NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 1536

CHRISTINA L. DANOS

VERSUS

WILLIAM H. ST. MARTIN, SR., INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, WILLIAM H. ST. MARTIN, JR., AND ALLSTATE INSURANCE COMPANY

On Appeal from the 32nd Judicial District Court
Parish of Terrebonne, Louisiana
Docket No. 152,045, Division "B"
Honorable John R. Walker, Judge Presiding

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Individually and on behalf of his
minor son, William H. St. Martin, Jr.,
and Allstate Insurance Company

KUHN, J DISSENTS + ASSIGNS

BEFORE: CARTER, C.J., PARRO, KUHN, McDONALD, AND KLINE,[1] J.J.

McDonald, J. dissents.

Judgment rendered SEP 1 4 2010

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[1] Judge William F. Kline, Jr., retired, is serving as judge pro tempore by special appointment of the Louisiana Supreme Court.

PARRO, J.

In this appeal arising out of a motor vehicle accident, William H. St. Martin, Sr., individually and on behalf of his minor son, William H. St. Martin, Jr., and Allstate Insurance Company (Allstate) appeal the award to Christina L. Danos of $2000 for diminution in value of her car and of $30,000 in general damages.

This court has examined the record and concludes that the testimony of Mr. Lester Bimah, an employee of Barker Honda, as well as a letter written by him certifying such damages, both of which were admitted without objection at trial, provide evidentiary support that, despite being repaired, Ms. Danos's vehicle was diminished in value as a result of the accident.[2] There is no countervailing evidence, and the record as a whole does not demonstrate that the award of $2000 was manifestly erroneous.

With reference to the general damage award, the record shows that Ms. Danos incurred neck, shoulder, and back pain as a direct result of the accident and continued to suffer from stiffness and intermittent spasms at the time of trial, two years after the accident. She was treated for her injuries in the emergency room of Terrebonne General Medical Center; by her family doctor, Dr. Kirk Dantin; by Terrebonne Physical Therapy; and by Dr. Todd Arcement, a chiropractor. She was still seeing the chiropractor occasionally for back and neck pain and stiffness related to the accident. Based on the evidence in the record, we find the trial court did not abuse its discretion in awarding Ms. Danos $30,000 in general damages.[3]

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[2] Louisiana law provides that diminution in value of a vehicle involved in an accident is an element of recoverable damages if sufficiently established. In a case involving damages to an automobile, where the measure of damages is the cost of repair, additional damages for depreciation may be recovered for the diminution of value due to the vehicle's involvement in an accident. However, there must be proof of such diminished value. Davies v. Automotive Cas. Ins., 26,112 (La. App. 2nd Cir. 12/7/94), 647 So.2d 419, 422; Defraites v. State Farm Mut. Auto. Ins. Co., 03-1081 (La. App. 5th Cir. 1/27/04), 864 So.2d 254, 260.

[3] General damages involve mental or physical pain and suffering, inconvenience, or other losses of lifestyle that cannot be measured definitively in terms of money. Boudreaux v. Farmer, 604 So.2d 641, 654 (La. App. 1st Cir.), writs denied, 605 So.2d 1373 and 1374 (La. 1992). The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. Jenkins v. State ex rel. Dep't of Transp. and Dev., 06-1804 (La. App. 1st Cir. 8/19/08), 993 So.2d 749, 767, writ denied, 08-2471 (La. 12/19/08), 996 So.2d 1133. Much discretion is left to the judge in the assessment of general damages. LSA-C.C. art. 2324.1. In reviewing a general damage award, a court does not review a particular item in isolation; rather, the entire damage award is reviewed for an abuse of discretion. Smith v. Goetzman, 97-0968 (La. App. 1st Cir. 9/25/98), 720 So.2d 39, 48.

After a thorough review of the record and relevant law and jurisprudence, we conclude that the trial court's oral reasons for judgment adequately explain its decision. As the issues in this case involve no more than an application of well-settled rules to a recurring fact situation, we affirm the judgment in accordance with Rule 2-16.2(A)(2), (4), (5), (6), and (8) of the Uniform Rules of Louisiana Courts of Appeal. All costs of this appeal are assessed against Allstate.

AFFIRMED.

CHRISTINA L. DANOS **FIRST CIRCUIT**

VERSUS **COURT OF APPEAL**

WILLIAM H. ST. MARTIN, SR., INDIVIDUALLY AND ON BEHALF OF HIS MINOR SON, WILLIAM ST. MARTIN, JR., AND ALLSTATE INSURANCE COMPANY **STATE OF LOUISIANA**

NO. ~~2009 CA 1076~~ 2009 CA 1536 8/30/11

KUHN, J, dissenting.

I disagree with the majority's affirmance of the trial court's awards for diminution in the value of the Danos vehicle and for general damages. The record lacks the requisite evidentiary basis to support the diminution award and the trial court abused its discretion in the general damages award.

The record shows that one witness, Lester Bimah, testified as to the value of the Danos vehicle after the accident. A letter signed by Bimah on "Barker Honda" stationary, addressed "To Whom It May Concern," stating that the Danos vehicle had "depreciated in value approximately $2000 due to moderate damage reported to Carfax" was admitted into evidence. At trial, no foundation was laid for the letter. Bimah stated that he could not show the court how he determined the vehicle had devalued by $2,000. He also said that he did not have any documentation demonstrating the $2,000 devaluation. The record contains no other evidence addressing the diminution in the value of the Danos vehicle. As such, the record lacks an evidentiary basis to support the $2,000 award. Accordingly, I would reverse the trial court's $2,000 award.

While it is axiomatic that the trial court has vast discretion in fashioning a general damages award, the record must nevertheless contain sufficient evidence to allow a trier of fact to assess the effects of the particular injury to the particular plaintiff under the particular circumstances. ***See 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). A plaintiff must prove what damage, by kind and seriousness, was caused by defendant's fault before the court can render an appropriate award. ***Hall v. Brookshire Bros., Ltd.***, 2002-2404, pp. 11-12 (La. 6/27/03), 848 So.2d 559, 567, And when the award rendered is beyond that which a reasonable trier of fact could so assess, the appellate court should reduce the award. ***See Youn***, 623 So.2d at 1261. Because this record fails to establish the particular injury Ms. Danos suffered, I believe the trial court abused its discretion in awarding $30,000 in general damages.

Initially, I note that the trial court made findings based on information that was not admitted into evidence. It determined that a "[s]pasm is not a subjective finding but an objective finding," and imputed that to Dr. Arcement's testimony that plaintiff had pain and suffered an injury valued at $30,000. The trial court also determined, without any evidence offered to support the findings, that "general practitioners usually feel that a sprain/strain ought to resolve itself within 90 days to six months. Then we have the other medical experts that give different opinions when they examine Plaintiffs." Lastly, in its reasons for judgment, the trial court stated that it "had Doctors Gervais and Arcement testify on previous occasions. The Court has no reason to disbelieve their testimony in these particular cases." This statement is clearly a reference to matters outside the record and, curiously, I note that Dr. Gravais did not testify in this case.

Compounding the trial court's reliance on evidence outside the four corners of this record was its note that "there has been no independent medical examinations that have been performed since Dr. Dantin stopped treating the Plaintiff in this case." But the burden of proof was with Danos to demonstrate the particular injury from which she suffered.

Although the trial court found Danos "to be very believable, very credible," neither the medical records nor her testimony supports the general damages award of $30,000. Danos testified that immediately after the accident, she had pain in her upper back, neck, and shoulders. She acknowledged that since the accident, the pain had lessened. When asked to describe the pain in her neck, she stated, "Sitting in a chair for a long period of time, it's uncomfortable. I feel like I get stiff. Trying to sleep, I can't get comfortable. I toss and turn. I get pains in my back and neck, like uncomfortable." Danos stated, that "[s]itting in a chair for a long period of time or trying to sleep," caused her back pain. When asked about the effects of the back or neck injuries on her daily living, Danos stated, "It's just uncomfortable as far as sleeping or doing things like I normally would. ... [J]ust anything as simple as going to a football [game] and sitting on the bleachers or sleeping. At work sitting in a chair." Explaining the pain, Danos said, "It's like a stiff pain. Like I get stiff. I have to always move around."

According to the medical records, Danos was in this accident on August 2, 2006. She was treated at Terrebonne General where she complained of neck and left shoulder pain. She had normal results from x-rays and was told she could return to work on August 7, 2006. She continued to receive occasional treatment from Dr. Kirk Dantin through December 2006. In May 2007, Danos began treating with chiropractor, Dr. Arcement. In addition to unresolved neck pain, her complaints to Dr. Arcement now included low back pain.

Nothing in Danos' testimony, or elsewhere in the record, explains the gap in treatment or how the manifestation of complaints of low-back pain related to the either the injuries she initially sustained or to the accident. Essentially, Danos has proven, at best, a four-month, soft-tissue injury. A general damages award of $30,000 for the four-month, soft-tissue injury this record establishes is an abuse of

discretion. As such, I would lower it to the highest point within its discretion, ***see Coco v. Winston Indus., Inc.***, 341 So.2d 332, 335 (La. 1976), which I believe would not be more than $12,000.

For these reasons, I would reverse the trial court's award of $2,000 for diminution of the value of the Danos vehicle and reduce to $12,000 the general damages award. Accordingly, I dissent.