NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 0241

TODD SUPRUN

VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY,
STAN WILLIAMS AS ADMINISTRATOR OF THE ESTATE OF
HIS MINOR CHILD, CHAD M. WILLIAMS,
CHAD M. WILLIAMS, AND
GOVERNMENT EMPLOYEES INSURANCE COMPANY

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Judgment rendered: SEP 12 2008

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On appeal from the 19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Number 512,114
The Honorable Kay Bates, Judge Presiding

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BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Downing, J. specially concurs.
Kuhn, J. concurs and assigns reasons.

DOWNING, J.

This is an appeal by the plaintiff, Todd Suprun, of a judgment in his favor awarding him damages for injuries sustained as a result of his being a victim of a rear-end automobile accident. Although the plaintiff underwent back surgery to remove an extruded disc fragment and incurred over $30,000 in medical expenses, the jury awarded only a little over $10,000 for the medical expenses, $800 for past lost wages, $5,000 for past and future physical pain and suffering, and declined to make an award for past and future mental anguish or loss of enjoyment of life. Mr. Suprun assigns error to the awards, arguing on appeal that the record supports a much greater award in all categories. Mr. Suprun also assigns error to an evidentiary ruling by the trial court, which he maintains entitles him to a *de novo* review on appeal. As discussed below, we reject Mr. Suprun's argument that the trial court erred in its evidentiary ruling such that *de novo* review is warranted. After a thorough review of the record under the appropriate standards of review, we conclude there is a rational basis in the record for the jury's decision to award less than the full amounts claimed by the plaintiff. Accordingly, we affirm.[1]

BACKGROUND FACTS

On December 7, 2002, Mr. Suprun was stopped at a red light in his full-size Chevrolet pickup truck. A Lincoln Town Car, driven by defendant, Chad Williams, was slowing down in the same lane approaching the red light and Mr.

[1] Plaintiff also assigned error to the trial court's denial of his motion for judgment notwithstanding the verdict and alternative motion for a new trial. However, given that we find the jury's verdict was not manifestly erroneous or clearly wrong, we pretermit as moot any discussion of the propriety of the jury's verdict under the stricter standard applicable to the motion for JNOV. See **Scarbrough v. O.K. Guard Dogs**, 03-1243, 03-1244, p. 13 (La. App. 1st Cir. 5/14/04), 879 So.2d 239, 249, *writ denied,* 04-1440 (La. 9/24/04), 882 So.2d 1127. Moreover, the denial of a motion for new trial is an interlocutory and non-appealable judgment. By 2005 La. Acts No. 205, effective January 1, 2006, La. C.C.P. art. 2083 was amended to provide that interlocutory judgments that "may cause irreparable harm" are now appealable only when expressly provided by law. Thus, the denial of a new trial is not appealable. The Louisiana Supreme Court, however, has instructed us to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits; thus, we limit our review to the assignments of error related to the merits. **McKee v. Wal-Mart Stores, Inc.**, 06-1672, pp. 7-8 (La. App. 1st Cir. 6/8/07), 964 So.2d 1008, 1013, *writ denied*, 07-1655 (La. 10/26/07), 966 So.2d 583.

Suprun's truck. Mr. Williams admitted that he glanced down to turn down the radio when his grandmother, who was a passenger in the back seat, alerted him that there was a truck stopped ahead. Although Mr. Williams immediately hit the brakes, he was unable to avoid impacting the back of Mr. Suprun's truck, which was still stopped at the red light. The record reveals this accident was a low-impact, low-speed, rear-end collision resulting in very minor property damage to both vehicles. Additionally, all of the witnesses, namely, the two drivers and Chad Williams' grandparents, who were passengers in the Lincoln, testified that they were all wearing their seatbelts and that the impact did not substantially jar or move either vehicle. Although at the scene of the accident Mr. Suprun denied being injured, he testified that he began experiencing headaches and neck pain almost immediately following the accident. Almost one month later, on January 8, 2003, he first sought medical treatment for his injury from Dr. Ned Martello, a chiropractor whose office was near his home.

When the chiropractic treatment did not alleviate all of Mr. Suprun's symptoms, he was referred to Dr. Wahid, at an urgent care clinic, who examined him and prescribed pain medication and muscle relaxants. On February 13, 2003, Mr. Suprun consulted with Dr. F. Allen Johnston, an orthopedic surgeon, with complaints of neck and back pain. Dr. Johnston took x-rays, prescribed pain medications and muscle relaxants, and referred Mr. Suprun to physical therapy. The therapy provided some help but did not alleviate the pain. On May 14, 2003, Dr. Johnston ordered an MRI, which revealed a bulging or herniated cervical disc at C6-7 and bulging or herniated lumbar discs at L4-5 and L5-S1. On May 21, 2003, Mr. Suprun reported that he was feeling much better and capable of taking a more sedentary job than he had previously. On May 22, 2003, Dr. Johnston

released him to work this new job without limitations. Mr. Suprun did not seek any other medical treatment until approximately ten months later.

In February 2004, Mr. Suprun underwent an independent medical examination (IME) by Dr. Kilroy at the request of defendant, Louisiana Farm Bureau Mutual Insurance Company (Farm Bureau). Dr. Kilroy issued an IME report recommending a myelogram to determine the extent of the injury causing Mr. Suprun's continued back pain. This recommended test was never performed.

On March 6, 2004, Mr. Suprun was involved in another automobile accident. On March 13, 2004, one week *following the second motor vehicle accident,* Mr. Suprun sought medical treatment from a Lake After Hours facility, relating that three days after the March 6, 2004 accident, he was having sex with his wife and felt a "pop" in his lower back, followed by immediate numbness in his right lower back, buttocks, groin, and down his right leg. At Lake After Hours, Mr. Suprun reported that the onset of those symptoms occurred just a few days prior to his visit to the clinic, and on an intake questionnaire, he responded with a question mark to the inquiry whether his complaints were related to an accident. An MRI performed at this time revealed, for the first time, the presence of a large extruded disc fragment impinging on the S1 nerve root, and immediate surgery was recommended. Mr. Suprun underwent surgery on April 7, 2004, after obtaining a second opinion from doctors in Houston, Texas. This litigation followed.

Mr. Suprun assigns error on appeal to all of the awards and also raises an issue regarding an evidentiary ruling. Because a finding of an evidentiary error may affect the applicable standard of review, in that this court must conduct a *de novo* review if the trial court commits an evidentiary error that interdicts the fact-finding process, alleged evidentiary errors must be addressed first on appeal.

Devall v. Baton Rouge Fire Department, 07-0156, p. 3 (La. App. 1st Cir. 11/2/07), 979 So.2d 500, 502.

STANDARD OF REVIEW

Initially, the standard of review for evidentiary rulings of a trial court is abuse of discretion; the trial court's ruling will not be disturbed unless it is clearly erroneous. **Devall**, 07-0156 at p. 4, 979 So.2d at 503; *see also* **Brandt v. Engle**, 00-3416, p. 10 (La. 6/29/01), 791 So.2d 614, 620. If the trial court has abused its discretion in its evidentiary rulings, *such that the jury verdict is tainted* by the errors, the appellate court should conduct a *de novo* review. See **McLean v. Hunter**, 495 So.2d 1298, 1304 (La. 1986). Errors are prejudicial when they materially affect the outcome of the trial and deprive a party of substantial rights. **Evans v. Lungrin**, 97-0541, pp. 6-7 (La. 2/6/98), 708 So.2d 731, 735. Thus, a *de novo* review should not be undertaken for every evidentiary exclusion error but should be limited to errors that interdict the fact-finding process. **Wingfield v. State, Department of Transportation and Development**, 01-2668, p. 15 (La. App. 1st Cir. 11/8/02), 835 So.2d 785, 799, writs denied, 03-0313, 03-0339, 03-0349 (La. 5/30/03), 845 So.2d 1059-60, cert.denied, 540 So.2d 950, 124 S.Ct. 419, 157 L.Ed.2d 282 (2003).

If a *de novo* review is not warranted by the nature of the error, the jury's factual findings are reviewed under the manifest error/clearly wrong standard of review. To reverse a jury's findings under this standard, we must find from the record that a reasonable factual basis does not exist for the finding and, further, that the finding is clearly wrong. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Moreover, our jurisprudence has consistently held that in the assessment of damages, much discretion is left to the jury, and upon appellate review, such

awards will be disturbed only when there has been a clear abuse of that discretion. **Thibodeaux v. Allstate Insurance Co.**, 625 So.2d 1337, 1340 (La. 1993).

LIMITATION OF CHIROPRACTOR'S TESTIMONY

The plaintiff asserts the trial court erred in limiting the testimony of his treating chiropractor, Dr. Ned Martello, by refusing to allow him to discuss the causative element of Mr. Suprun's disc problems or to permit him to review and provide testimony regarding Mr. Suprun's MRI results. The plaintiff claims that had Dr. Martello's testimony not been so limited by the trial court, it would have corroborated the testimony of Dr. Johnston, giving the jury the testimony of *two* healthcare providers linking Mr. Suprun's disc fragment and the resulting need for surgery to the original L5-S1 disc injury to the December 7, 2002 accident underlying this suit. Thus, plaintiff argues, the trial court's error was prejudicial and so tainted the jury's verdict that a *de novo* review by this court is warranted.

We do not agree. A majority of this panel finds that the trial court did not abuse its discretion in limiting the testimony of Dr. Martello, as the purported expert testimony regarding causation and interpretations of diagnostic testing, such as MRIs, are not within the normal scope of matters appropriately within the level of expertise held by a chiropractor.[2] In this case, nothing in the testimony of Dr, Martello indicated that he had any special training necessary to interpret tests such as Mr. Suprun's MRI. Thus, it appears the trial court was well within its discretion in limiting the testimony of Dr. Martello to those areas normally within the scope of his expertise.

[2] For the reasons detailed in the concurring opinion that follows, the writer of this opinion is of the view that the trial court *did* abuse its discretion in limiting the chiropractor's testimony. However, because this writer also concedes that, although an abuse of discretion, the trial court's evidentiary ruling did not so taint the jury's fact-finding process or interdict the verdict such that a *de novo* review is warranted; the error was harmless, and the ultimate result in this matter is the same.

Moreover, *even if we agreed* with the plaintiff that the trial court erred in limiting Dr. Martello's testimony, we would not disturb the jury's verdict by conducting a *de novo* review, given the extensive and inconsistent testimony about causation, diagnostic testing results, and recommended treatment. The testimony excluded by the trial court was merely cumulative and corroborative of evidence presented by other medical experts regarding causation, the need for surgery, and the interpretation of his diagnostic tests. Thus, we cannot conclude that the verdict was so tainted by the trial court's restriction of Dr. Martello's testimony to warrant a *de novo* review. See **Menard v. Audubon Insurance Group**, 06-1192, p. 8 (La. App. 3rd Cir. 3/14/07), 953 So.2d 187, 192.

ANALYSIS

We now review the plaintiff's remaining assignments of error under the applicable manifest error and abuse of discretion standards of review. As noted earlier, to reverse a jury's findings under the manifest error standard, we must find from the record that a reasonable factual basis does not exist for the finding and, further, that the finding is clearly wrong. **Rosell**, 549 So.2d at 844. In addition, much discretion is left to the jury in the assessment of damages, and such awards will only by disturbed by an appellate court when there has been a clear abuse of that discretion. See **Thibodeaux**, 625 So.2d at 1340.

The plaintiff asserts five separate assignments of error, each pertaining to the inadequacy of a particular award of damages. A careful review of the record reveals that the jury's awards were made not solely on a quantum basis, but rather hinged greatly on the jury's factual determinations regarding causation. Thus, instead of reviewing each separate item of damage for the appropriateness of each

amount, we will discuss and resolve all five assignments together in determining if the jury's verdict was manifestly erroneous and/or an abuse of discretion.

The evidence in the record relating to causation is inconsistent, variant, and disputed. Thus, the jury's conclusions were based on credibility determinations and the weight given to the evidence. The record contains ample evidence (i.e., a reasonable factual basis) from which the jury reasonably could have found that the plaintiff failed to prove that the full extent of his symptoms and injuries and the need for surgery were caused solely by the accident that occurred on December 7, 2002. The record contains many inconsistencies among the testimony of the witnesses, including the expert healthcare providers, regarding the extent of Mr. Suprun's injuries after the December accident, the duration of those injuries, and the cause of the injury that ultimately required surgery. These inconsistencies required the fact-finder to make credibility determinations and weigh the evidence to determine the issue of causation.[3] The record also reflects the plaintiff was released to work, and there was an approximate ten-month gap in medical treatment. Moreover, there was an intervening accident and another subsequent incident, after which the symptoms necessitating surgery surfaced and became problematic.

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[3]For example, a notation in the medical records of Dr. Martello dated January 29, 2003, reveals that Mr. Suprun reported that he had bent down at work and felt a "catch" in his lower back; prior to this alleged incident at work, Mr. Suprun's complaints were limited to neck and upper back pain. In fact, there is no documented complaint in Mr. Suprun's medical records of lower back pain until after he reported the January 2003 incident that occurred at work. The majority of Mr. Suprun's symptoms, for which he claimed an award for mental anguish, were related to sexual difficulty and dysfunction he claimed to have suffered as a result of the December accident. Again, however, on cross examination he admitted that the problems with his sexual relationship with his wife did not surface until after the March 2004 incident when he heard and felt a "pop" in his back, followed by numbness in the entire area.

The medical testimony also was inconclusive on the causation of Mr. Suprun's extruded disc fragment, which undisputedly, necessitated the surgery. Drs. Kilroy and Landreneau testified that the disc fragment injury was an independent and separate injury from the bulging discs that resulted after the December 2002 accident. Specifically, they testified that the disc fragment was not a progressive injury, but rather a sudden and emergent situation. Orthopedic surgeon, Dr. Johnston, who had treated Mr. Suprun only for the bulging discs and discontinued treatment in June 2003, on the other hand opined that the bulging disc injury caused by the December 2002 accident may well have started the chain of events that ultimately resulted in the need for Mr. Suprun's back surgery. However, given that Dr. Johnston had not treated Mr. Suprun for the lower back symptoms that arose after the March 6, 2004 accident, of which he was not aware until just prior to trial, he admitted that he would have to defer to Dr. Landreneau regarding Mr. Suprun's diagnosis, condition, and need for surgery.

The foregoing summary of the evidence in the record clearly provides a reasonable factual basis for the jury's verdict awarding less than all of the damages claimed. The jury could well have found that the accident at issue herein simply caused bulging discs to become symptomatic and that those symptoms were of a temporary duration.[4] There are ample inconsistencies in the testimony of the plaintiff to raise issues of credibility that were to be determined by the jury. Moreover, there is evidence in the record of a subsequent intervening accident, after which the more severe symptoms that ultimately necessitated surgery arose. Because there is a very reasonable basis in the record to support the jury's finding that, as a result of the December accident, Mr. Suprun suffered moderate symptoms, temporary in nature, that had completely resolved when he was discharged in June, the award made by the jury was not an abuse of discretion correlative to this factual finding. Given the evidence in the record of a reported subsequent incident at work, after which new symptoms surfaced, a subsequent automobile accident, and the incident of having his back "pop" during sex with his wife just three days after the second accident, we simply cannot say the jury was clearly wrong in finding not all of the injuries claimed were caused by the accident at issue herein, and the awarding of amounts less than the total amounts claimed was not an abuse of discretion. Therefore, we reject appellant's claims that the jury committed manifest error in its determination of the extent of the injuries caused by the December 7, 2002 accident. Moreover, we do not find that the jury's awards, based on its determination of the extent of the injuries caused by the accident at issue herein, were an abuse of discretion.

[4] Notably, although the medical evidence is undisputed that tests revealed the existence of two bulging discs in Mr. Suprun's back, this medical evidence did not establish that the bulging discs were caused by the accident; rather, the evidence only proved that they became symptomatic after the accident.

CONCLUSION

Accordingly, the judgment of the trial court is affirmed. Mr. Suprun is assessed all costs of this appeal.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008-0241

TODD SUPRUN

VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY,
STAN WILLIAMS AS ADMINISTRATOR OF THE ESTATE OF
HIS MINOR CHILD, CHAD M. WILLIAMS,
CHAD M. WILLIAMS, AND
GOVERNMENT EMPLOYEES INSURANCE COMPANY

* *

DOWNING, J., concurring.

For the reasons that follow, I am of the opinion that the trial court in this matter did, indeed, abuse its discretion in limiting the testimony of Dr. Martello, finding that testimony should have included his opinion regarding causation of Mr. Suprun's injuries as well as his interpretation of Mr. Suprun's diagnostic tests. However, because I also find the error did not taint the jury's verdict, for the reasons given in the majority opinion, I agree a *de novo* review is not warranted, and, under the appropriate manifest error standard of review, the decision should be affirmed.

Menard v. Audubon Insurance Group, 06-1192 (La. App. 3rd Cir. 3/14/07), 953 So.2d 187, is the only reported Louisiana case that addresses the appropriate extent and admissibility of a chiropractor's testimony. As in this case, the plaintiff in **Menard** assigned error to the trial court's "improperly limiting the testimony of her treating chiropractor by refusing to allow him to discuss the causal relationship between her injuries and the accident, the need for future

chiropractic care, and the diagnostic studies that were performed." **Menard**, 06-1192 at pp. 5-6, 953 So.2d at 190. Also as in the case before us, the plaintiff in **Menard** argued the error required a *de novo* review on appeal. The third circuit, noting the absence of relevant jurisprudence in Louisiana, turned for guidance to the limited treatment of the issue in other jurisdictions. In particular, the court cited a Mississippi case that held that a chiropractor is qualified to render an opinion regarding the diagnosis, causation, and prognosis of injury, and that the taking and interpretation of x-rays is within the scope of chiropractic practice. See **Miss. Farm Bureau Mut. Ins. Co. v. Garrett**, 487 So.2d 1320, 1327 (Miss. 1986). The third circuit also cited **Hodder v. United States**, 328 F.Supp.2d 335, 347 (E.D.N.Y. 2004), a case citing authority for the principle that chiropractors are deemed competent expert witnesses testifying on the nature of the ailment and causation. The third circuit, without expressly stating that the trial court erred in restricting the testimony of the chiropractor, held that a *de novo* review was not warranted because of the extensive testimony about causation, recommended treatment, and diagnostic studies from other healthcare providers that was contained in the record, even without the chiropractor's testimony regarding the same.

I am in agreement with the opinion in **Menard** and the cases cited therein and conclude that the trial court should not have so restricted Dr. Martello's testimony in this case. It has been consistently held that there is no abuse of discretion in allowing a chiropractor to testify in a personal injury action, where a proper foundation is laid and the matter is within the scope of the profession and practice of chiropractic. **Carvell v. Winn**, 154 So.2d 788, 790 (La. App. 3rd Cir. 1963), *writ refused*, 245 La. 61, 156 So.2d 603 (1963), *citing* Annotation,

'Chiropractor's Competency as expert in personal injury action,' 52 A.L.R.2d 1385; 32 C.J.S. Evidence § 537, p. 265. Louisiana law provides a definition of the "practice of chiropractic" that I think further supports a finding that Dr. Martello was qualified and should have been allowed to testify to causation and diagnostic tests and results as Mr. Suprun's treating physician. The practice of chiropractic is defined as "being engaged in the business of ... the *diagnosing of conditions associated with the functional integrity of the spine* and treating by adjustment, manipulation, and the use of the physical and the other properties of heat, light, water, electricity, sound, massage, therapeutic exercise, mobilization, mechanical devices, and other physical rehabilitation measures for the purpose of correcting interference with normal nerve transmission and expression.... A chiropractor *may also order such diagnostic tests as are necessary for determining conditions associated with the functional integrity of the spine.*" La. R.S. 37:2801(3)(a) (Emphasis added.) Moreover, La. R.S. 37:2817 specifically entitles licensed chiropractors to utilize x-ray procedures. While chiropractors may not directly perform or administer other diagnostic tests, La. R.S. 37:2801(3)(b)(i) specifically provides that nothing shall be construed to prohibit a chiropractor from ordering such diagnostic procedures when deemed necessary by the chiropractor.

Therefore, although not a medical doctor, the chiropractor in this case was the plaintiff's treating physician from whom he sought treatment initially after the accident. Pursuant to La. C.E. art. 702, Dr. Martello's opinion testimony, based on scientific and specialized knowledge that would assist the trier of fact to understand the plaintiff's injuries, the extent thereof, and their causation, should have been allowed. Additionally, he should have been allowed to testify as to his opinion regarding the interpretation of the diagnostic tests given the plaintiff. He

is allowed by law to order such diagnostic tests and, therefore, should be allowed to provide opinion testimony regarding the results and implications thereof.

Accordingly, I am of the opinion that the trial court abused its discretion in limiting the testimony of Dr. Martello in this case. However, for the reasons stated in the majority opinion, such error in this case was harmless.

TODD SUPRUN **FIRST CIRCUIT**

VERSUS **COURT OF APPEAL**

LOUISIANA FARM BUREAU MUTUAL INSURANCE COMPANY, STAN WILLIAMS AS ADMINISTRATOR OF THE ESTATE OF HIS MINOR CHILD, CHAD M. WILLIAMS, CHAD M. WILLIAMS, AND GOVERNMENT EMPLOYEES INSURANCE COMPANY **STATE OF LOUISIANA**

NO. 2007 CA 0925

KUHN, J., concurring.

I concur to point out that the opinion in footnote two points out the failure to allow Dr. Martello to testify further was harmless error, yet in the body concludes there was no abuse of discretion. Since both approaches resolve this assignment of error, further discussion of the assignment of error is unnecessary. The law is well settled that chiropractors are licensed in Louisiana and testify as experts within our courts. Discussion of the law in this regard seems to call these basic legal precepts into question. Expert testimony is admitted by the trial court to assist in the decision-making process. The ultimate decision regarding which testimony is helpful rests with the trial court.