NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 CA 1943

WILBERT MCCLAY

VERSUS

WILGOT JACOBSSON AND STATE FARM INSURANCE COMPANY

Judgment rendered May 2, 2008

J.2.B.

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Appealed from the
Nineteenth Judicial District Court
Parish of East Baton Rouge, Louisiana
Trial Court No. 534,299
The Honorable Wilson E. Fields

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JOHNNIE L. MATTHEWS
JOHNELL M. MATTHEWS
ANTHONY LONG
BATON ROUGE, LA

ATTORNEYS FOR
PLAINTIFF/APPELLEE
WILBERT McCLAY

DARRELL J. LOUP
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANTS/APPELLANTS
WILGOT JACOBSSON AND
STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY

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BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

Welch J. concurs without reasons.

PETTIGREW, J.

Defendants, Wilgot Jacobsson and State Farm Mutual Automobile Insurance Company, appeal a judgment rendered in favor of the plaintiff, Wilbert McClay. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This matter concerns a two-car accident involving vehicles driven by Mr. Jacobsson and Dr. McClay. The accident occurred in Baton Rouge, Louisiana, on Lobdell Boulevard (Lobdell) near its intersection with Renoir Avenue (Renoir). In this area, Lobdell consists of two southbound lanes that are separated from two northbound lanes by a grass median.

Dr. McClay and Mr. Jacobsson were the only witnesses to the accident, and their respective versions of the circumstances surrounding the accident are vastly different. According to Dr. McClay, he was proceeding eastbound on Renoir, when he came to a complete stop at the stop sign controlling Renoir's intersection with Lobdell, the favored street. Dr. McClay testified that he waited at the stop sign for traffic in the southbound lanes of Lobdell to pass. Once this traffic cleared, Dr. McClay determined that it was safe to proceed. He then crossed the southbound lanes and entered the break in the median, where he again stopped while waiting for an opportunity to turn left so that he could travel northbound on Lobdell. Dr. McClay testified that he had already successfully crossed the southbound lanes and had been waiting in the median area for fifteen to thirty seconds when he was struck by Mr. Jacobsson's vehicle. Dr. McClay further contended that he was entirely within the median area when the collision occurred.

Mr. Jacobsson, on the other hand, testified that he was traveling in the inside southbound lane of Lobdell, when he suddenly noticed Dr. McClay's vehicle attempting to cross the southbound lanes ahead of him. Mr. Jacobsson acknowledged that he was travelling at approximately the speed limit of fifty miles per hour, despite the fact that it was drizzling and the roads were slick. According to Mr. Jacobsson, he attempted to apply his brakes to avoid the collision; however, his vehicle began to slide, and he was

unable to stop his vehicle in time. Mr. Jacobsson insisted, however, that he never went outside of his lane of travel prior to impact, and that the collision occurred in this lane.

The evidence in the record demonstrates that Dr. McClay's vehicle spun around approximately 180 degrees in the median area after impact. In addition, Mr. Jacobsson testified that his vehicle continued to travel after the impact until it came to rest approximately fifty feet onto the grassy portion of the median. Photographs taken by Dr. McClay immediately after the accident demonstrate that all debris resulting from the accident was located in the median area, and that no debris was found in the southbound lanes of Lobdell, where Mr. Jacobsson contended the collision occurred.

After a bench trial, the trial court concluded that Dr. McClay's version of the accident was more credible. The trial court specifically determined that the accident occurred in the median area, rather than in the southbound travel lanes, based on the location of the debris. Thus, the trial court found Mr. Jacobsson to be 100% at fault in the accident, and it awarded Dr. McClay general damages in the amount of $27,000.00, plus special damages in the amount of $3,930.00. Defendants have appealed.

ADMISSIBILITY OF POLICE REPORT

With their first assignment of error, defendants contend that the trial court erred in refusing to admit into evidence the deposition testimony of Baton Rouge City Police Officer Charles W. Cox, along with the attached police report of the accident prepared by Baton Rouge City Police Officer Scottie Hammond. At the beginning of the trial, defendants acknowledged that the police report was inadmissible as hearsay.[1] Nevertheless, defendants attempted to have the police report introduced into evidence as an attachment to Officer Cox's deposition.

Defendants advised the trial court that Officer Hammond was unavailable to testify because he suffered from a brain tumor.[2] Therefore, defendants attempted to get the information contained within the police report into the record by using the deposition testimony of Officer Cox, who had reviewed and initialed the report as

[1] See LSA-C.E. art. 803(8)(b)(i).

[2] Defendants contended that they had attempted to depose Officer Hammond, but he failed to appear. They later discovered that Officer Hammond was ill and unable to appear. Dr. McClay did not contest these assertions by the defendants.

Officer Hammond's supervising officer. In his deposition, Officer Cox authenticated the police report prepared by Officer Hammond and further established that Officer Hammond followed standard protocol in preparing the report.

Dr. McClay objected to the introduction of the deposition, contending that Officer Cox had no personal knowledge of the events surrounding the accident.[3] Dr. McClay acknowledged that if Officer Hammond had been available, he could have testified about what the parties told him after the accident; however, under such circumstances, Officer Hammond would have been subject to cross-examination regarding the accuracy of what he had written in the report. Dr. McClay argued that he would be prejudiced if the court allowed the deposition of Officer Cox and the attached police report into evidence, since Officer Hammond was not available for cross-examination. The trial court agreed with Dr. McClay and denied the defendants' attempt to introduce the evidence.

In their brief to this court, the defendants specifically assert that "[t]he police report is extremely relevant as to exactly how the accident occurred and, more importantly, as to Dr. McClay's and Mr. Jacobsson's respective statements given to Officer Hammond at the scene of the accident." Defendants insist that the police report indicates that Dr. McClay said nothing to Officer Hammond about having been safely in the median area at the time of impact. Instead, defendants contend that the police report demonstrates that Dr. McClay told Officer Hammond that he simply did not see Mr. Jacobsson's oncoming vehicle prior to the accident.

In support of their claim that the police report should be admissible, defendants cite LSA-C.E. art. 804(B)(6), which provides exceptions to the hearsay rule when the declarant is unavailable and states:

> **(6) Other exceptions.** In a civil case, a statement not specifically covered by any of the foregoing exceptions if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy, and the proponent of the evidence has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates and the proponent of the statement makes known in writing to the adverse party and to the court his intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance

[3] It is undisputed that neither officer actually witnessed the accident.

> of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. If, under the circumstances of a particular case, giving of this notice was not practicable or failure to give notice is found by the court to have been excusable, the court may authorize a delayed notice to be given, and in that event the opposing party is entitled to a recess, continuance, or other appropriate relief sufficient to enable him to prepare to meet the evidence.

As noted above, the defendants have sought to introduce the police report into evidence so that the statements Dr. McClay allegedly made to Officer Hammond would be in the record. Thus, as counsel for defendants acknowledged in oral argument before this court, Dr. McClay was the "declarant" responsible for making the relevant statement. As Dr. McClay was a party who testified at trial, he was not "unavailable" as that term is defined. See LSA-C.E. art. 804(A). Thus, we conclude that LSA-C.E. art. 804(B)(6) is inapplicable to this matter, and the trial court did not err in refusing to admit into evidence the deposition testimony of Officer Cox, along with the attached police report.[4]

FAULT

Defendants next contend that the trial court erred in concluding that Dr. McClay's version of the events was supported by the objective evidence or was more credible than the version offered by Mr. Jacobsson. In addition, defendants contend that the trial court erred in assessing 100% of the fault in the accident to Mr. Jacobsson.

Appellate courts may not disturb a trier of fact's factual findings unless: (1) the appellate court finds from the record that a reasonable factual basis for the finding of the trial court does not exist; and (2) the appellate court determines 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). Furthermore, when factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given "great deference" by the appellate court. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Thus, when there is a conflict in the testimony, reasonable evaluations of credibility and

[4] Furthermore, we note that defendants were, in fact, able to question Dr. McClay concerning the statements he allegedly made to Officer Hammond after the accident. Through this exchange at trial, defendants' counsel was able to establish on the record the fact that Officer Hammond's report did not reflect that the accident occurred in the median as Dr. McClay claimed in his testimony at trial.

reasonable inferences of fact should not be disturbed upon review, although the appellate court may feel its own evaluations and inferences are as reasonable. **Rosell**, 549 So.2d at 844. Credibility determinations may be clearly wrong when documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story. **Rosell**, 549 So.2d at 844-45. However, absent contradictory evidence or inconsistent or implausible statements, it is "virtually never" clearly wrong for the fact finder to accept one witness's version of the facts over another. **Rosell**, 549 So.2d at 845.

In this matter, the only witnesses to the accident were the parties themselves. The trial court clearly credited Dr. McClay's testimony over that of Mr. Jacobsson's, and we cannot say that the objective evidence so contradicts Dr. McClay's testimony that a reasonable fact finder would not have credited his testimony. The photographs introduced at trial demonstrate that the debris resulting from the accident is found only in the median area and not in the travel lanes of Lobdell. Furthermore, both vehicles were found within the median area, with Mr. Jacobsson's vehicle having traveled approximately fifty feet up onto the median after impact. Thus, after a thorough review of the record, we find no manifest error in the trial court's findings of fact in this matter.

DAMAGES

In their final assignment of error, defendants contend that the trial court erred in awarding damages to Dr. McClay totaling $30,930.00. In their brief, defendants acknowledge that Dr. McClay submitted medical bills totaling $3,930.00; however, defendants argue that those bills were not incurred as a result of the accident at issue. In addition, defendants contend that the general damage award of $27,000.00 is clearly excessive.

A reviewing court should not set aside an award of special damages unless the award was based upon manifestly erroneous factual findings. **Kaiser v. Hardin**, 2006-2092, p. 12 (La. 4/11/07), 953 So.2d 802, 810. Furthermore, the discretion vested in the trier of fact is "great," even vast, so an appellate court should rarely disturb an award of general damages. **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). The role of an appellate court in reviewing general damages 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. Each case is different, and the adequacy or inadequacy of the award should be determined by the facts or circumstances particular to the case under consideration. **Youn**, 623 So.2d at 1260. The initial inquiry is whether the award for the particular injuries and their effects under the particular circumstances on the particular injured person is a clear abuse of the "much discretion" of the trier of fact. Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then for the purpose of determining the highest or lowest point, reasonably within that discretion. **Youn**, 623 So.2d at 1260.

Dr. McClay testified that as a result of this accident, he suffered injuries to his head, neck, legs, and lower back. The medical records indicate that Dr. McClay obtained physical therapy and other medical treatment for the injuries over a period of three months immediately after the accident. After a gap in treatment of approximately one year, Dr. McClay returned to treatment. Dr. McClay explained this gap by stating that as a doctor, he often treated himself for his injuries rather than go to see another doctor.[5] He further testified that he had some nerve damage as a result of the accident, but that he did not want to have surgery because he considered it too risky.

According to Dr. McClay, he still has trouble with his hip, buttocks, and lower back as of the date of trial, more than two years after the accident. Dr. McClay testified that because of these injuries, he has trouble walking or running, he cannot play basketball or work like he used to, and he has trouble with sexual activity. Dr. McClay acknowledged that he had been injured in an accident several years prior to this accident; however, he testified that the injuries resulting from that accident were essentially asymptomatic by the time of the accident at issue before this court.

[5] Dr. McClay also testified that his insurance policy was somewhat limited, which contributed to his decision to treat himself for his injuries.

Based on the evidence contained in the record, we find no manifest error in the trial court's determination that Dr. McClay sustained special damages in the amount of $3,930.00. Further, we cannot say that the trial court's assessment of the effect of Dr. McClay's injuries in this particular case amounts to an award of general damages beyond the realm of reason. Accordingly, we find no error in the trial court's award of damages.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the defendants, Wilgot Jacobsson and State Farm Mutual Automobile Insurance Company.

AFFIRMED.