring him a check today?

By the witness:

> I will not do a deposition.

By counsel for Mr. Valet:

> You didn't bring him anything today? ...

By the witness:

> Four clients. What you want to do is four clients.

By counsel for defendants:

> -- and we said, no, it's one deposition and $1,600 is, we feel, too --

By the witness:

$400. My girls told you $400 per client per depo. ...

Well I've got news for you. The courts are not going to fix fees and I'll tell you the courts are going to tell you they're not going to get into the practice of fixing depo fees. This actually may be a first around here, that an insurance company will not pay a depo fee up front. ...

Imagine to subpoena me to make sure I come up with the -- come here for the deposition. So, I'm here, so, if you know, you want to go with a contempt charge, I'll be more than happy to put this in front of Judge Ricks and let's see what she says, because I guarantee you, I think -- I feel comfortable the Court is not going to get involved in fixing depo fees for every deposition from every doctor in the 21st. ...

At this point in time, it's nothing but sheer humiliation and intimidation and I'm not buying it.

By counsel for defendants:

So, basically, you're refusing to do the deposition?

By the witness:

I basically do refuse the deposition once -- but I have satisfied [the] subpoena because I'm here. ... And this is a really precedent (sic) -- we're not going to have a precedent that says the insurance company doesn't want to pay a depo fee, that we're going to put it in the 21st, because I know -- I mean, this really [is] a poison that I'm going to put a stop to.

By counsel for defendants:

How long did it take you to review each chart?

By the witness:

I think that's irrelevant at this point in time. ...

I don't think -- I'm not going to answer any more questions.

Defendants urge that they were entitled to have Dr. Cefalu's testimony excluded from the trial on the merits because, as demonstrated in his deposition

testimony, his conduct substantially impaired their ability to conduct discovery and defend against Mr. Valet's claims. And pointing out that Dr. Cefalu charged $1,700 for the four narrative reports of the Valets' injuries that were included as items of special damages, defendants urge the trial court abused its discretion in setting the fee for Dr. Cefalu's in-court testimony at $1,000. Because we find merit in defendants' assertion that the trial court's reliance on Dr. Cefalu's in-court testimony was manifestly erroneous, we pretermit ruling on defendants' entitlement to relief for either their motion to exclude the health care provider's testimony or their challenge of the assessment of the fee as costs which the trial court set for that testimony.

A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." The supreme court has announced a two-part test for the reversal of a factfinder's determinations: (1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). ***Stobart v. State through Dep't of Transp. and Dev.***, 617 So.2d 880, 882 (La. 1993).

The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. ***Id.*** Reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. ***Rosell v. ESCO***, 549 So.2d 840, 844 (La.1989). But even in a finding purportedly based upon a credibility determination, where the witness's story is implausible on its

face, a court of appeal should find that the factfinder is manifestly erroneous or clearly wrong to credit it. ***See Rosell***, 549 So.2d at 844-45. In other words, this court cannot shirk its duty of appellate review of fact by simply deferring to a trial court's factual determinations because its reasons for judgment are couched in terms of a credibility call. ***Rogers v. City of Baton Rouge***, 04-1001, p. 9 (La. App. 1st Cir. 6/29/05), 916 So.2d 1099, 1104, ***writ denied***, 05-2022 (La. 2/3/06), 922 So.2d 1187.

A trial court is not bound to accept the testimony of a physician, even in the absence of contradictory medical expert testimony. ***Davis v. Sonnier***, 96-515, p. 16 (La. App. 3d Cir. 11/6/96), 682 So.2d 910, 919 (citing ***Russ v. Jones***, 580 So.2d 1098, 1101 (La. 4th Cir. 1991)). Ultimately, the weight to be given expert testimony is dependent upon the facts on which it is based, as well as the professional qualifications and experience of the expert. For an expert opinion to be valid and to merit much weight, the facts on which it is based must be substantiated by the record. ***Davis***, 96-515 at p. 16, 682 So.2d at 919.

At the trial on the merits, introduced into evidence were Dr. Cefalu's handwritten notes, purportedly taken contemporaneously with his examinations of Mr. Valet and his three children and upon which he based his opinion and that were further outlined in his narrative reports for each patient. These lines constitute Dr. Cefalu's "notes" for his January 28, 2004 examinations of each patient. The notes are illegible and beyond the comprehension of any reasonable person and do not remotely resemble words written in English.

According to Dr. Cefalu's narratives and his in-court testimony, Mr. Valet sustained thoracic and lumbar strains and sprains as a result of the January 9, 2003

accident. Dr. Cefalu diagnosed each of the three children as having sustained an acute bilateral cervical strain and sprain with associated headaches that he opined was a direct result of the January 9, 2003 accident. Despite the differences in his diagnoses between Mr. Valet and each of his children, his handwritten notes for each patient are remarkably similar in appearance. Based on our review, no reasonable trier of fact could conclude that these notes constituted bases for Dr. Cefalu's opinions.

Particularly disturbing in this case is Dr. Cefalu's narrative report on Mr. Valet. Mr. Valet testified, and his Veterans Administration medical records confirmed, that he suffers from incomplete quadriplegia as a result of a non-combat gunshot wound he sustained to the C-5 level of his spine while he was in the military when he confronted a person robbing his apartment. The wound left Mr. Valet's right side paralyzed and, as of the date of trial, he continued to suffer residual effects including overall right-side weakness, a severe limp, a drop foot, and an inability to bend his right leg in a normal manner or to use his right hand. Despite the severe injury to his spine, in his narrative report, Dr. Cefalu described Mr. Valet as "in good stable overall health" prior to the January 9, 2003 accident with no reference whatsoever to Mr. Valet's preexisting condition in the report. The narrative report also states:

> In the initial history taking, there were no complaints of any loss of consciousness, syncope or blackout spells, or any other neurological complaints related to the *cervical* spine. No complaints of any unilateral or bilateral leg weakness, numbness, tingling, or paralysis were noted in the initial history. (Emphasis added.)

Although Dr. Cefalu testified that his reference in that portion of the report was an oversight, it is noteworthy that in support of his fee of $425 per narrative report,

he stressed that the process of creating the report included an involved proofreading and editing stage after his staff's initial transcription of his dictated notes. More importantly, it is unfathomable that in the physician's "initial history taking" of this patient, absolutely no reference was made to Mr. Valet's significant preexisting injury.

During his in-court testimony, Dr. Cefalu conceded that the narrative statement, "Sensory and motor examination, deep tendon reflexes, and vascular examination of both upper extremities were normal and symmetrical," was probably an oversight. Likewise, Dr. Cefalu characterized the narrative's notation, "Sensory and motor examination, deep tendon reflexes, and vascular motor examination of both lower extremities were normal and symmetrical," as an oversight and indicated that his failure to mention Mr. Valet's drop foot in the narrative's comment, "Straight leg raising tests of both lower extremities were negative," was irrelevant to his examination.

Despite the lack of history of the patient's preexisting impairments, Dr. Cefalu denied that his opinion set out in the narrative indicating, "At the time of initial presentation to my office on January 28, 2003, [Mr.] Valet ... was completely disabled from work and unable to hold any type of gainful employment whatsoever indefinitely ..., and he was in need of active treatment," suggested that Mr. Valet was disabled as a result of the January 9, 2003 accident. Although he admitted that a patient's medical history has significance, he did not believe obtaining and reviewing Mr. Valet's medical records from the Veterans Administration was important. Dr. Cefalu consistently emphasized that he treated Mr. Valet for injuries to his thoracic and lumbar spine and, therefore, his

preexisting injury to his cervical spine was not relevant to the health care provider's treatment, diagnosis, or medical opinion for this patient.

Based on Dr. Cefalu's totally unconvincing explanation of his erroneous history and inadequate physical examination, we find his testimony is implausible on its face, and no reasonable trier of fact would credit it. As such, we find the trial court's reliance on Dr. Cefalu's testimony and his expert medical opinion relating Mr. Valet's injuries to the January 9, 2003 accident is manifestly erroneous.

According to Dr. Cefalu, while in each other's presence, he asked one child about his complaints, followed by the same question to each of the remaining children. Although we certainly appreciate a health care provider's procedure of permitting the presence of a parent during an examination of a child, we agree with defendants' assertion that Dr. Cefalu's practice of examining all three of these young children in the presence of one another left open the opportunity for one to find suggestive the symptoms identified by his sibling, particularly since all the injuries suffered by the Valets were based on subjective complaints of pain. Given Dr. Cefalu's diminished credibility as a result of his blatant omission of Mr. Valet's preexisting injury in his narrative report, we believe this questionable practice of examining all three children at the same time renders the medical history and subjective complaints related unreliable from a common-sense standpoint. Thus, we find that the trial court was manifestly erroneous in relying on Dr. Cefalu's treatment, diagnoses, and medical opinions insofar as they applied to the Valet children.

Having found Dr. Cefalu's testimony lacked credibility, we must determine whether the trial court abused its discretion in rendering its general damages awards. ***See Russ v. Jones***, 580 So.2d at 1102 (citing ***Coco v. Winston Indus., Inc.***, 341 So.2d 332, 335 (La. 1977)). And the trial court's findings on the assessment of special damages are subject to the manifest error standard which the plaintiff must prove by a preponderance of the evidence. ***Johnson v. State Through Dep't of Pub. Safety and Corr.***, 95-0003, p. 8 (La. App. 1st Cir. 10/6/95), 671 So.2d 454, 459. Because a trier of fact is not bound to accept a physician's testimony pertaining to his diagnoses and treatment of an motor vehicle accident victims in determining proper awards for general and special damages even in the absence of contradictory expert testimony, see ***Russ v. Jones***, 580 So.2d at 1101, we review the record to ascertain what other evidence of injuries was admitted that could support the trial court's awards of damages.

The undisputed evidence established that Ms. Kendrick's pickup had a single bench-type seat in which all occupants were seated. None were wearing seatbelts. Ms. Kendrick testified that when her truck hit the sign in the roadway, Mr. Valet grabbed the children. As Mr. Valet was lifted in an upward direction, the children were thrown downward. Mr. Valet hit his mouth, causing it to bleed and swell. Mr. Valet and the children advised Ms. Kendrick after the accident that they were in pain so they were going to see a doctor.

Mr. Valet's testimony about the dynamics of the impact was generally in conformity with Ms. Kendrick's. He stated that his face hit the dashboard. Mr. Valet said he was sore and "banged up" the next morning, particularly noting his "neck and stuff were starting to hurt; mouth was swollen and hurt." He testified

that he went to Dr. Cefalu with complaints of neck and lower back pain. Dr. Cefalu prescribed medicine. He continued to treat with Dr. Cefalu for about five to six months. After that, he "was pretty much back to regular." Mr. Valet explained that after the accident, he was particularly concerned about his neck because of his preexisting condition. He recalled that each time he saw Dr. Cefalu, the examinations lasted between thirty and sixty minutes because at times he was treated with heat pads.

Mr. Valet testified about his children's injuries, noting that all three children had headaches and neck pain. Dr. Cefalu prescribed medicine for each. According to their father, Khalil saw Dr. Cefalu for about five months; Khayla treated for about that same length of time; and Kheelin visited Dr. Cefalu during January, February, April, and May.

Additionally, we note that the bills for Dr. Cefalu's treatment and the costs of the prescription medicine for all the Valets were admitted into evidence without objection. Thus, we find it appropriate to consider this evidence in our determination of whether the trial court's awards of special damages were manifestly erroneous.

Based on our review of the evidence, we conclude that the trial court's decision to credit Dr. Cefalu's testimony resulted in rendition of general damages awards in amounts greater than that afforded by its discretion, and the inclusion of the costs of Dr. Cefalu's narrative reports as items of special damages was manifest error. Additionally, given these facts, it is also inappropriate to tax the cost of the reports as court costs under La. R.S. 13:3666(C), as the reports were not "reasonable and necessary" in the determination of damages. After

discrediting Dr. Cefalu's testimony and disallowing his narrative reports as items of special damages, based on all the remaining evidence particularly Mr. Valet's testimony, the highest amounts substantiated by the record for Mr. Valet's injuries is $5,750 in general damages and $1,523.36 in special damages; $2,250 each in general damages for the injuries of Khalil and Khayla with special damages of $561.76 for Khalil and $555.70 for Khayla; and $1,750 in general damages and $425.06 in special damages for Kheelin's injuries. Thus, we amend the judgment accordingly.

The trial court has great discretion in awarding costs, including expert witness fees. ***Gauthier v. Wilson***, 2004-2527, p. 6 (La. App. 1st Cir. 11/4/05), 927 So.2d 383, 387, ***writ denied***, 2005-2402 (La. 3/31/06), 925 So.2d 1258. But because we have found the trial court was manifestly erroneous in relying on Dr. Cefalu's testimony, we find the assessment of $1,000 for his expert fee as court costs for which defendants are liable was an abuse of discretion, and it is reversed.

DECREE

Having found the trial court's reliance on Dr. Cefalu's testimony manifestly erroneous, the judgment is amended to award the highest amount conform to the evidence. Accordingly, Mr. Valet is awarded $5,750 in general damages and $1,523.36 in special damages for his injuries; $2,250 each for the general damages suffered by Khalil and Khayla Valet and $561.76 and $555.70, respectively, for their special damages; and $1,750 in general damages and $425.06 in special damages for Kheelin Valet's injuries. The trial court's determination setting Dr. Cefalu's expert fee is reversed. In all other ways, the judgment is affirmed. Appeal costs are assessed one-half against Kenneth Valet and one-half against

defendants, Cassandra Kendrick and Imperial Fire and Casualty Insurance Company.

AMENDED AND, AS AMENDED, AFFIRMED IN PART; REVERSED IN PART.