

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1467

ANGELA BRIGNAC

VERSUS

LOUISIANA FARM BUREAU INSURANCE
AGENCY, INC. AND BRIAN MUMPHREY

Judgment Rendered: **SEP 07 2011**

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of West Baton Rouge, Louisiana
Trial Court Number 36,536

Honorable Alvin Batiste, Jr., Judge

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**BEFORE: CARTER, C.J., PETTIGREW, GAIDRY, McCLENDON
AND WELCH, JJ.**

*Carter CJ dissents for reasons assigned
by Judge Welch
Welch, J. dissents with reasons assigned*

GAIDRY, J.

Plaintiff, Angela Brignac, appeals a judgment awarding her damages against defendants, Louisiana Farm Bureau Insurance Agency, Inc. (Farm Bureau), and its insured, Brian Mumphrey, as well as the dismissal of her claims against her uninsured motorist carrier, USAgencies Casualty Insurance Company, (USAgencies). We affirm.

BACKGROUND

On August 25, 2006 at approximately 5:30 a.m., Ms. Brignac was stopped at the menu board in a McDonald's drive-through ordering breakfast when her vehicle was struck from the rear by a truck operated by Brian Mumphrey. Mr. Mumphrey had stopped his vehicle in the drive-through line behind Ms. Brignac and reached down to pick up his wallet from the floor, when his foot slipped off of the brake. Once he realized his vehicle was rolling forward, he put his foot back on the brake, but his vehicle still tapped the rear of Ms. Brignac's vehicle. The police were not called to the accident scene; Ms. Brignac and Mr. Mumphrey moved their vehicles from the drive-through line, exchanged information, then got their food and left. They did not inspect the vehicles for damage. After Ms. Brignac went home and discussed the accident with her boyfriend, they called the police to report the accident and Ms. Brignac went to the hospital to be examined.

Ms. Brignac filed this lawsuit against Mr. Mumphrey and Farm Bureau, Mr. Mumphrey's liability insurer. In her petition, filed on August 24, 2007, Ms. Brignac alleged that she sustained injuries to her right shoulder, back, neck, head, mouth, teeth, and jaw as a result of the collision. She later amended her petition to add her uninsured motorist carrier, USAgencies, as a defendant.

Following the presentation of the evidence, the trial court awarded Ms. Brignac damages for past medical expenses for treatment for her jaw injury in the amount of \$3,586.55 and general damages in the amount of \$6,000.00. The court

denied Ms. Brignac's claim for past and future medical expenses for the alleged shoulder injury. Because the total damage award was less than the amount of the liability policy issued by Farm Bureau, judgment was entered dismissing all claims against USAgencies. Ms. Brignac has appealed from this judgment.

DISCUSSION

On appeal, Ms. Brignac contends that the trial court committed manifest error in failing to award past and future medical expenses associated with her right shoulder injury, in considering and emphasizing the low-impact nature of the vehicular collision in determining the extent of her damages, and in relying on the six-week delay in seeking treatment for her shoulder injury to find that the shoulder injury was not related to the accident.

In a personal injury suit, plaintiff bears the burden of proving a causal relationship between the injury sustained and the accident that caused the injury by a preponderance of the evidence. *Yohn v. Brandon*, 01-1896, p. 6 (La.App. 1 Cir. 9/27/02), 835 So.2d 580, 584, writ denied, 02-2592 (La. 12/13/02), 831 So.2d 989. The test for determining 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 subsequent injuries were caused by the accident. *Id.* Generally, the effect and weight to be given medical expert testimony is within the broad discretion of the factfinder. A tortfeasor is liable only for damages caused by his negligent act; he is not liable for damages caused by separate, independent or intervening causes. Hence, the plaintiff has the burden of proving that her injuries were not the result of such separate, independent, or intervening causes. *Yohn*, 01-1896 at p. 7, 835 So.2d at 584. The trial court's causation finding is a factual determination that may not be set aside on appeal in the absence of manifest error or unless it is clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989).

Ms. Brignac alleges that she has consistently complained of right shoulder pain from the date of the accident through the date of trial. She testified at trial that she complained of shoulder and jaw pain in the emergency room on the day of the accident. However, the shoulder complaint is not documented in the emergency room records. Neither the emergency room doctor nor the triage nurse noted any complaint of shoulder pain on the date of the accident. The emergency room records show that Ms. Brignac reported to the emergency room several hours after the accident complaining only of pain/injuries to her face, chest, and right leg. “Shoulder” was not circled on the Emergency Physician Record MVA form, and the physician noted on the form that she had normal range of motion in her neck and extremities. Tenderness was noted in her clavicle on examination. X-rays were taken of her clavicle and mandible, both of which were negative. The x-rays did show some minimal degenerative changes in her AC joint. Ms. Brignac was discharged with instructions to follow up with her doctor in a few days if her symptoms did not improve.

The first documented complaint related to her shoulder was not until Ms. Brignac began seeing Dr. Johnston six weeks post-accident. Although Ms. Brignac testified that she spoke with her family physician, Dr. Christine Smith, regarding her shoulder injury and was told she would have to see another doctor, there is no note of this in Dr. Smith’s records.

When Ms. Brignac first went to see Dr. Johnston on October 10, 2006, she informed him that she had injured her shoulder in a car accident. She denied having any shoulder problems prior to the accident.¹ After examining her, Dr. Johnston suspected a strained rotator cuff and a cervical strain. Dr. Johnston saw Ms. Brignac on ten occasions thereafter through November 18, 2009, the day

¹ A form filled out by Ms. Brignac for a Dr. Whitfield in 2002 lists numerous complaints, including: frequent chronic joint pain, frequent back and neck pain, stiffness, headaches, head injuries, and back and neck injuries.

before giving his deposition, during which time he treated her conservatively, prescribing pain medications, physical therapy, and exercises, and he also gave Ms. Brignac cortisone injections in her shoulder. Dr. Johnston acknowledged that she was not compliant with his treatment instructions; she did not go to physical therapy as instructed, and she obtained prescriptions for narcotics from multiple doctors and filled them at multiple pharmacies in violation of their Pain Management Agreement. Although Dr. Johnston expressed an opinion that Ms. Brignac's shoulder injury was related to the automobile accident, he testified that his opinion was "based on history and what she tells me solely."

Ms. Brignac was referred to Morgan Physical Therapy by Dr. Johnston. She did not regularly attend her scheduled physical therapy appointments in October and November of 2006. At her November 10, 2006 appointment, she complained of being sore after playing with her twenty-pound toddler the day before. She did not return after this appointment and was eventually discharged for non-attendance. She returned to Morgan Physical Therapy on July 26, 2007, at which time she reported that she had been feeling better after her November 2006 appointment, but as her daughter got older and heavier and she was lifting her more and more, her right shoulder was hurting a lot. She did not show up for subsequent physical therapy appointments.

The trial court was not convinced that Ms. Brignac proved that her shoulder injury was related to the accident. After reviewing the record, we cannot say that the trial court's factual determination on the issue of causation was manifestly erroneous or clearly wrong. The trial court was faced with conflicting evidence as to whether Ms. Brignac complained of a shoulder injury prior to seeing Dr. Johnston six weeks after the accident, and made a factual finding that she did not. When faced with two conflicting views of the evidence, the court's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell*, 549 So.2d at 844.

Although Dr. Johnston opined that Ms. Brignac's shoulder injury was caused by the accident, he testified that his opinion was based solely on what Ms. Brignac told him. As the court is free to accept or reject an expert's opinion, the trial court's choice not to credit Dr. Johnston's opinion regarding causation is not error. Noting other possible causes for Ms. Brignac's shoulder injury, including repetitive lifting of her child, and considering the lapse of time between the accident and Ms. Brignac first seeking treatment for the shoulder problem, the court was not convinced that Ms. Brignac proved that her shoulder injury was related to the accident. We find no manifest error in this conclusion.

Ms. Brignac next argues that the court erred in emphasizing the low-impact nature of the accident in determining that her shoulder injury was not caused by the accident. This assignment of error is meritless. The court acknowledged that although this was a low-impact accident, the impact of the accident *does not* necessarily determine the extent of the injuries sustained. The court went on to say that because the medical testimony or evidence corroborating the extent of Ms. Brignac's injuries was lacking, credibility would play a big part in determining the extent of the injuries sustained in the accident. The court made a credibility call in determining that the shoulder injury was not related to the accident, and we find no manifest error in this determination.

Finally, Ms. Brignac argues that the court erred in relying on the six-week delay in seeking treatment after the accident in determining that her shoulder injury was not caused by the accident, because she complained of shoulder pain in the emergency room immediately after the accident and to her family doctor, Dr. Smith, before eventually going to see Dr. Johnston. As noted above, there was no documentation of shoulder pain in the emergency records, nor was there documentation of any complaint in Dr. Smith's records. The trial court clearly made a credibility call that Ms. Brignac first complained of shoulder pain six

weeks after the accident, and we find no error in this determination. This assignment of error is also meritless.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. Costs of this appeal are assessed to plaintiff, Angela Brignac.

AFFIRMED.

ANGELA BRIGNAC

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**LOUISIANA FARM BUREAU
INSURANCE AGENCY, INC.
AND BRIAN MUMPHREY**

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Welch, J., dissenting.

JEW

I respectfully dissent. After reviewing the evidence, the trial court found that an accident had taken place and that Ms. Brignac did sustain injury as a result, but concluded that Ms. Brignac failed to demonstrate that her complaints of right shoulder pain were causally related to the accident. In so doing, apparently because of the gaps in Ms. Brignac's treatment for her shoulder and jaw pain, the court made a specific determination that Ms. Brignac was entitled to an award of damages only for those injuries she complained of at River West Medical Center's emergency room on the morning of the accident. The court then made a factual determination that Ms. Brignac only complained of face and chest pain at that time and awarded her damages only for those injuries.

I do not believe that the trial court made a credibility determination in finding that Ms. Brignac failed to demonstrate that her complaints of shoulder pain and her shoulder injury were causally related to the accident. Instead, it was the trial court's factual finding that there was no documentation of Ms. Brignac's shoulder injury in the emergency room records which ultimately led the trial court to conclude that because Ms. Brignac did not seek medical treatment for a right shoulder injury until six weeks after the automobile accident, that medical treatment was unrelated to the automobile collision. However, I believe that the trial court's factual conclusion that the emergency records do not document a complaint of shoulder pain is manifestly erroneous.

While it is true that the term "shoulder" is not circled on the first page of the Emergency Physician Record MVA form under the patient's chief complaints, on

the second page of the records, Ms. Brignac's complaints of right shoulder pain during the physical examination are documented. On the second page of the records, on an anatomical diagram, there is a circle on the right shoulder area between the neck and the arm with the notations "T" and "S," which denote "tenderness" and "swelling." Obviously, in order for a reference to swelling to have been made, there was an objective sign of trauma to Ms. Brignac's right shoulder during the examination, and in order for there to be a reference to tenderness in the area of the right shoulder, Ms. Brignac must have made some type of complaint upon examination of the area. The fact that x-rays of Ms. Brignac's right clavicle (commonly referred to as the "collar bone") were ordered, along with x-rays of her face and jaw area, further documents complaints of right shoulder pain and a suspected right shoulder injury immediately following the accident.

Because the trial court's causation determination is based on its erroneous factual conclusion that the medical records do not document Ms. Brignac's shoulder injury and that finding is material to the trial court's causation determination, this court should review the facts *de novo* in order to determine whether Ms. Brignac demonstrated a causal connection between her right shoulder injury and if so, determine whether she is entitled to past and present medical expenses and an increase in the general damage award for that injury.

The uncontradicted medical evidence related Ms. Brignac's complaints of shoulder pain and her shoulder injury to the automobile collision. Dr. Johnston observed during his first physical examination of Ms. Brignac that she had tenderness over the AC joint, the point at which the collar bone attaches to the shoulder, and grinding at the AC joint. Dr. Johnston diagnosed Ms. Brignac as having impingement syndrome, chronic irritation of the rotator cuff, and AC joint

problems, which he stated necessitated surgical intervention to avoid a potential rotator cuff tear. Dr. Johnston remained steadfast in his opinion that Ms. Brignac's right shoulder pain, which had remained consistent from the date of the accident, is causally related to the accident, even when his opinion was challenged on cross examination by: (1) the minor nature of the impact; (2) the fact that Ms. Brignac filled pain prescriptions written by her primary care physician while Dr. Johnston was treating her, even though Ms. Brignac signed a pain management agreement in which she agreed not to obtain certain pain medications from other doctors; (3) the fact that Ms. Brignac did not complete the course of physical therapy he prescribed; (4) the fact that Ms. Brignac had reported joint pain and back and neck pain and stiffness in medical reports in 2002 prior to the accident, and (5) the fact that as of July 31, 2007, Ms. Brignac had a daughter who weighed about 25 pounds and complained of pain while trying to lift her during her visit to Dr. Johnston. While acknowledging his opinion was based on what Ms. Brignac had told him and on her MRI results, the doctor stressed that Ms. Brignac made complaints of pain consistent with a shoulder injury since the day of the accident, when her shoulder had been x-rayed, suggestive of initial problems with her shoulder. He further testified that while Ms. Brignac may have some dependency issues, nothing presented to him on cross examination changed his opinion as far as relating Ms. Brignac's shoulder injury to the automobile collision.

Defendants did not offer any medical evidence to refute Dr. Johnston's opinion, but instead attacked Ms. Brignac's credibility at trial. Based on the uncontradicted medical evidence, I find that Ms. Brignac proved it is more probable than not that her shoulder injury was caused by the accident. I therefore would award her damages for medical expenses associated with the injury and increase her award of general damages to reflect the shoulder injury.