NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

JEW

FIRST CIRCUIT

NUMBER 2016 CA 0644

MELISSA GORDON AND STEPHEN GORDON

VERSUS

JOHN DOE, PAUL WRIGHT, VISION TRUCKING, LLC AND GULF SOUTH INSURANCE

Judgment Rendered: JAN 19 2017

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 581,529

Honorable William A. Morvant, Judge

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Plaintiff – Stephen Gordon

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Defendants – Paul Wright, Vision Trucking, LLC, and American States Insurance Company

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

Crain, J concurs

BH Holdridge J, concurs w/out reasons

WELCH, J.

In this action for damages arising out of an automobile accident, the plaintiff, Stephen Gordon, appeals a judgment awarding him damages in the total amount of $20,092.07, plus legal interest from the date of judicial demand. For reasons that follow, we affirm the judgment of the trial court and issue this memorandum opinion in compliance with Uniform Rules—Courts of Appeal, Rule 2-16.1(B).

On November 26, 2008, Mr. Gordon was driving his 1996 Jeep Cherokee eastbound in the middle lane of travel on Interstate-10 on the Mississippi River bridge in East Baton Rouge Parish, Louisiana. At the same time, a 1999 Mack dump truck was also being driven eastbound on Interstate-10 on the Mississippi River bridge, but in the left lane of travel. As Mr. Gordon continued traveling in the middle lane, the driver of the dump truck changed from the left lane to the middle lane, striking the rear of Mr. Gordon's vehicle and causing the vehicles to collide. At the time of the accident, Mr. Gordon's wife, Melissa Gordon, was a guest passenger in Mr. Gordon's vehicle. The Gordons claimed that as a result of the accident, they were injured and sustained damages. Therefore, on August 17, 2009, the Gordons filed this action seeking damages. Named as defendants in the suit were the driver of the dump truck[1]; Paul Wright, the owner of the dump truck; Vision Trucking, LLC, the driver's employer; Joseph W. Wright, Jr, the owner of Vision Trucking, LLC; and the liability insurer of the driver and Vision Trucking, LLC.[2]

Mrs. Gordon subsequently settled her claims against the defendants, and a bench trial was held on October 29, 2015 with respect to Mr. Gordon's claims. At

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[1] The name or identity of the driver of the dump truck was unknown, as the driver was designated as John Doe in the plaintiffs' petition.

[2] Although the plaintiffs' petition designates the liability insurer as Gulf South Insurance, the record reflects that the liability insurer was actually American States Insurance Company.

trial, the only issues to be determined were causation and damages. After taking the matter under advisement, the trial court issued extensive written reasons. Therein, the trial court determined that Mr. Gordon's testimony lacked credibility with respect to the severity of the accident and the injuries he suffered and that "[a]lmost all of [his] testimony regarding [his] injuries and treatment [was] belied by other evidence and testimony in the record." Nonetheless, the trial court, noting the extensive medical treatment that Mr. Gordon had to his neck, back, and right leg prior to the accident, determined that the accident aggravated Mr. Gordon's pre-existing condition. Therefore, the trial court concluded that Mr. Gordon suffered from a soft tissue injury for four to six months as a result of the accident and rendered judgment in favor of Mr. Gordon, awarding him general damages in the amount of $15,000.00 and special damages in the amount of $5,092.07. A judgment in accordance with the trial court's ruling was signed on January 5, 2016, and is from this judgment that the plaintiff has appealed.

On appeal, the plaintiff contends that the trial court: (1) erred in failing to award special damages in the full amount of the claimed past medical expenses; (2) erred in failing to award future medical expenses for recommended surgical procedures; and (3) abused its discretion in awarding general damages that were unreasonably low. For the reasons set forth below, we find no manifest error or abuse of discretion in the damages awarded by the trial court.

It is well-settled that a judge or jury is given great discretion in its assessment of quantum of both general and special damages. **Kelley v. General Ins. Co. of America**, 2014-0180 (La. App. 1st Cir. 12/23/14), 168 So.3d 528, 540, writs denied, 2015-0157 and 2015-0165 (La. 4/10/15), 163 So.3d 814 and 816; **Guillory v. Lee**, 2009-0075 (La. 6/26/09), 16 So.3d 1104, 1116; see La. C.C. art. 2324.1. The assessment of quantum, or the appropriate amount of damages, by a trial judge or jury is a determination of fact that is entitled to great deference on

review. **Guillory**, 16 So.3d at 1116. Because the discretion vested in the trier of fact is so great, and even vast, an appellate court should rarely disturb an award on review. *Id.* Further, when factual findings are based on determinations regarding the credibility of witnesses, the manifest error/clearly wrong standard of review demands great deference to the trier of fact's findings. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

As noted above, on appeal herein, Mr. Gordon challenges the trial court's award of only $5,092.07 for past medical expenses and its failure to award future medical expenses for a recommended surgery. At trial, Mr. Gordon offered evidence of past medical expenses incurred (a Medicaid lien) in the amount $5,092.07, and $27,980.20 from The Neuromedical Center/The Spine Hospital for two office visits with Dr. Richard A. Stanger, a neurosurgeon, and several diagnostic studies recommended by Dr. Stanger in 2015.[3] In addition, Mr. Gordon offered evidence that Dr. Stanger recommended future medical treatment, *i.e.*, surgery and a nerve block, at a cost of $66.032.76.

Under Louisiana Law, a tort victim may recover past (from injury to trial) and future (post-trial) medical expenses caused by tortious conduct. **Menard v. Lafayette Ins. Co.**, 2009-1869 (La. 3/16/10), 31 So.3d 996, 1006. In order to recover such expenses, the plaintiff must prove, by a preponderance of the evidence, both the existence of the injuries and a causal connection between the injuries and the accident. **Yohn v. Brandon**, 2001-1896 (La. App. 1st Cir. 9/27/02), 835 So.2d 580, 584, writ denied, 2002-2592 (La. 12/13/02), 831 So.2d 989. The test for determining the causal relationship between the accident and the

[3] On appeal, Mr. Gordon argues, among other things, that the trial court erred in failing to award the medical expenses incurred for his treatment with Dr. Stanger and the diagnostic treatment recommended by Dr. Stanger since Mr. Gordon was given the trial court's "permission" to see Dr. Stanger following the death of Dr. Howard. The record before us does not contain any evidence establishing that Mr. Gordon saw or treated with Dr. Stanger with the trial court's "permission;" therefore, we do not address whether such permission would support an award of medical expenses.

subsequent injury is whether the plaintiff proved, through medical testimony, that it is more probably than not that the subsequent injuries were caused by the accident. **McNeely v. Ford Motor Co., Inc.**, 98-2139 (La. App. 1st Cir. 12/28/99), 763 So.2d 659, 667, writ denied, 2000-0780 (La. 4/28/00), 760 So.2d 1182. In a situation where a pre-existing condition is aggravated in an accident, the tortfeasor is required to compensate the victim for the full extent of the aggravation injury. **Mack v. Wiley**, 2007-2344 (La. App. 1st Cir. 5/2/08), 991 So. 2d 479, 489, writ denied, 2008-1181 (La. 9/19/08), 992 So. 2d 932.

Generally, the effect and weight to be given medical expert testimony is within the broad discretion of the fact finder. **Yohn**, 835 So.2d at 584. A trier of fact may accept or reject, in whole or in part, the opinions expressed by an expert. **Harris v. State, ex rel. Department of Transportation and Development**, 2007-1566 (La. App. 1st Cir. 11/10/08), 997 So.2d 849, 866, writ denied, 2008-2886 (La. 2/6/09), 999 So.2d 785. Further, where the testimony of expert witnesses differs, the trier of fact has great, even vast discretion in determining the credibility of the evidence, and a finding in this regard will not be overturned unless it is clearly wrong. **Cotton v. State Farm Mutual Automobile Ins. Co.**, 2010-1609 (La. App. 1st Cir. 5/6/11), 65 So.3d 213, 220, writ denied, 2011-1084 (La. 9/2/11), 68 So.3d 522.

In this case, the trial court found that "for years prior to the accident in question[, Mr. Gordon] received extensive treatment to his neck, back, and right leg" and that as a result of the accident, Mr. Gordon suffered "an aggravation of a pre-existing condition that resolved in four to six months." In reaching this conclusion, the trial court relied on the deposition testimony of Dr. Michael T. Howard, the plaintiff's original treating physician, and thus, the record reasonably supports this conclusion. Dr. Howard testified that he began seeing Mr. Gordon on April 30, 2008 for neck and back pain; at that time, the plaintiff reported that he

had previously fallen and fractured his right leg and that he had been involved in a motor vehicle accident three years earlier wherein he suffered neck and back injuries. Dr. Howard diagnosed Mr. Gordon as having chronic cervical, thoracic, and lumbar strain syndrome, as well as right tibia-fibula pain secondary to fracture. Following the initial visit and prior to the accident at issue herein, Dr. Howard saw Mr. Gordon approximately eight more times for those same complaints and he eventually referred Mr. Gordon to a neurosurgeon. Notably, Mr. Gordon was on his way to an appointment with Dr. Howard when he was involved in the accident herein. Dr. Howard testified that following the November 28, 2008 accident herein, Mr. Gordon's condition was exacerbated with regard to his range of motion and pain, but Dr. Howard stated that he continued with the same treatment (medications) and diagnosis. Dr. Howard further testified that by February 17, 2009, Mr. Gordon had returned to his pre-accident condition in terms of his physical exam findings, although his medications did not change. Hence, Dr. Howard opined that the accident at issue herein aggravated Mr. Gordon's condition for a period of time. Based on this evidence the trial court awarded Mr. Gordon special damages in the amount of $5,092.07, as reflected by the Medicaid lien, for the medical expenses for the treatment of his aggravated condition.

With respect to Mr. Gordon's claim for past medical expenses associated with his treatment and diagnostic studies with Dr. Stanger ($27,980.20) and his claim for future medical expenses for the treatment recommended by Dr. Stanger ($66.032.76), the trial court found that Mr. Gordon failed to meet his burden of proving that these additional medical expenses and the need for the recommended treatment were caused by the accident at issue, as opposed to the continued progression and treatment of his pre-accident injuries. Therefore, the trial court concluded that these expenses were not related to the injuries caused by this accident, and this conclusion is also reasonably supported by the record.

As the trial court noted in its reasons for judgment, there were no medical specialists that the plaintiff saw after the accident that had not been recommended by Dr. Howard prior to the accident, and after the accident, Mr. Gordon did not present with any new complaints. Prior to the accident, Dr. Howard recommended that Mr. Gordon see a neurosurgeon with respect to his complaints. After the accident, Mr. Gordon saw Dr. Stanger, a neurosurgeon, twice—on March 31, 2015 and October 23, 2015—for his complaints. Although Dr. Stanger opined that Mr. Gordon's reported complaints were caused by the accident at issue, Dr. Stanger stated that his opinion was based upon the medical history he received from Mr. Gordon and that his opinion could change if the facts or patient's history regarding the severity or onset of the symptoms changed. Despite Mr. Gordon's history of treatment for back and neck pain with Dr. Howard, including the fact that Mr. Gordon was on his way to an appointment with Dr. Howard at the time of the accident, Mr. Gordon told Dr. Stanger that his pain started with the 2008 accident at issue. Hence, the trial court found that Mr. Gordon was not truthful in his history to Dr. Stanger with regard to the severity or onset of his back and neck pain; therefore, the trial court gave no weight to the opinion of Dr. Stanger with respect to his treatment of Mr. Gordon—both past and future—as being related to the accident.

Mindful that a plaintiff must prove, by a preponderance of the evidence, the existence of injuries and a causal connection between the injuries and the accident herein, we find no manifest error in the trial court's determination that Mr. Gordon failed to establish a causal connection between the accident and all of the medical expenses for which he sought recovery. The trial court's award of $5,092.07 is consistent with its factual finding that Mr. Gordon suffered from an aggravation of a pre-existing injury as a result of the accident, but that he was not entitled to recover all of the medical expenses he requested, *i.e.*, the $27,980.20 associated

with Dr. Stanger, because those expenses were not causally related to the accident; thus, we cannot say the award was an abuse of the trial court's vast discretion. Similarly, with respect to Mr. Gordon's claimed future medical expenses, the trial court was faced with conflicting medical testimony—while Dr. Stanger opined that Mr. Gordon would require some medical treatment in the future as a result of the accident, that opinion was based on an inaccurate history provided by Mr. Gordon regarding the onset and severity of his symptoms and Dr. Howard stated that physically, Mr. Gordon had returned to his pre-accident condition by early 2009. In refusing to award Mr. Gordon future medical expenses, the trial court obviously concluded that Mr. Gordon's injuries from the accident were resolved within a relatively short period of time after the accident and that any pain he continued to experience was the result of his pre-existing condition and unrelated to the accident. Based on our review of the entire record, we are satisfied that there is a reasonable factual basis in the record to support the trial court's findings. Therefore, we cannot say that the trial court was manifestly erroneous or abused its discretion in not awarding Mr. Gordon future medical expenses.

Lastly, on appeal, Mr. Gordon challenges the trial court's general damage award of $15,000.00. General damages are those which are inherently speculative in nature and cannot be fixed with mathematical certainty. **Wainright v. Fontenot,** 2000-0492 (La. 10/17/00), 774 So.2d 70, 74. The role of an appellate court in reviewing a general damage award is not to decide what it considers to be an appropriate award, but rather, to review the exercise of discretion by the trier of fact. **Bouquet v. Wal-Mart Stores, Inc.**, 2008-0309 (La. 4/4/08), 979 So.2d 456, 459.

The standard of appellate review for general damage awards is set forth in **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), wherein the

Louisiana Supreme Court stated that "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." The appellate court's first inquiry should be "whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the 'much discretion' of the trier of fact." **Youn**, 623 So.2d at 1260. Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. **Graham v. Offshore Specialty Fabricators, Inc.**, 2009-0117 (La. App. 1st Cir. 1/8/10), 37 So.3d 1002, 1018.

In the trial court's reasons for judgment, it noted that Mr. Gordon testified that the accident was a "serious motor vehicle accident," and that the initial impact from the dump truck was hard, and that there were multiple hits from the dump truck. However, the trial court noted that the photographs of Mr. Gordon's vehicle failed to support Mr. Gordon's testimony and contradicted his version of the severity of the accident, because the photographs showed scratches on the vehicle, with little to no actual damage. The trial court also noted that the plaintiff testified that his vehicle was fully drivable after the accident and that he never repaired the vehicle. In addition, the trial court found that Mr. Gordon's medical records belied Mr. Gordon's claim regarding the severity of injuries he suffered in the motor vehicle accident. Thus, based on the testimony and evidence, the trial court found that Mr. Gordon suffered from a four to six month soft tissue injury (aggravation of a pre-existing condition) and awarded Mr. Gordon general damages in the amount of $15,000.00. From the trial court's reasons for judgment, it is obvious that the trial court questioned the veracity of Mr. Gordon's testimony regarding the severity of the accident and the extent of his injuries and we find that a reasonable factual basis exists in the record for the trial court's conclusion that not all of Mr.

Gordon's complaints about his injuries were related to the accident. Therefore, based on the particular facts of this case, we cannot say that the trial court abused its discretion in the general damage award of $15,000.00 to Mr. Gordon.

Although Mr. Gordon maintains that the general damage award should be increased because the general damage award was inconsistent with the special damage award in the amount of the Medicaid lien ($5,092.07) because the Medicaid lien included approximately three years of medical treatment, we cannot say that the award is so inconsistent as to constitute an abuse of discretion.[4] The trial court's reasons for judgment specifically reflect that it found the effects of the accident on Mr. Gordon did not exceed four to six months and this conclusion was well within the discretion afforded the trial court; however, the evidence in support of the special damage award does reveal that the Medicaid lien included bills with dates that extend beyond the four to six months following the accident. Nevertheless, in awarding special damages in the amount of the Medicaid lien, the trial court could have reasonably concluded that Mr. Gordon incurred those medical expenses in good faith as a result of the accident (and thus, was entitled to recover the full amount of those expenses), but that the injuries caused by the accident (the aggravation of his pre-existing condition) did not exceed four to six months after the accident. Thus, the record before us fails to establish that any purported discrepancy between the special damage award of $5,092.07 and the general damage award of $15,000.00 is so inconsistent as to constitute an abuse of discretion or that it warrants an increase in Mr. Gordon's general damage award.

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[4] Generally, when a plaintiff is found to have suffered injuries in an accident, is awarded special damages, but not general damages, the verdict is considered inconsistent, and the reviewing court must determine whether the fact finder's determination is so inconsistent as to constitute an abuse of discretion. See **Green v. K-Mart Corporation**, 2003-2495 (La. 5/25/04), 874 So.2d 838, 843-844; **Wainright**, 774 So.2d at 76. Although in this case Mr. Gordon was awarded *some* general damages (rather than *no* general damages), he argues that the trial court's general and special damage awards are inconsistent. Therefore, by analogy, we find this standard is useful to the resolution of Mr. Gordon's argument.

Accordingly, for all of the above and foregoing reasons, the January 5, 2016 judgment of the trial court is affirmed. All costs of this appeal are assessed to the plaintiff/appellant, Stephen Gordon.

AFFIRMED.