NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0739

JOEL A. WILLIAMS AND YVONNE WILLIAMS

VERSUS

FINANCIAL INDEMNITY COMPANY

Judgment Rendered: DEC 2 1 2011

* * * * * * * * * *

On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
Docket No. 573,289

The Honorable R. Michael Caldwell, Judge Presiding

* * * * * * * * * *

Brian K. Abels
Denham Springs, Louisiana

Counsel for Defendant/Appellant
Financial Indemnity Company

James D. Thomas, II
Baton Rouge, Louisiana

and

Edmund M. Thomas
Shreveport, Louisiana

Counsel for Plaintiffs/Appellees
Joel A. Williams and Yvonne Williams

* * * * * * * * * *

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal by an uninsured/underinsured motorist carrier of an award of general damages in an automobile accident case. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 16, 2007 Joel A. Williams was driving his 1997 Chevrolet truck in Ascension Parish, when he was involved in a collision with a 2004 Ford Taurus driven by Jan L. Avara. Subsequently, Mr. Avara's insurer, AIG National Insurance Company ("AIG"), tendered its policy limits of $10,000.00 to Mr. Williams. Thereafter, Mr. Williams and his wife, Yvonne Williams, filed the instant suit, seeking recovery from their uninsured/underinsured motorist insurer, Financial Indemnity Company ("Financial"), for property and personal injury damages exceeding AIG's tender and for Mrs. Williams' loss of consortium. Financial defended the suit, asserting that no additional damages were owed and contending that Mr. Williams had failed to mitigate his damages, had suffered only a minor soft tissue injury, and/or that Mr. Williams' alleged injuries were the result of pre-existing conditions.

Following a December 1, 2010 bench trial, judgment was rendered against Financial in the following amounts: $75,000.00 for Mr. Williams' general damages; $25,000.00 for Mrs. Williams' general damages (loss of consortium); $12,343.85 for Mr. and Mrs. Williams' special damages; and $400.00 for Dr. Randolph G. Rice's expert witness fees. Financial filed a suspensive appeal of this judgment, urging, in summary, that the trial court committed legal error in applying the **Housley** presumption (**Housley v. Cerise**, 579 So.2d 973 (La. 1991)), and that the general damage awards were erroneous because: (1) Mr. Williams did not establish he was disabled, (2)

Mr. Williams failed to mitigate his damages, and (3) Mr. Williams' post-accident activities did not support the awards.

LAW AND ANALYSIS

In ruling in the plaintiffs' favor, the trial court gave the following reason for judgment in open court, in pertinent part:

> This arises out of an accident that occurred on December 16, 2007 in Ascension Parish. The uncontradicted testimony of the plaintiff, Mr. Joel Williams[,] was that he was proceeding through an intersection with a green light. The other vehicle made a left turn in front of him. There has been no evidence to show any liability on the part of Mr. Williams. A left-turning motorist has a high duty of care, so obviously the other party was at fault and there is no indication of any comparative fault of Mr. Williams. So this matter comes down to a question of quantum. It was stipulated that the tortfeasor's insurer had paid its policy limits of $10,000, and this is an uninsured motorist claim against Mr. Williams' uninsured motorist carrier. The evidence is that Mr. Williams worked in manual labor all of his life. He experienced some low back problems in 2005 and then again in 2006, but has gone a period of over 13 months during which he sought no medical treatment for his low back. And his testimony was that he had no problems with his low back during that period. Following this accident he had problems with his neck and shoulders and low back. His neck and shoulders improved after a few months with physical therapy, however it's his testimony that his back never improved, continued to bother him, and the medical records indicate he continued to receive medical treatment continuously thereafter. It's Mr. Williams' position that he either aggravated a pre-existing condition or developed a bulging disk as a result of this accident. It's the position of the defendants that Mr. Williams had ongoing chronic low back problems, that there was some exacerbation from this accident but no evidence that continuing problems to date or into the future or any disability were related to the effects of this accident. It is difficult for the plaintiff to prove because doctors are reluctant to render an opinion with regard to causation where there is a pre-existing condition and a subsequent accident. Because of that difficulty, the jurisprudence has developed a presumption that is applicable in cases like this. This is often called the **Housley** presumption resulting from the supreme court case of that name. That presumption provides that where a plaintiff is in relatively good health before the accident, sustains the accident and experiences symptoms which begin with the accident and are continually present thereafter, where there is a, quote, reasonable possibility, closed quote, of a medical connection between the accident and the continuing complaints, then it is presumed that the continuing complaints resulted from the accident. More

> properly stated, the cases provide that where the doctors indicate there is a medical possibility of a relationship between the accident and the continuing disability, then it is presumed that the continuing disability resulted from the accident. In this case, the doctors were reluctant to say that his continuing problems were caused by the accident but did indicate there was a possibility that his continuing complaints were related to the accident. Mr. Williams and his wife believe they are related to the accident and there is certainly evidence to support that opinion. And I believe that the **Housley** presumption does apply in this case. So I believe that the problems that Mr. Williams has suffered with since the date of this accident and continues to suffer with at this time were caused by and are related to this accident. So I am going to award him the $12,343.85 in medical expenses that he incurred. He has a claim for substantial lost, past, and future wages, but, as argued by the defense, there is no medical evidence showing that he needed to cease work or should have ceased work, so I cannot award him anything for those figures. However, the circumstantial evidence and the testimony of Mr. and Mrs. Williams and the facts would indicate that his disability or inability to work is related to the problems that he is having. But, again, without any medical testimony, I cannot award him a specific sum for that. It is clear that he has had problems for three years since the date of this accident and will likely continue to have problems with his back the rest of his life. I think he is disabled even though there is no medical testimony to that effect. I therefore award him the sum of $75,000 in general damages for the problems he has sustained as a result of this accident. That, together with his medical expenses bring[s] his award to $87,343.85. His wife, Yvonne Williams, also has a claim for loss of consortium. Both Mr. and Mrs. Williams testified that his problems have severely affected their relationship. It is clear that those problems will continue on into the future. So I award her the sum of $25,000 for loss of consortium. . . .

On appeal, Financial contends the trial court erred in applying **Housley** when Mr. Williams' treating physicians "could not relate all of their treatment to the subject accident due to plaintiff's chronic prior back condition and pain," and Mr. Williams "never fully recovered from his chronic pre-accident back pain." Further, Financial asserts that the trial court erred in the amount of general damages awarded based on a finding that Mr. Williams was disabled "when the record is completely devoid of any evidence of disability," when Mr. Williams failed to mitigate his

damages, and because Mr. Williams engaged in activities contrary to his allegedly disability.

Louisiana courts of appeal apply the manifest error standard of review in civil cases. Under the manifest error standard, a factual finding cannot be set aside unless the appellate court finds that the trier of fact's determination is manifestly erroneous or clearly wrong. In order to reverse a factfinder's determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the factfinder is clearly wrong or manifestly erroneous. The appellate court must not re-weigh the evidence or substitute its own factual findings because it would have decided the case differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong, even if the reviewing court would have decided the case differently. Reviewing courts have also consistently held that causation is a factual finding that should not be reversed on appeal absent manifest error. **Detraz v. Lee**, 2005-1263, p. 7 (La. 1/17/07), 950 So.2d 557, 561.

In the instant case, the trial judge found that application of the **Housley** presumption was appropriate. In **Housley**, the supreme court stated that a claimant's disability is presumed to have resulted from an accident, if before the accident the injured person was in good health, but commencing with the accident the symptoms of the disabling condition appeared and continuously manifested themselves afterwards, providing that the medical evidence shows there to be a reasonable possibility of causal connection between the accident and the disabling condition. See **Housley v. Cerise**, 579 So.2d at 980. Thus, a plaintiff must establish three things in order to be

entitled to the **Housley** presumption: (1) that he was in good health prior to the accident; (2) that the symptoms of the claimed injury appeared and continuously manifested themselves after the accident; and (3) that the medical evidence shows a reasonable possibility of causation between the accident and the claimed injury.[1] See **Thomas v. Comfort Center of Monroe, LA, Inc.**, 2010-0494, pp. 14-15 (La. App. 1 Cir. 10/29/10), 48 So.3d 1228, 1238. A "reasonable possibility" standard is less than the "preponderance" standard. **Arceneaux v. Howard**, 633 So.2d 207, 210 (La. App. 1 Cir. 1993), writ denied, 634 So.2d 833 (La. 1994).

Preexisting degenerative disc disease does not necessarily prevent a plaintiff from establishing the pre-accident "good health" requirement to a **Housley** presumption, particularly when the plaintiff was asymptomatic prior to the accident. The testimony of the plaintiff and his witnesses is sufficient to establish the plaintiff's good health prior to the accident. As a general rule the trier of fact should accept as true the uncontradicted testimony of a witness, even though the witness is a party; however, this rule applies only in the absence of circumstances in the record casting suspicion on the reliability of this testimony. See **Poland v. State Farm Mutual Automobile Insurance Company**, 2003-1417 at p. 11, 885 So.2d at 1150.

A trial court's decision to apply the **Housley** presumption is a factual finding and is subject to the manifest error standard of review. If the

[1] A reasonable possibility of causal connection between the accident and the disabling condition can be established by medical testimony that the accident at issue was a "contributing factor" in the plaintiff's adverse medical condition. See **Housley v. Cerise**, 579 So.2d at 980. Medical records from the accident are sufficient to establish a reasonable possibility that a plaintiff's injuries were caused by the accident. See **Arceneaux v. Howard**, 633 So.2d at 211. A reasonable possibility of causation between the accident and the claimed injury may also be demonstrated by circumstantial or common knowledge evidence. See **Poland v. State Farm Mutual Automobile Insurance Company**, 2003-1417, p. 9 (La. App. 1 Cir. 6/25/03), 885 So.2d 1144, 1149.

factfinder's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse. See **Cooper v. United Southern Assurance Co.**, 97-0250, p. 24 (La. App. 1 Cir. 9/9/98), 718 So.2d 1029, 1041 (citing **Housley v. Cerise**, 579 So.2d at 976).

In the instant case, Mr. Williams testified that he had some lower back pain in 2005 and 2006, prior to the accident, that he was treated then by Dr. Baird and Dr. Bice, receiving an injection from Dr. Bice, and that his pain condition had resolved, until the 2007 accident. Mr. Williams further testified that in 2005 and 2006 his pain did not prevent him from engaging in his normal activities, such as working at his manual labor job, hunting, fishing, gardening, and enjoying social activities with his wife, but that after the 2007 accident, his pain prevented him from doing almost all of these activities. Mrs. Williams' testimony corroborated Mr. Williams' testimony. The medical evidence also showed Mr. Williams did not receive treatment for his back after October 16, 2006 until January 14, 2008 (a fifteen month gap in treatment). In addition, all three of Mr. Williams' treating physicians who testified at trial (Dr. William Baird, an internist; Dr. Tulsi Bice, a physical medicine, rehabilitation, and pain specialist; and Dr. Vikram Parmar, an orthopedic surgeon) stated that Mr. Williams' pre-existing back condition was exacerbated by the 2007 automobile accident.

However, we note that Dr. Baird testified that Mr. Williams' post-accident pain was similar to his pre-accident condition, in that it would improve and then worsen again, but Dr. Baird could not say the conditions were exactly the same. Dr. Baird labeled Mr. Williams' condition as chronic back pain. Further, though Mr. Williams was found to have a herniated disc after the December 2007 accident, his doctors could not say the herniated disc was caused by the accident; it may have developed previously, but was

not diagnosed, since Mr. Williams had not had an MRI prior to the 2007 accident. Dr. Parmar also testified that degenerative changes in the spine are not unusual in a man of Mr. Williams' age.

Because there was a factual basis in the record for the trial court to have found that Mr. Williams was in "good health" for more than a year immediately preceding the accident, as he had not sought medical treatment for his back during that time, we cannot say the trial court erred in applying the **Housley** presumption, under the relevant jurisprudence. See **Poland v. State Farm Mutual Automobile Insurance Company**, 2003-1417 at p. 9, 885 So.2d at 1150. While there was some medical testimony indicating that Mr. Williams may have reported to one or more doctors that he was not completely pain-free from October 16, 2006 until the December 16, 2007 accident, Mr. Williams testified to the contrary.[2] We are unable to say the trial court manifestly erred in choosing to credit Mr. Williams' testimony. See **Detraz v. Lee**, 2005-1263 at p. 11, 950 So.2d at 564.

And even without the aid of the **Housley** presumption, it is clear that the trial judge in this case could have reached the same result. While the medical evidence in this case did not establish that all of Mr. Williams' back complaints (particularly the disc herniation) were caused by the accident, the treating physicians' testimony provided a sufficient basis for the trial court to have found that, as a result of the accident: Mr. Williams suffered a soft tissue injury to his neck and shoulders, which resolved within several months, and an aggravation of his pre-existing degenerative back condition. After a thorough review of the record, we are unable to say the general

[2] Dr. Baird testified that when Mr. Williams returned to him for treatment after the December 2007 automobile accident, he indicated that "he never really got complete resolution of [his prior pain problem]." However, Mr. Williams testified that he did not recall having made that statement to Dr. Baird. Further, Dr. Bice stated in her deposition that Mr. Williams reported to her, following his 2007 accident, that the treatment she previously administered to him for his prior back pain "eventually helped."

damages awarded were an abuse of the trial court's "vast" discretion "for the effects of the particular injury to the particular plaintiff[s] under the particular circumstances" presented in this case. 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).

While Financial argues on appeal that Mr. Williams did not establish he was disabled, failed to mitigate his damages, and that his post-accident activities did not support the awards, it is apparent from the reasons assigned by the trial judge that he credited the testimony of Mr. Williams as to the extent of his physical impairment, resulting from the December 16, 2007 automobile accident, and with respect to his efforts to obtain medical relief from his pain. Even though Mr. Williams admitted that he attempted to resume his normal activities after the accident (he went hunting, fishing, and rode a four-wheeler several times, he cut his grass on a riding lawn mower, and he went on a couple of short trips with family and friends), he explained that as a result of the accident at issue, he is "eighty-twenty[; i.e. he] can't do eighty percent of the stuff [he] used to do."

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, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). 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, p. 6 (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 840, 844 (La. 1989). Accordingly, we must affirm the trial court's findings of fact and damage awards based thereon.

CONCLUSION

For the reasons assigned herein, the judgment of trial court is affirmed. All costs of this appeal are to be borne by Financial Indemnity Company.

AFFIRMED.