

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0056


ROBERT BARRY

VERSUS

**FRANK LACOUR, EWING AQUATECH POOL, INC., AND
AQUAGUARDIAN INSURANCE COMPANY**



Judgment Rendered: SEP 16 2009

VGW by 

On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 553,009, Division "F" Section "22"

Honorable Timothy E. Kelley, Judge Presiding

O'Neal Walsh
Baton Rouge, LA

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Robert Barry

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Ewing Aquatech Pool, Inc. and
Aquaguardian Insurance Company

BEFORE: WHIPPLE, WELCH, AND HUGHES, JJ.

*Welch Jr. agreeing in part and dissenting in part
with reasons assigned.*

HUGHES, J.

This is an appeal from a judgment in an automobile accident case, contesting the amount of damages awarded. For the reasons that follow, we amend the trial court judgment and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On April 21, 2006 seventy-year-old Robert Barry was a passenger in a 1999 Toyota Camry driving on Siegen Lane in Baton Rouge when the vehicle was rear-ended by a 1997 Ford F-310 truck driven by Frank Lacour, who was in the course and scope of his employment with Ewing Aquatech Pool, Inc. (Ewing Aquatech) at the time of the accident.

Mr. Barry filed the instant lawsuit seeking compensation for injuries he sustained in the accident, naming as defendants Mr. Lacour, Ewing Aquatech, and their insurer, Aquaguardian Insurance Company. Following a bench trial held August 26, 2008, judgment was rendered in favor of Mr. Barry and against the defendants, awarding him \$100,031.58 in total damages (\$20,031.58 in special damages and \$80,000.00 in general damages), all court costs, and judicial interest.

Defendants appeal this judgment, urging that the trial court erred: (1) in finding that the plaintiff's left shoulder pain and subsequent surgery were related to the subject accident, and (2) in awarding medical special damages for weight loss treatment unsupported by medical evidence.

Mr. Barry has filed an answer to the appeal seeking: (1) an increase in the amount of damages and medical expenses awarded from \$100,031.58 to \$144,306.69, and (2) an award of costs of the trial court and also of this appellate

court.¹

DISCUSSION

The only issues presented in this appeal are related to the damages awarded to Robert Barry. In making the award of damages in this case, the trial judge gave the following oral reasons for judgment:

This is an April 21, 2006 accident where Mr. Barry was a guest passenger in a vehicle that was struck by Mr. Lacour, who was in the act of, it was part of his employment, and liability is not an issue, a hundred percent liability to the defendant.

The issue really is twofold, best I can tell. One is whether the low back injury is a new injury or an aggravation of a preexisting injury, and whether or not the left shoulder injury and subsequent [arthroscopic] surgery is caused by -- whether there's causation with this accident.

As far as the lower back is concerned, the best I can tell from the meds that I've looked at and the discussion today, it's an aggravation of a preexisting condition. That aggravation though I think is -- I'm going to assign a pain and suffering value of fifteen thousand dollars to [sic]. It was significant enough to cause a good deal of discomfort and continuing discomfort.

As far as the right shoulder is concerned, there's a tear in the right shoulder. There's an injection involved to help resolve that. That is directly related to the accident by Dr. Field. I will assign fifteen thousand dollars for that injury.

The left shoulder, while I think it's somewhere around page thirty-one of Dr. Field's deposition, he says that it's difficult for him to relate causation to the accident for the left shoulder. He then goes on throughout the remainder of the deposition to discuss overuse of one side because of injury to the other, which in fact ends up being related to the accident in that it would not have occurred had not the accident caused disability to the right side. I believe that does establish causation for the left side injury, and I'm going to assign thirty thousand dollars to the left shoulder injury, for a total pain and suffering of sixty thousand dollars.

The meds therefore all fall in line at twenty thousand thirty-one dollars and fifty-eight cents.

¹ In his answer, Mr. Barry asserted:

1.

[Robert Barry] is aggrieved by the amount of damages awarded in the Judgment.

2.

[Robert Barry] seeks the increase of the award for damages to his back from \$15,000.00 to \$25,000.00; an increase in the amount of damages assigned for injury to the right shoulder from \$15,000.00 to \$25,000.00 and an injury to his left shoulder from \$30,000.00 to \$50,000.00.

3.

Payment of medical expenses for medically prescribed weight loss program to help resolve[] injuries to his back in the amount of \$4,275.11 which was introduced into the record but apparently overlooked by the court when assigning damages for medical expenses incurred. This would increas[e] the award for medical expenses from \$20,031.58 to \$24,306.69.

It was a significant change in this gentleman's quality of life and his enjoyment of life. I'll assign twenty thousand dollars as damages associated with loss of quality of enjoyment of life.

If I do my math right, which I don't always do, it's a total award of one hundred thousand thirty-one dollars and fifty-eight cents.

Again, the back is assigned fifteen thousand; right shoulder, fifteen thousand; left shoulder, thirty thousand; loss of enjoyment of life, twenty thousand; plus the requested meds. Interest to run from the date of judicial demand. All costs assessed against the defendant.

Inherent in the decision of the trial court are findings of fact: that Mr. Barry's low back, left and right shoulder injuries were caused and/or aggravated by the automobile accident at issue; and that the requested medical expenses were related to the accident.

A court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The supreme court has announced a two-part test for the reversal of a factfinder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Stobart v. State, through Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). See also **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Thus, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Stobart v. State, through Department of Transportation and Development**, 617 So.2d at 882. Where factual findings are based on determinations regarding the credibility of witnesses, the trier of fact's findings demand great deference. **Boudreaux v. Jeff**, 2003-1932, p. 9 (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 671; **Secret Cove, L.L.C. v. Thomas**, 2002-2498, pp. 6-7 (La. App. 1 Cir. 11/7/03), 862 So.2d 1010, 1016, writ denied, 2004-0447 (La. 4/2/04), 869 So.2d 889. Even

though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. **Rosell v. ESCO**, 549 So.2d at 844. A review of the evidence presented in the instant case reveals a reasonable factual basis for the rulings of the trial court.

At the time of the April 21, 2006 accident, the car in which Mr. Barry was riding was stopped at a stop sign, when the vehicle driven by Mr. Lacour ran into the back of it, causing extensive damage to the rear of the car, extending even to the golf clubs that were in the trunk. Mr. Barry reported to the investigating officer that his shoulder and lower back were hurting. Although he did not seek medical treatment on the day of the accident, he went to the emergency room the next morning; he was given pain medication and referred to an orthopedic surgeon.

Mr. Barry first saw orthopedist Dr. Jorge Isaza on May 8, 2006, reporting low back and right shoulder pain; physical therapy was prescribed. Mr. Barry testified that he went to physical therapy for approximately six weeks, but obtained no significant relief. (Medical records introduced into evidence show Mr. Barry received physical therapy on May 10th, 12th, 15th, 18th, 22nd, 24th, 26th, 31st, and on June 2nd, 5th, 7th, and 9th.

Mr. Barry next saw Dr. Isaza on June 15, 2006, continuing to complain of back and shoulder pain. Dr. Isaza ordered an M.R.I., which was conducted on June 21, 2006, and revealed: minor multi-level disc bulging at L3-4 through L5-S1; a questionable tiny annular tear at L4-5; mild to moderate facet arthrosis at L3-4 through L5-S1 with prominent effusions within the L3-4 facet joints; and mild left neural foraminal narrowing at the L4-5 level. Thereafter, Dr. Isaza referred Mr. Barry to Dr. Gray Barrow for facet injections in his low back and ordered an M.R.I. of his right shoulder.

With respect to his back injury, Mr. Barry testified that his primary care provider, Dr. H. Kean Day, Jr., recommended he lose weight to obtain some relief from his back pain. To accomplish this, Mr. Barry underwent a weight loss program at Baton Rouge Gastroenterology Clinic and lost fifty-three pounds. Mr. Barry testified that losing weight helped his back problem. Mr. Barry further acknowledged that he had had back problems prior to the time of this accident.

Regarding his right shoulder, an M.R.I. showed an "articular surface tear of the distal anterior insertion of the supraspinatus." For treatment of this injury, Mr. Barry was referred to Dr. Mark Field. Dr. Field administered cortisone and lidocaine injections in Mr. Barry's right shoulder, which Mr. Barry stated provided him with temporary pain relief.

Mr. Barry also testified that although his left shoulder did not hurt immediately after the accident, he began to experience pain with that shoulder as well, stating as follows:

My left shoulder, it was kind of a gradual progression of being hurt. It would hurt a little bit but not enough to complain about, you know. As time went on and I saw Dr. Field more, I did mention to Dr. Field, you know, that my left shoulder was hurting about the same amount as my right shoulder, and then finally, my left shoulder was hurting an awful lot more, and they did an MRI on my left shoulder which showed, you know, a tear in my left shoulder, and it was very, very painful, and anyway, he decided to operate on my left shoulder.

Mr. Barry testified that he had never had any pain or problems with either of his shoulders prior to this accident and that he had not sustained any other injury to his shoulders. Mr. Barry did not recall exactly when he first mentioned having pain in his left shoulder to Dr. Field, but stated, "I didn't mention the pain when it was barely hurting, but then it got worse and then sure enough there was a tear in it."

Dr. Field first recorded Mr. Barry's complaints of pain in his left shoulder on October 10, 2006. However, Dr. Field admitted that he was not the first doctor Mr. Barry saw and that he did not really know when Mr. Barry complained of pain in

his left shoulder for the first time. Dr. Field further stated that sometimes when a patient hurts one arm, he may overuse the other arm and so injure it as well, and he felt this was probably what happened to Mr. Barry. However, because his examination of Mr. Barry in August of 2006 did not reveal symptoms in his left shoulder, Dr. Field had difficulty relating the left shoulder injury to the instant accident.

Although a steroid injection gave Mr. Barry temporary relief from the pain in his left shoulder, arthroscopic surgery was later recommended and performed by Dr. Field on April 5, 2007. Mr. Barry testified that it took five to six months for him to fully recover from the surgery.

Mr. Barry testified that the injuries he sustained in the automobile accident caused changes in his lifestyle. He testified that he is an avid LSU fan and has attended some 250 LSU games, but that his injuries prevented him from attending games because the walking and standing required hurt his back. He also testified that his injuries affected his ability to play golf and do his own shopping. Mr. Barry stated that he also avoided attending parties because standing was painful to his back. Although his back and left shoulder pain had resolved by the time of trial, Mr. Barry continued to experience problems with his right shoulder.

After a thorough review of the evidence presented in this case, we conclude a reasonable basis is presented upon which the trial court could have found the injuries complained of and medical expenses incurred were related to the accident at issue. We are unable to say the trial court manifestly erred in its factual findings.

We next address the amount of damages awarded. Mr. Barry contends that the trial court awarded him expenses incurred for medical weight loss but failed to include these expenses in the total amount of medical expenses awarded. Mr. Barry further requests this court increase the amount of general damages awarded.

In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury. LSA-C.C. art. 2324.1. On appellate review, damage awards will be disturbed only when there has been a clear abuse of that discretion. The initial inquiry must always be directed at whether the trial court's award for the particular injuries and their effects upon this particular injured person is a clear abuse of the trier of fact's much discretion. **Cole v. State, Department of Public Safety and Corrections**, 2003-2269, p. 5 (La. App. 1 Cir. 6/25/04), 886 So.2d 463, 465, writ denied, 2004-1836 (La. 10/29/04), 885 So.2d 589.

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. 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. **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). Only after making a finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which is reasonably within the discretion afforded that court. **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1977).

Our review of the award made for general damages in this case does not reveal any abuse of discretion on the part of the trial court, and we are therefore unable to disturb the amount awarded. Our review of the amount of medical expenses awarded does indicate that the expenses for medical weight loss treatment were included; however, a mathematical error was made. The trial court

calculated the total amount of medical expenses to be \$20,031.58, while the medical bills introduced into evidence actually add up to \$21,417.72.² Therefore, we amend the amount of special damages (medical bills) from \$20,031.58 to \$21,417.72.

CONCLUSION

For the reasons assigned, the judgment of the trial court is amended, and affirmed as amended; each party is to bear his own expenses of this appeal.

AMENDED; AFFIRMED AS AMENDED.

² In this amount we have included expenses related to procuring the records for trial of the Baton Rouge Orthopedic Clinic (\$60.99), the Baton Rouge Clinic (\$51.81), and the Surgical Specialty Centre (\$64.32).

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

 Although I agree with the majority opinion with respect to most of the issues raised by the parties on appeal, I believe that the trial court's factual finding that Mr. Barry's left shoulder injury was caused by the automobile accident at issue is manifestly erroneous. In a personal injury suit, the plaintiff bears the burden of proving a causal relationship between the accident and the injuries complained of. **American Motorist Ins. Co. v. American Rent-All, Inc.**, 579 So.2d 429, 433 (La. 1991). The plaintiff must prove causation by a preponderance of the evidence. **Maranto v. Goodyear Tire & Rubber Co.**, 94-2603, 94-2615 (La. 2/20/95), 650 So.2d 757, 759. The test for proving the causal relationship between the accident and the subsequent injury is whether the plaintiff proved, through medical testimony, that it is more probable than not that the injuries were caused by the accident. *Id.* It follows that speculation, conjecture, mere possibility, and even unsupported probabilities are not sufficient to prove a plaintiff's claim. **Hebert v. Rapides Parish Police Jury**, 2006-2001, 2006-2164, p. 8 (La. 4/11/07), 974 So.2d 635, 642.

The evidence offered by the plaintiff with regard to the causal relationship between the accident and his left shoulder injury consisted of his own testimony and the deposition testimony of his treating physician, Dr. Field.

According to Mr. Barry, he never had any kind of shoulder pain before the accident. He explained that the pain in his left shoulder was a "gradual progression," and that after the accident, it "hurt a little bit[,] but not enough to

complain about it.” As time went by and his left shoulder began hurting as much as his right shoulder, Mr. Barry mentioned the left shoulder pain to Dr. Field. Mr. Barry explained that eventually, his left shoulder was hurting more than his right shoulder, a tear was discovered in it, and Dr. Field decided to operate on that shoulder.

Dr. Field opined that while he believed Mr. Barry’s right shoulder injury was related to the automobile accident, it was difficult for him to relate Mr. Barry’s left shoulder injury to the accident given the amount of time—more than four months—that had elapsed between the accident and the time Mr. Barry made his initial complaint about left shoulder pain and given that the initial complaint of left shoulder pain occurred when Mr. Barry’s right shoulder began feeling better.

In determining that the left shoulder injury was caused by the accident, the trial court, while noting the difficulty Dr. Field had relating that injury to the accident, found that because Dr. Field had discussed in his deposition the possibility that the overuse of one shoulder, while the other shoulder is injured, could cause injury to that shoulder, that Mr. Barry’s left shoulder injury would not have occurred had the accident not caused his right shoulder injury, thereby establishing causal relationship. However, the mere *possibility* that overuse of the left shoulder while the right shoulder was injured caused the left shoulder injury is not the equivalent of medical testimony establishing that it was more probable than not that the left shoulder injury was caused by the accident. Therefore, this evidence is insufficient to discharge the plaintiff’s burden of proving causation. Furthermore, in Dr. Field’s deposition, he explained that in order for the left shoulder injury to be related to overuse, the left shoulder pain should have presented itself when Mr. Barry’s right arm was hurting, causing him to use the left arm more than the right arm. Dr. Field further testified that Mr. Barry made his

initial complaint about left shoulder pain when his right shoulder began feeling better. Thus, any reasonable possibility that the left shoulder injury occurred due to overuse of the left arm while the right arm was hurting was directly refuted by the timing of Mr. Barry's initial complaint to Dr. Field of pain in his left shoulder.

Based on the evidence in the record, no trier of fact could reasonably conclude that the problems Mr. Barry experienced with his left shoulder more than four months after the accident were caused by that accident. Therefore, I would amend the judgment to eliminate the award of \$30,000 in general damages and any special damages relating to Mr. Barry's left shoulder injury.

Thus, I respectfully dissent in part.