NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1388

LEVEDIA PARKER

VERSUS

CITY OF NEW ROADS, PATRICK FABRE, AND LEXINGTON INSURANCE COMPANY

On Appeal from the 18th Judicial District Court
Parish of Pointe Coupee, Louisiana
Docket No. 41,950, Division "C"
Honorable Alvin Batiste, Jr., Judge Presiding

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City of New Roads, Patrick Fabre, and
Lexington Insurance Company

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered February 11, 2011

PARRO, J.

Defendants appeal the judgment of the trial court in favor of the plaintiff, Levedia Parker, awarding her damages for the injuries she allegedly sustained in an automobile accident. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 4, 2008, Ms. Parker was a guest passenger in a vehicle owned and driven by Ms. Mary L. Williams. The Williams vehicle was properly stopped on Main Street in New Roads, Louisiana, when it was struck from behind by a vehicle driven by Patrick Fabre, while he was in the course and scope of his employment as a detective with the City of New Roads. Ms. Parker was almost 82 years old at the time of the accident.

On November 13, 2008, Ms. Parker filed a petition against Mr. Fabre, the City of New Roads, and Lexington Insurance Company, seeking damages for injuries allegedly arising out of the accident. At the start of trial, the parties stipulated to Mr. Fabre's liability in causing the accident. Therefore, the only issues before the trial court were whether Ms. Parker had suffered personal injuries as a result of the accident, and if so, what amount of damages should be awarded to Ms. Parker to compensate her for such injuries.

After a bench trial, the trial court requested post-trial briefs from the parties and took the matter under advisement. Thereafter, the trial court issued written reasons for judgment in which it determined that the injuries Ms. Parker complained of were more probably than not caused by the accident. The trial court further determined that although Ms. Parker had suffered with arthritis prior to the accident, the testimony of her treating physician, Dr. Stephen Wilson, had established that the accident had aggravated the arthritic condition in Ms. Parker's lower back and neck. Accordingly, the trial court awarded Ms. Parker general damages in the amount of $20,000, special damages in the amount of $2,921.78 for medical expenses, all costs of court, including an expert witness fee in the amount of $700 for Dr. Wilson, plus legal interest from the

date of judicial demand. A judgment in accordance with these written reasons was signed on April 6, 2010. It is from this judgment that the defendants have appealed.

STANDARD OF REVIEW

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. Morris v. Safeway Ins. Co. of Louisiana, 03-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04-2572 (La. 12/17/04), 888 So.2d 872. In order to affirm the factual findings of the trier of fact, the supreme court posited a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude that there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines that the factual finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092.

If the trial court's factual findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Hulsey v. Sears, Roebuck & Co., 96-2704 (La. App. 1st Cir. 12/29/97), 705 So.2d 1173, 1176-77. However, an appellate court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination, where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story. Id. at 1177.

DISCUSSION

In their first assignment of error, defendants assert that Ms. Parker failed to establish causation in this matter. Specifically, defendants argue that Ms. Parker failed to prove that any injuries she complained of, including the aggravation of any pre-existing condition she may have had, were caused by the collision in this matter.

It is well-settled that a tortfeasor takes his victim as he finds him, and when a defendant's tortious conduct aggravates a pre-existing condition, the defendant must compensate the victim for the full extent of the aggravation. Lasha v. Olin Corp., 625 So.2d 1002, 1005-06 (La. 1993). The plaintiff, however, is required to establish a causal link between the tortious conduct and the aggravation of the pre-existing condition. The test to determine if that burden has been met is whether the plaintiff proved through medical testimony that it is more likely or probable than not that the subsequent injuries were caused by the accident. Guillory v. Lee, 09-0075 (La. 6/26/09), 16 So.3d 1104, 1124.

The testimony at trial demonstrated that Ms. Parker was involved in an automobile accident that occurred when the vehicle Mr. Fabre was driving rear-ended the vehicle in which Ms. Parker was a passenger.[1] Mr. Fabre guessed that he was travelling approximately 15 mph just prior to the accident, but he testified that he hit his brakes so that he was travelling approximately 10 mph just prior to impact.[2] He acknowledged that his tires screeched when he hit his brakes and that the force of the impact was sufficient to knock to the ground a portion of the bumper of the vehicle in which Ms. Parker was travelling, although he insisted that the collision was merely a tap. Mr. Fabre further testified that there was no damage to his car and that no one in the other vehicle needed any medical assistance at the time.

Nevertheless, Ms. Parker testified that she went to her family doctor, Dr. Robert Helm, on the evening of the accident because she started hurting some time after the accident. There are no medical records from Dr. Helm's office in the record, because

[1] As noted above, Mr. Fabre's liability in causing the accident is not disputed.

[2] He also testified at one point that he had almost stopped the car prior to impact.

he retired shortly after Ms. Parker visited him in connection with the accident, and his records were unobtainable. However, there is evidence in the record to corroborate Ms. Parker's testimony that she visited Dr. Helm shortly after the accident. First, there is a radiology report for x-rays taken of Ms. Parker's lumbar spine at Pointe Coupee General Hospital on September 10, 2008, which shows that the x-rays were ordered by Dr. Helm. In addition, medical records from Dr. Donald Doucet demonstrate that Ms. Parker visited him for treatment of pain in her right-side shoulder and back and for numbness in her leg relative to the motor vehicle accident. A notation in the file indicated that she had been getting pain medication from Dr. Helm.

Ms. Parker continued treatment with Dr. Doucet, who eventually referred her to Dr. Stephen Wilson, an orthopedic surgeon. Dr. Wilson testified by deposition, introduced at trial, that Ms. Parker first came to see him on October 23, 2008, after having been in the automobile accident on August 4, 2008, complaining primarily of pain across the lower back. Dr. Wilson testified that, according to Ms. Parker, most of the pain was across the lower back area on the right side and that it was worse when she would walk, get out of bed, or tried to lift something. Dr. Wilson further testified that Ms. Parker complained of some pain in her neck. According to Dr. Wilson, Ms. Parker denied having any problems prior to the accident, and further denied having been in any prior accidents.

Upon examination of Ms. Parker's neck and back, Dr. Wilson determined that she had some tenderness in the posterior neck area, as well as tenderness in the right side of her back. Dr. Wilson initially diagnosed her with "[m]uscle and ligamentous strain to the neck and back[,] with low back syndrome, some right leg sciatica." He treated her on this initial visit by injecting the right side of her lower back with Depo-Medrol and Xylocaine. Dr. Wilson also advised Ms. Parker to take two Advil tablets after each meal, and he prescribed Lortab 5 for pain. Dr. Wilson acknowledged in his deposition that his findings were based on Ms. Parker's subjective complaints of pain because there were no objective findings, such as muscle atrophy, gross deformity of the joints, lack of

pulse in the extremities, or lack of reflexes in the extremities, upon which to base his diagnosis. However, Dr. Wilson did note that her x-rays demonstrated minimal degenerative changes and arthritis that pre-existed the accident and that he had no reason not to believe Ms. Parker's subjective complaints that her pain had increased since the accident. Moreover, Dr. Wilson testified repeatedly that, in his opinion and based on Ms. Parker's history, the accident aggravated Ms. Parker's pre-existing arthritic condition in her lower back and neck.

Ms. Parker continued treatment with Dr. Wilson on November 13, 2008, January 8, 2009, January 22, 2009, March 5, 2009, April 8, 2009, and May 21, 2009. At each visit, Dr. Wilson noted the same issues with her back and neck, although at times, Ms. Parker would complain of pain in her arm that had not been there before, and at other times the pain in her back and neck would appear to be improved. Dr. Wilson's medical records reflect that he advised Ms. Parker that he believed that the accident had aggravated her pre-existing arthritic condition. At every visit, except the May visit, Dr. Wilson continued to inject Ms. Parker in the neck and/or lower back with Depo-Medrol and Xylocaine. In the May visit, Dr. Wilson's records note that Ms. Parker was much improved and that she no longer had any severe neck or back pain. The record of this visit further notes that Ms. Parker stated that she did not need any further treatment and that she was not having any significant pain. She was told she could return in six weeks, or as needed, if she were having any difficulty.

Ms. Parker did not return to Dr. Wilson until September 4, 2009, when she again complained of lower back pain. At that appointment, she was given an injection of Depo-Medrol and Xylocaine; however, unlike her previous appointments, she was told to be careful with heavy lifting. She again saw Dr. Wilson on September 17, 2009, October 8, 2009, and November 12, 2009. At each of these visits, Dr. Wilson continued to note subjective findings of pain, without objective findings.

Clearly, Ms. Parker provided sufficient evidence to prove through medical testimony that it was more likely than not that the injuries complained of were caused

by the accident. As noted, Dr. Wilson testified repeatedly that in his opinion, the accident had aggravated Ms. Parker's pre-existing arthritic condition and had caused the increase in her pain. In order to challenge this evidence, the defendants have relied on the lack of objective findings supporting Dr. Wilson's diagnosis and have chosen to challenge Ms. Parker's credibility, so as to demonstrate that her subjective complaints of pain are not sufficient to support Dr. Wilson's diagnosis.

Defendants contend that Ms. Parker was not truthful in her testimony and her statements to Dr. Wilson when she denied having been in an automobile accident prior to the accident at issue in this matter. At the trial, the defendants introduced a radiology report from x-rays taken of Ms. Parker's cervical, thoracic, and lumbar spine at Pointe Coupee General Hospital in August 2006. According to a notation on the report, the x-rays were allegedly taken after a motor vehicle accident with multiple injuries. When questioned about the report and the x-rays, Ms. Parker continued to deny that she had ever been in any other accidents prior to the instant accident. The radiology report does not note any significant injury; indeed, the report merely notes the same mild, degenerative changes apparently visible in the x-rays taken after the 2008 accident at issue. When asked if knowing about this prior accident would have any effect on his testimony, Dr. Wilson stated that he would have to know how bad the accident was, if she was hurt after the accident, how long she was hurt, and whether it was any different from the current accident. However, there is simply no evidence in the record to demonstrate that Ms. Parker was hurt at all in the 2006 accident, or that she sought treatment beyond the x-rays.

Ms. Williams, who was apparently involved in the 2006 accident as well, testified that the accident occurred in the parking lot of a Piggly Wiggly. However, she testified that she could not remember specifically when the accident occurred, only that it was minor. Defendants have introduced many of Ms. Parker's medical records into the record of this matter; however, none of these records demonstrates that Ms. Parker sought treatment for back or neck pain after this alleged 2006 accident. Thus, even if

Ms. Parker failed to provide completely accurate information about the 2006 accident, there is simply no evidence that this accident caused any aggravation of her pre-existing arthritic condition. Furthermore, although the defendants offered Ms. Williams' testimony for the proposition that Ms. Parker complained frequently of back pain prior to the 2008 accident, there is no medical testimony to support this testimony,[3] and it is directly contradicted by Ms. Parker's testimony. Clearly, the trial court credited Ms. Parker's testimony in this area over that of Ms. Williams.[4] When findings are based on determinations regarding credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the trier of fact's findings; for only the fact finder 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. Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. But where such factors are not present, and a fact finder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989).

On the other hand, it appears that the trial court chose to credit Ms. Williams' statements on other issues, such as whether Ms. Parker had done yardwork at her home. Ms. Williams testified that she recalled a time after the 2008 accident in which she had gone to Ms. Parker's house and had seen her in the back yard putting away

[3] There is some evidence that Ms. Parker sought treatment on May 24, 2005, for back pain. However, this certainly does not rise to the level of constantly seeking treatment for her back pain, and it was more than three years prior to the 2008 accident, and prior to the 2006 accident. After the accident at issue, Ms. Parker was seeking treatment on a more or less monthly basis for the pain for several months, which demonstrates a clear aggravation of the pain she had been experiencing prior to the accident based on the evidence in the record.

[4] Defendants also pointed to other statements made by Ms. Williams in which she claimed that Ms. Parker had told her not to tell Ms. Parker's lawyer that she (Ms. Parker) was not injured in the 2008 accident. Defendants claim that these statements are uncontested; however, Ms. Parker clearly contested them at trial, and Ms. Williams offered no evidence in support of these statements. Therefore, the trial court apparently chose to credit the testimony of Ms. Parker on this issue.

some garden tools. Ms. Williams testified that Ms. Parker told her that she had just been doing some hedging and weeding in the yard. Ms. Parker denied having said that, and insisted that she had merely been picking up the tools after her grandson had done the yard work for her. In its written reasons, however, the trial court appeared to give credence to Ms. Williams' story, in conjunction with Dr. Wilson's medical records beginning in September 2009, in which he noted, for the first time, that Ms. Parker should be careful with heavy lifting. Based on Ms. Williams' testimony and Dr. Wilson's medical records, the trial court found that Ms. Parker had reinjured herself in some other way after her visit with Dr. Wilson on May 21, 2009. Therefore, the trial court found that defendants were not liable for Ms. Parker's injuries after that date.

Defendants also attempted to challenge Ms. Parker's credibility based on the statements she made concerning how often she used her cane while walking. Ms. Parker testified that she had needed her cane to get around since the accident. On direct examination, she was less emphatic about the need for the cane at all times, saying that she needed it to help her go down steps. She testified that she would sometimes grab onto the kitchen table or other things in order to help herself get up or move around. However, on cross-examination, Ms. Parker was asked by defense counsel if she used her cane all the time since the accident, without exceptions. She responded, "Exactly."

Therefore, in an effort to impeach this testimony, defendants submitted the testimony of Joseph A. Landry, a private investigator hired by the defendants to follow and videotape Ms. Parker in connection with this litigation. According to Mr. Landry and the DVD he submitted containing the video he had compiled, he was able to catch Ms. Parker on video on one occasion entering and leaving her doctor's office without the cane. In addition, he recorded Ms. Parker at one point walking out on her porch without the cane; however, the video of that incident demonstrates that Ms. Parker grabbed the railing for support according to Mr. Landry's testimony. Furthermore, the testimony and video demonstrate that Mr. Landry taped approximately twenty-two and

a half hours of video while surveilling Ms. Parker, but was only able to provide approximately one and a half minutes of video of Ms. Parker entering and leaving her doctor's office, along with a short amount of video of her on her porch. Apparently, the trial court considered this testimony and evidence irrelevant to the issue of Ms. Parker's credibility.[5]

In their second assignment of error, defendants contend that the trial court applied an improper burden of proof when it stated that "[n]o evidence was submitted that proved the plaintiff could not have sustained the injuries she complained of from the low impact collision." According to defendants, this statement demonstrates that the trial court improperly shifted the burden of proof to them, rather than leaving the burden of proof with the plaintiff.

It is true that the burden of proof in a personal injury case rests with the plaintiff to prove that the injuries complained of were more likely than not caused by the accident. See Guillory, 16 So.3d at 1124. However, a review of the trial court's written reasons reveals that the trial court was clearly aware of this burden and applied it properly, as it stated, in pertinent part:

> The evidence presented at trial proved by a preponderance of the evidence that the plaintiff sustained injuries through no fault of her own as a result of the negligence of Officer Patrick Fabre of the City of New Roads. No evidence was submitted that proved the plaintiff could not have sustained the injuries she complained of from the low impact collision. The testimony of Dr. Wilson establishes that more probably than not the injuries that the plaintiff complained of were caused by this accident. Although the plaintiff suffered with arthritis prior to this accident[,] Dr. Wilson emphatically stated several times that this accident aggravated the plaintiff's arthritic condition in her lower back and neck. Our law is clear that you take your victim as you find her and are responsible for all the natural and probable consequences of your [tortious] conduct. *Lasha v. Olin Corp.*[,] 625 So.2d 1002 (La. 1993).

The trial court referred to the burden of proof as a "preponderance of the evidence" or "more probably than not" in its reasons. Furthermore, the trial court's reasons referred to the evidence presented by the plaintiff, specifically the testimony of Dr. Wilson, as having established that the injuries complained of by the plaintiff were

[5] It should also be noted that the dates of this surveillance were after the dates that the trial court had determined defendants were no longer responsible for Ms. Parker's injuries.

more probably than not caused by the accident. Clearly, the comment in reference to no evidence having been submitted to prove that the plaintiff could not have sustained the injuries in the accident was simply an acknowledgement by the trial court of the fact that defendants had failed to undermine the evidence presented by the plaintiff. Therefore, defendants' assertion that the trial court improperly shifted the burden of proof to them in this matter is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court in favor of the plaintiff, Levedia Parker, and against defendants, the City of New Roads, Patrick Fabre, and Lexington Insurance Company. All costs of this appeal are assessed to defendants.

AFFIRMED.