NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1365

KELLY COMMANDER WIFE OF/AND DEREK COMMANDER AND CORY J. COMMANDER

VERSUS

TIMBERCREEK PROPERTY OWNERS ASSOCIATION, INC., MID-SOUTH TURF, INC. (OF MISSISSIPPI), ACE CONTRACTORS, LLC AND SCOTTSDALE INSURANCE COMPANY

RHP
JEW
PMc by JEW

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 2005-11778, Division "E"
Honorable William J. Burris, Judge Presiding

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Timbercreek Property Owners
Association, Inc. and
Scottsdale Insurance Company

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered APR 21 2009

PARRO, J.

Kelly Commander, her husband, Derek, and their son, Cory, appeal a judgment finding Cory 75% at fault in a motor vehicle accident; they seek a lower allocation of fault to him and an increase in his general damages. Timbercreek Property Owners Association, Inc. (TPOA) and its insurer, Scottsdale Insurance Company, answered the appeal, asserting Cory was 100% at fault and seeking reversal of the 5% of fault allotted to it in the judgment.[1] For the following reasons, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of October 1, 2004, eighteen-year-old Cory Commander picked up two friends, and the three drove around together for a while. Around 1:20 a.m. the following morning, Cory wanted to turn around, so he turned onto a residential street and drove to the end of the street, where there was a cul-de-sac. As he returned in the other direction on the two-lane street, his vehicle hit some pallets of sod that had been left next to the curb and were not protected with any warning cones or barriers. After striking the pallets of sod, he ran off the road and struck a parked pickup truck, knocking its back end off the driveway and into the lawn, and then hit a mailbox post. Although the speed limit on the road was 20 miles per hour, Cory estimated that he was travelling about 35 miles per hour when he hit the sod. He had not been drinking, using illicit drugs, or taking any medications. Cory sustained injuries, including a cervical/lumbar strain that resolved in one month and a right wrist triangular fibro-cartilage tear and sprain lasting about nine months.

TPOA was the property owner adjoining the street where the accident occurred. It had contracted with Ace Contractors, LLC to do some redesign work on a retention pond and had contracted with Mid-South to lay sod around the pond. Mid-South could not finish laying the sod in an area where the ground was too wet, so it placed the remaining pallets of sod next to the curb on the street adjoining the work site. When Mid-South left the job on the afternoon preceding the accident, a couple of TPOA

[1] A default judgment was confirmed against Mid-South Turf, Inc. (Mid-South), and the court assigned 20% of the fault to it. Another named defendant, Ace Contractors, LLC, was dismissed by the plaintiffs before trial.

officers knew that pallets of sod were in the street. TPOA assumed responsibility for the remainder of the job and completed laying the sod on the morning after the accident.

After a bench trial, the court found that Cory was 75% at fault, Mid-South was 20% at fault, and TPOA was 5% at fault. The court awarded $10,000 in general damages, $3,126.25 for medical expenses, and $500 for Cory's property damage deductible. Applying the percentages of fault to the damage award, the judgment ordered Mid-South to pay $2,725.24 and TPOA to pay $681.31. The plaintiffs' motion for a new trial was denied, and they appealed, assigning as error the court's apportionment of fault and its award of general damages. TPOA and its insurer answered the appeal, arguing that Cory was 100% at fault and that the court erred in assigning any fault to it.

ALLOCATION OF FAULT

With reference to the allocation of fault when liability is shared by two or more defendants, Louisiana Civil Code article 2323(A) provides, in pertinent part, as follows:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined ... . If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

See also Rideau v. State Farm Mut. Auto. Ins. Co., 06-0894 (La. App. 1st Cir. 8/29/07), 970 So.2d 564, 574, writ denied, 07-2228 (La. 1/11/08), 972 So.2d 1168. A determination of the allocation of fault by the trier of fact is a factual finding and cannot be overturned in the absence of manifest error. Barsavage v. State, Through Dep't of Transp. & Dev., 96-0688 (La. App. 1st Cir. 12/20/96), 686 So.2d 957, 962, writs denied, 97-0595 and 97-0634 (La. 4/18/97), 692 So.2d 455 and 456.

The two-part test for the appellate review of a factual finding is: (1) whether there is a reasonable factual basis in the record for the finding of the trier of fact; and (2) whether the record further establishes that the finding is not 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 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 the factual finding was clearly wrong. See Stobart v. State, Through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993).

When the court of appeal finds that a reversible error of law or manifest error of material fact was made in the trial court, it is required, whenever possible, to re-determine the facts *de novo* and render a judgment on the merits. Ferrell v. Fireman's Fund Ins. Co., 94-1252 (La. 2/20/95), 650 So.2d 742, 745. Where legal error interdicts the fact finding process, the manifest error standard no longer applies, and, if the record is otherwise complete, an appellate court should make its own *de novo* review of the record. Evans v. Lungrin, 97-0541 (La. 2/6/98), 708 So.2d 731, 735. However, when the error affects only one of several factual findings, each finding pertinent to liability must be evaluated to determine the applicability of the manifest error rule to each. Picou v. Ferrara, 483 So.2d 915, 918 (La. 1986). A court of appeal is not to conduct a *de novo* review of factual findings not affected by the trial court's error. See Lam ex rel. Lam v. State Farm Mut. Auto. Ins. Co., 05-1139 (La. 11/29/06), 946 So.2d 133, 138.

In determining percentages of fault, the trial court must consider the nature of the conduct of all parties and the extent of the causal relationship between the conduct and the damages claimed. Watson v. State Farm Fire & Cas. Ins. Co., 469 So.2d 967, 974 (La. 1985). In assessing the nature of the conduct of the parties, various factors may influence the degree of fault, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. Clement v. Frey, 95-1119 (La. 1/16/96), 666 So.2d 607, 611. If the court of

appeal finds a "clearly wrong" apportionment of fault, it should adjust the allocation, but only to the extent of lowering or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. Id.; see also Rideau, 970 So.2d at 574.

Both parties, TPOA and the Commanders, have questioned the trial court's allocation of fault, claiming the court was clearly wrong. The Commanders assert that the degree of fault allocated to Cory was excessive and should be reduced, while the fault allocated to TPOA should be increased. They suggest that a more equitable allocation would place 50% of the fault on Cory, 50% on TPOA, and none on Mid-South. TPOA, on the other hand, argues that the court should have allocated 100% of the fault to Cory and none to it or to Mid-South. Accordingly, we have reviewed the record and the court's written reasons for judgment to determine whether the court's allocation of fault was manifestly erroneous, examining first the allocation of 75% of the fault to Cory.

The trial court's summary of the evidence supporting its factual finding included the following:

> Though there was testimony that the street lights were not on or not present, it appears to the Court the street was illuminated by street lights. As [Cory and his friends] drove down the street the driver failed to see pallets of sod placed against the curb to his left. The speed limit was posted as 20 mph and the plaintiff testified to driving at about 35 mph. After turning around, he hit an empty pallet, swerved and hit pallets of sod stacked about 3 feet high, swerved again and hit a truck knocking it from the driveway to the front lawn and eventually spun around in the roadway. There were no barricades, caution tape or cones around the stacks of pallets.

There is evidentiary support in the record for all of these findings. First, although Cory testified that there were no street lights, photographs of the site show there were street lights near the accident site. Mr. Peace testified there were six or seven lights along the street, and he had never seen the entire strip of lights out. The photographs show one of the street lights was in front of 2076 Timbercreek Lane; Mr. Peace indicated this house was just to the north of the detention pond where the work was being done. Also, each house along the street had a gas lantern in the front yard,

which provided additional illumination.

The subdivision street where the accident occurred was just two lanes wide with curbs on each side. The photographs and testimony show that there were several three-feet-high stacks of sod pallets next to the curb on Cory's left as he entered the subdivision. However, Cory said he did not see any of this when he passed those pallets on his way in and did not see the stacks of pallets in time to avoid them after he had turned around and was on the way out. Although the pallets of sod were protruding about four feet into the roadway from the curb, there were also several cars parked along the street next to the curb on both sides of the street. These vehicles protruded much further into the roadway than the pallets, but Cory did not strike any of them, nor did any of those vehicles block his view of the pallets from either direction.

Right after entering the subdivision, there was a sign showing the speed limit was 20 miles per hour; there were two other 20-miles-per-hour speed limit signs that Cory would have passed as he drove the length of the street and back. Cory admitted he had a duty to travel within the posted speed limit and to keep a proper lookout while driving. Yet, according to his own testimony, he was driving 35 miles per hour, almost twice the speed limit, when he hit the pallets of sod; however, we note that the impact was severe enough to knock a full-size pickup truck off the driveway and take down a mailbox after hitting the pallets. A photograph of the Commanders' car shows extensive front end damage, and Kelly Commander testified that the vehicle was declared a total loss by the insurance company.

Considering this evidence, we conclude that there was a reasonable factual basis in the record for the trial court's finding that Cory should bear 75% of the fault in this case. There was no reason for Cory to be exceeding the speed limit. Since he was driving at night on a street that he had never driven before, he should have been more alert to his surroundings. Had he been travelling at 20 miles per hour, his chances of seeing and avoiding the pallets of sod would have been greatly increased. Given the speed and the force of the collision, the trial court could reasonably have concluded that even if there had been some kind of barricade or cones, Cory could not have stopped or

swerved in time to avoid the pallets. Our review of the entirety of the record establishes that the trial court's factual findings are not manifestly erroneous. Therefore, we will not reduce Cory's percentage of fault.

With reference to the allocation of fault between TPOA and Mid-South, we note that both the Commanders and TPOA assert on appeal that Mid-South was not in any way at fault in this case: TPOA would allocate 100% of the fault to Cory, and the Commanders would allocate 50% to TPOA and 50% to Cory. As we have already determined that the court's allocation of 75% of the fault to Cory did not constitute manifest error, we must examine the allocation of fault between TPOA and Mid-South.

In explaining its conclusion concerning the placement of the pallets of sod in the street, the court made several factual findings, as follows:

> Mid South delivered the sod on Friday and stacked it on pallets around the pond where some of the sod was laid that day. Later on Friday, Mid South moved the pallets to the roadway. It is unclear whether Mid South contacted anyone from TPOA about the moving of the pallets. Saturday morning, members of TPOA laid the remaining sod and had the pallets removed.

Mr. Bill Peace, the president of TPOA at the time of trial, testified concerning the facts surrounding the placement of the pallets of sod at the edge of the street overnight. His was the **only** evidence bearing on the relative responsibilities of these two parties. The following colloquies occurred:

> Q. How did the pallets get into the roadway?
>
> A. When Mid-South left, evidently they placed them in the roadway.
>
> Q. Okay.
>
> A. There was some sod left over. They didn't want to put the sod down in the wet area. I think Mr. Bradley was there at the time, and he said that we [TPOA] would sod the rest of it.
>
> * * *
>
> Q. Now as I understand when you and I talked about this, you knew, the Homeowners' Association knew that Mid-South was not going to lay the balance of the sod when they left that afternoon immediately preceding the night of the accident, correct?
>
> A. Yes. I think that is right. I wasn't there. I don't know how that came about, but the bottom line is they did not lay the sod down there.

They took their forklift and set it up on the edge of the street.

* * *

Q. Now at the time that the accident happened, the Homeowners' Association knew that Mid-South had moved the pallets and placed them as is shown in Exhibit 7, correct?

A. A couple of people knew that. Yes, uh-huh (affirmative response).

Q. Those couple of people were representatives of the Homeowners' Association back then?

A. Yes.

Q. And Mr. Bradley was what, the president?

A. That is correct.

Q. There was some other gentleman, a Mr. Songy, as I seem to remember you telling me?

A. I think he lives right across the street so he probably would have known what was going on.

Q. Was he an officer of the company at the time that you recall?

A. I think he might have been secretary.

* * *

Q. At the time that Mid-South left, the Homeowners' Association knew that they were not intending on coming back to do any more work on the project relative to laying the balance of the sod, you told me that?

A. Yes, because it was real late. We knew they [were not] going to be back.

Q. As we have discussed already, just so we are clear, at that moment in time, the Homeowners' Association decided that it was going to take over and finish laying the balance of the sod that remained?

A. That is correct. We didn't have a choice.

Q. I think you told me that anything that was going to be done with that sod was going to be the Homeowners responsibility because Mid-South wasn't expected to return; is that right?

A. Yes.

Q. Now as the day ended and it got dark immediately preceding the night this accident happened, the Homeowners' Association did not place any cones or barricades around the area of the sod?

A. No.

Based on this evidence, it is clear that TPOA, through its officers, knew about the

placement of the sod in the street before the accident and also knew that there were no barricades, cones, or other warnings placed around the sod. Therefore, the evidence supports the trial court's conclusion that TPOA should bear some of the fault.

However, it is also clear that when Mid-South left the job, it used its forklift to place the pallets of sod in the roadway where vehicles would be travelling, but did nothing further to warn of this condition. We note that Kelly Commander testified that she and her husband, "[a]s a construction company owner, if we ever put any materials in the roadway, ... we always barricade that material to make sure that ... the public can see it ... ." Therefore, between Mid-South and TPOA, there is evidence supporting the trial court's conclusion that Mid-South, an independent contractor, had the equipment to put the pallets in some other location and was in a better position to be aware of the danger and to do something to warn of the presence of the pallets in the street. The record as a whole does not show that these factual findings concerning the allocation of fault were manifestly erroneous. Therefore, we conclude that the trial court did not err in assigning 20% of the fault to Mid-South and 5% to TPOA.

DAMAGES

General damages are those which may not be fixed with any degree of pecuniary exactitude, but which involve mental or physical pain or suffering, inconvenience, the loss of gratification or intellectual or physical enjoyment, or other losses of life or lifestyle, which cannot really be measured definitively in terms of money. McGee v. A C and S, Inc., 05-1036 (La. 7/10/06), 933 So.2d 770, 774. On the other hand, special damages are those which have a ready market value, such that the amount may theoretically be determined with relative certainty, such as medical expenses and lost wages. Id.

Vast discretion is accorded the trier of fact in fixing general damage awards. LSA-C.C. art. 2324.1; Youn v. Maritime Overseas Corp., 623 So.2d 1257, 1260-61 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). This vast discretion is such that an appellate court should rarely disturb an award of general damages. Youn, 623 So.2d at 1261. Thus, the role of the appellate court in reviewing

general damage awards 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. Id. As our supreme court explained in Youn:

> Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award.

Id. The initial inquiry in reviewing an award of general damages is whether the trier of fact abused its vast discretion in assessing the amount of damages for the particular injuries and their effects under the particular circumstances on the particular injured person. Youn, 623 So.2d at 1260; Reck v. Stevens, 373 So.2d 498, 501 (La. 1979). Only after a determination that the trier of fact has abused its much discretion is a resort to prior awards appropriate and then only for the purpose of determining the highest or lowest point which is reasonably within that discretion. Youn, 623 So.2d at 1260; Coco v. Winston Industries, Inc., 341 So.2d 332, 335 (La. 1976).

The Commanders contend that the trial court abused its discretion in awarding Cory only $10,000 in general damages and suggest that a more appropriate award would be in the range of $25,000 to $30,000. Cory's medical records were in evidence, and he and his mother testified concerning his injuries and treatments.

The medical records and testimony established that Cory's back, neck, and knee symptoms were essentially resolved within a month after the accident. The more serious injury was to his right wrist. Torn cartilage in the wrist caused him pain with some of his regular activities, and he continued seeking treatment until nine months later. During that time, his complaints about wrist swelling and pain were intermittent and occurred following strenuous activities, such as weight-lifting, shoveling, and hammering. When he was not engaged in those activities, his symptoms disappeared. Although arthroscopic surgery was discussed, it apparently was not necessary, since Cory discontinued all treatments after July 1, 2005.

Many rational triers of fact could have decided a higher award was appropriate;

however, we cannot conclude from the entirety of the evidence in this case that the trial court abused its great discretion in determining general damages. The award bears a reasonable relationship to the nature and extent of Cory's injuries. See Youn, 623 So.2d at 1261. Accordingly, we will affirm the trial court's award of $10,000 in general damages.

CONCLUSION

The judgment of April 1, 2008, is affirmed. Each party is to bear its own costs of this appeal.

AFFIRMED.