NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 2154

JACQUELINE ARIEL MURRAY

VERSUS

MICHAEL P. RYAN, AND ANY LIABILITY INSURER(S) OF MICHAEL P. RYAN; COCO-COLA ENTERPRISES; CONTINENTAL CASUALTY COMPANY, AS LIABILITY INSURER OF COCO-COLA ENTERPRISES, AND ANY OTHER LIABILITY INSURER(S) OF COCO-COLA ENTERPRISES; AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AS UNINSURED MOTORIST AND MEDICAL PAYMENTS CARRIER OF PETITIONER

Judgment rendered NOV 14 2007

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 2003-14107 c/w 2004-10989
Honorable Patricia T. Hedges, Judge

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MICHAEL P. RYAN, COCA-COLA
ENTERPRISES INC., AND
CONTINENTAL CASUALTY COMPANY

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BEFORE: CARTER, C.J., PETTIGREW, AND WELCH, JJ.

Welch J. dissents with reasons assigned

PETTIGREW, J.

This is an action for personal injuries sustained by plaintiff as a result of a vehicular collision. Following a two-day bench trial, judgment was rendered in favor of plaintiff; and defendants have appealed.

On September 6, 2002, plaintiff, Jacqueline Ariel Murray ("Ms. Murray"), was operating a 2000 Mitsubishi Galant and proceeding in a westerly direction in the left-hand lane of Louisiana Highway 433 (a/k/a Old Spanish Trail), a four-lane thoroughfare in Slidell, St. Tammany Parish, Louisiana. The Murray vehicle was insured by defendant, State Farm Mutual Automobile Insurance Company ("State Farm"), which provided uninsured/underinsured motorist coverage as well as medical payments coverage. Ms. Murray was accompanied by her then-boyfriend, Ryan Hebert. Defendant, Michael P. Ryan ("Mr. Ryan") was operating a 1991 International truck owned by his employer, defendant Coca Cola Enterprises, Inc. ("Coca Cola"), and insured by defendant Continental Casualty Company (collectively referred to herein as "defendants").

The accident that forms the basis of this litigation occurred when the truck operated by Mr. Ryan pulled out from an adjacent parking lot, crossed the westbound lanes of Highway 433 with the intention of continuing through the median and turning left in the eastbound lanes of Old Spanish Trail. Mr. Ryan was forced to stop in the break between the medians due to oncoming traffic in the eastbound lane. As a result, the back end of Mr. Ryan's truck extended into the inside or left westbound lane of Highway 433, impeding traffic. Unable to stop, the vehicle operated by Ms. Murray struck the left rear of the truck operated by Mr. Ryan. Following the accident, Ms. Murray and her passenger, Mr. Hebert, were transported by ambulance to Northshore Regional Medical Center where they were treated and released.

Prior to trial Ms. Murray stipulated that her cause of action did not exceed $50,000.00, and a bench trial was held on the matter on April 26 and 27, 2006. At the close of the evidence, the trial court requested that the parties submit post-trial memoranda. On June 23, 2006, the trial court issued Reasons for Judgment and ruled that defendants were totally at fault in causing the accident and liable to Ms. Murray in

the sum of fifty thousand ($50,000.00) dollars, together with legal interest from the date of judicial demand and all costs of court. From this judgment, defendants appealed and urged four assignments of error.

The initial assignment of error presented by defendants is that the trial court erred when it failed or refused to consider testimony of defendants' accident reconstruction expert relative to the acceleration capabilities of the Coca Cola truck and industry calculations based thereon. The record reveals that defendants presented the testimony of Wayne Winkler, who was accepted by the trial court as an expert in the field of accident reconstruction. Mr. Winkler stated that prior to his retirement from the State Police, he attended a five-part series of schools on accident reconstruction taught by Northwestern University in Evanston, Illinois. He further stated that he has been self-employed in accident reconstruction for approximately ten years.

Mr. Winkler testified about the specific capabilities of the Coca Cola truck operated by Mr. Ryan – in particular, its rate of acceleration and the speed at which it traveled prior to the accident. Mr. Winkler conceded under cross-examination that the figures he cited were not based upon an inspection of the Coca Cola truck involved in the accident or even knowledge of the specifications of the truck in question. Mr. Winkler also admitted that his estimations were derived from a general calculation contained in data published by the Northwestern University Traffic Institute that set forth measurements and standards for a generic "medium truck." Upon Mr. Winkler's admission to the trial court that he had not performed any tests on the Coca Cola truck at issue in this litigation, the trial court disallowed any testimony by Mr. Winkler "as to anything about this truck."

It is well settled in Louisiana that the trial court is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. **Williams v. Rubicon, Inc.**, 01-0074, p. 5 (La. App. 1 Cir. 2/15/02), 808 So.2d 852, 858, writ denied, 02-0802 (La. 12/04/02), 833 So.2d 942, cert. denied, 540 U.S. 812, 124 S.Ct. 54, 157 L.Ed.2d 25 (2003). A trial court may accept or reject in whole or in part the opinion expressed by an expert. **Id.** The effect and weight to be given expert testimony is within the broad discretion of the trial judge. **Wade v. Teachers' Retirement**

System of Louisiana, 05-1590, p. 8 (La. App. 1 Cir. 6/9/06), 938 So.2d 103, 108, writ denied, 06-2024 (La. 11/03/06), 940 So.2d 673. The importance placed upon such testimony is largely dependent upon the expert's qualifications and the facts that form the basis of his opinion. **Williams**, 01-0074 at 5, 808 So.2d at 858. We find no error in the trial court's decision to disallow testimony by Mr. Winkler relative to the acceleration capabilities of the Coca Cola truck. This assignment is without merit.

The second assignment of error presented by defendants is that the trial court erred in finding that Mr. Ryan was solely at fault in causing the accident. Our law provides that a court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882, n. 2 (La. 1993). For an appellate court to reverse a trial court's factual finding, it must find from the record that a reasonable factual basis does not exist for the finding of the trial court and that the record establishes that the finding is clearly wrong. **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). If the findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Furthermore, when factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus, when there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, although the appellate court may feel that its own evaluations and inferences are as reasonable. **Id.** The manifest error standard demands great deference to the trier of fact's findings, for 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. **Id.** Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Id.**

In the instant case, the parties presented two versions of how the accident occurred. Ms. Murray's version of the accident was supported by a disinterested eyewitness, Tom Greder, whom the trial court found to be "an extremely strong and credible witness for [Ms. Murray]." The trial court further noted that it found the testimony provided by Mr. Greder to be more credible than the testimony provided by defendant's expert, Mr. Winkler. Following a thorough review of the record, we find that the trial court's conclusions in this regard are reasonable and that its findings are not manifestly erroneous. Thus, we may not disturb the trial court's findings on the issues of negligence and causation. Defendants' second assignment of error is without merit.

In their third assignment of error, defendants challenge the trial court's award of $50,000.00 in general damages to Ms. Murray. The trier of fact is accorded much discretion in fixing general damage awards. La. Civ. Code art. 2324.1; **Oden v. Gales**, 06-0946, p. 4 (La. App. 1 Cir. 3/23/07), 960 So.2d 114, 117. The discretion vested in the trier of fact is great, even "vast," so that an appellate court should rarely disturb an award of general damages. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

Before an appellate court can disturb the quantum of an award, the record must clearly reveal that the trier of fact abused its discretion. In order to make this determination, the reviewing court looks first to the individual circumstances of the injured plaintiff. **Theriot v. Allstate Ins. Co.**, 625 So.2d 1337, 1340 (La. 1993). Only after analysis of the facts and circumstances peculiar to the particular case and plaintiff may an appellate court conclude that the award is not appropriate. **Id.**

Based upon our review of the evidence before us, we find no abuse of discretion by the trial court with respect to the damages awarded. While the damage award in this case may be on the high side, it is not so high as to constitute an abuse of the trial court's vast discretion. Given the "particular injuries and their effects under the particular circumstances" on Ms. Murray, the trial court's damage award is not beyond that which a reasonable trier of fact could assess. See **Youn**, 623 So.2d at 1260. Defendants' third assignment of error is similarly without merit.

The final assignment of error presented by defendants is that the trial court committed reversible error when it awarded unspecified property damages to Ms. Murray as part of its Reasons for Judgment. Defendants argue that inasmuch as Ms. Murray testified that the vehicle operated by her at the time of the collision was owned by her father, "[t]he trial court was clearly wrong to award unspecified damages therefore." A review of the record reveals that although the trial court's written reasons awarded Ms. Murray reimbursement for the damages to her vehicle, the trial court's judgment awards only general damages. It is well settled that a trial court's judgment controls over written reasons. **C.R.W. v. State, Department of Social Services**, 2005-1044, p. 15 n.2 (La. App. 1 Cir. 9/1/06) 943 So.2d 471, 484 n.2, writ denied, 2006-2386 (La. 12/21/06), 944 So.2d 1289. This assignment is also without merit.

For the above and foregoing reasons, we affirm the judgment of the trial court and assess all costs associated with this appeal against defendants-appellants, Michael P. Ryan, Coca Cola Enterprises, Inc., and Continental Casualty Company. We issue this memorandum opinion in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1B.

AFFIRMED.

JACQUELINE ARIEL MURRAY **NUMBER 2006 CA 2154**

VERSUS

MICHAEL P. RYAN, AND ANY LIBILITY INSURER(S) OF MICHAEL P. RYAN; COCO-COLA ENTERPRISES; CONTINENTAL CASUALTY COMPANY, AS LIABILITY INSURER OF COCO-COLA ENTERPRISES, AND ANY OTHER LIABILITY INSURER(S) OF COCO-COLA ENTERPRISES, AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, AS UNINSURED MOTORIST AND MEDICAL PAYMENTS CARRIER OF PETITIOENR

FIRST CIRCUIT

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STATE OF LOUISIANA

WELCH, J., AGREEING IN PART AND DISSENTING IN PART.

JEW

I agree with the resolution of the first three assignments of error. However, I conclude that the trial court abused its discretion in entering a $50,000.00 general damage award under the facts of this case, and therefore, I respectfully dissent on the quantum issue.

The record reflects that several days after the accident, plaintiff sought treatment with Dr. Frank Guidry, a family practitioner, complaining of pain in her neck, back, and arm. Dr. Guidry diagnosed plaintiff as suffering from a cervical upper back strain and advised her to return in two weeks. Plaintiff missed her next two scheduled appointments, but saw Dr. Guidry six weeks later, complaining of continued back pain. Dr. Guidry recommended that plaintiff have physical therapy two times a week for four weeks, and return to him in one month. Plaintiff did not complete the course of recommended physical therapy treatments. She returned to Dr. Guidry's office in February of 2003, five months after the accident, complaining of back pain. Dr. Guidry advised her to continue physical therapy; however, plaintiff did not do so, believing physical therapy was "a waste of time." Plaintiff last saw Dr. Guidry on November 17, 2004, complaining of mid back pain and other medical ailments. Dr. Guidry attested that, given plaintiff's complaints

of back pain for a longer period of time than typically associated with a back sprain, an orthopedic evaluation was necessary to render a proper diagnosis.

In October of 2003, plaintiff visited another family physician, Dr. Charles Searle, for back pain and shoulder pain. Dr. Searle ordered an MRI of plaintiff's thoracic spine and shoulder. The spinal MRI revealed that plaintiff has scoliosis, or curvature of the spine. It also revealed a small, two millimeter disc bulge at the T-8-9 level with no spinal cord impingement.

On January 26, 2004, plaintiff consulted Dr. Timothy Devraj, an orthopedic surgeon, for an orthopedic evaluation. He conducted an examination, which revealed no significant findings. Dr. Devraj noted that the clinical significance of the mild bulge in plaintiff's thoracic spine was debatable because seventy percent of people have this type of disc bulge and are asymptomatic. He also stated that it was difficult to say with any degree of medical certainty that the bulge was related to the automobile accident given the high percentage of asymptomatic thoracic disc herniations. Dr. Devraj opined it was difficult to prove that the disc bulge was related to or was not related to the accident, stating at best it was "possible" the accident caused the condition based on facts he was asked to assume by plaintiff's attorney.

In a personal injury action, the plaintiff has the burden of proving by a preponderance of the evidence a causal connection between the injury sustained and the accident that caused the injury. The test for determining the causal relationship between the accident and subsequent injury is whether the plaintiff proved through medical testimony that it was more probable than not that the subsequent injury was caused by the accident. **Oden v. Gales,** 2006-0946, p. 6 (La. App. 1st Cir. 3/23/07), 960 So.2d 114, 118.

Plaintiff clearly did not meet her burden of proving that the disc bulge more probably than not was caused by the accident. The evidence established that

plaintiff sustained a cervical back sprain as a result of the accident; however, there simply was no objective evidence relating plaintiff's subjective complaints of back pain over a three-and-a-half year time frame to the subject accident.

While the record does support an award for a soft-tissue injury, there is nothing in the record demonstrating that plaintiff was under any type of acute distress as a result of that injury. Furthermore, the record reflects that on four different occasions, plaintiff failed to follow her doctors' orders regarding treatment. Under all of the circumstances of this case, I believe the trial court abused its discretion in awarding $50,000.00 in general damages. Considering other general awards in the case of similar soft-tissue type injuries, I feel the highest general damage award supported by the facts of this case is $25,000.00.