

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0584

HAROLD STEWART AND TONYA JACKSON

VERSUS

**RICHARD HALEY AND FARMERS INSURANCE
COMPANY**



Judgment Rendered: **NOV 9 2011**

On Appeal from the 19th Judicial District Court
In and for the Parish of East Baton Rouge
Docket No. 575,322

The Honorable William A. Morvant, Judge Presiding

Maurice R. Franks
Baton Rouge, Louisiana

Counsel for Plaintiffs/Appellants
Harold Stewart and Tonya Jackson

Charles L. Chassignac, IV
James Eric Johnson
Bryan J. Haydel, Jr.
Eleanor Wall
Baton Rouge, Louisiana

Counsel for Defendants/Appellees
Farmers Insurance Exchange and
Richard Haley

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

JMM
McDonald, J. concurs and will assign reasons.

HUGHES, J.

The plaintiffs in this case appeal a district court judgment awarding special damages for personal injury, but failing to award general damages. For the reasons that follow, we amend the judgment and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On April 24, 2008 Tonya Jackson was driving the 2003 Mercedes-Benz automobile of Harold Stewart, who was a passenger in the car, when it was rear-ended by a truck driven by Richard Haley. Mr. Haley was insured by Farmers Insurance Exchange¹ (“Farmers”) at the time of the accident.

Ms. Jackson claimed to have injured her neck and Mr. Stewart claimed to have injured his lower back in the accident. Both Ms. Jackson and Mr. Stewart received chiropractic treatment from Dr. Bryan Foss following the accident, incurring medical expenses in the amounts of \$4,403.51 and \$3,806.93, respectively. Mr. Stewart also incurred a medical expense in the amount of \$179.00 for treatment by Dr. Shawn Hall, bringing his total claimed medical expenses to \$3,985.93.

Ms. Jackson and Mr. Stewart jointly filed the instant suit against Mr. Haley and Farmers to recover damages suffered as a result of the accident. The fault of Mr. Haley was conceded, and a jury trial was held on October 13, 2010, on the issue of damages only.

At the trial, the jury answered the jury interrogatories as follows:

- 1) Do you find that Harold Stewart suffered any injury as a result of the April 24, 2008 motor vehicle accident that is the subject matter of this litigation?

Yes √ No

¹ Mr. Haley’s insurer was named as “Farmers Insurance Company” in the plaintiffs’ petition, but in the defendants’ answer, Farmers was named as “Farmers Insurance Exchange.” Thereafter, the plaintiffs amended their petition to substitute the latter for the former, as the proper party defendant.

If you answered "yes," to question 1, please proceed to question 2. If you answered "no," please proceed to question 3.

- 2) Please state what sum of money, if any, would reasonable, fairly, and fully compensate Harold Stewart for his injuries and property damage, if any, arising out of the April 24, 2008 motor vehicle accident that is the subject of this litigation.

Physical Pain and Suffering (past & future)	\$ <u>0</u>
Mental Anguish (past & future)	\$ <u>0</u>
Loss of Enjoyment of Life	\$ <u>0</u>
Medical Expenses (past)	\$ <u>3,985.93</u>
Medical Expenses (future)	\$ <u>0</u>
Property Damage	\$ <u>0</u>
TOTAL	\$ <u>3,985.93</u>

- 3) Do you find that Tonya Jackson suffered any injury as a result of the April 24, 2008 motor vehicle accident that is the subject of this litigation?

Yes √ No

If you answered "yes," to question 3, please proceed to question 4. If you answered "no," please sign the verdict form and return the form to the baliff.

- 4) Please state what sum of money, if any, would reasonable, fairly, and fully compensate Tonya Jackson for her injuries and property damage, if any, arising out of the April 24, 2008 motor vehicle accident that is the subject of this litigation.

Physical Pain and Suffering (past & future)	\$ <u>0</u>
Mental Anguish (past & future)	\$ <u>0</u>
Loss of Enjoyment of Life	\$ <u>0</u>
Medical Expenses (past)	\$ <u>4,403.51</u>
Medical Expenses (future)	\$ <u>0</u>
Property Damage	\$ <u>0</u>
TOTAL	\$ <u>4,403.51</u>

Accordingly, a judgment was signed on October 27, 2010, in favor of the plaintiffs in the amounts stated in the jury interrogatories, along with court costs and judicial interest. The plaintiffs' post-trial motions for additur, judgment notwithstanding the verdict, and new trial and the defendants' motion for judgment notwithstanding the verdict were denied.

The plaintiffs now appeal the judgment of the district court, assigning as error the failure of the court to grant their motions for additur, judgment notwithstanding the verdict, and new trial, arguing damages for pain and suffering, mental anguish, or loss of enjoyment of life should have been awarded. The defendants have filed an answer to this appeal, seeking to have this court reverse or modify the award to deny “recovery for chiropractic and medical treatment expenses that were not proven to be necessitated by actual injury caused by the subject motor vehicle accident.” We further note that the plaintiffs/appellants filed a motion with this court concerning the date for oral arguments; however, the motion is now moot.²

LAW AND ANALYSIS

We first address the claim asserted in the defendants’ answer that the plaintiffs failed to prove that the medical expenses they incurred resulted from the automobile accident at issue in this case.

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, 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

² The plaintiffs/appellants requested that oral argument in the case be scheduled after August, 2011. The motion was referred to this panel for action; however, prior to the issuance of a ruling, the clerk of court’s office scheduled oral argument for September, 2011. Therefore the motion is moot.

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 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, 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 at 844.

In the instant case, the jury's answers to the jury interrogatories reflect that the jury believed that Harold Stewart and Tonya Jackson were injured as a result of the April 24, 2008 motor vehicle accident. Additionally, in order for the jury to have awarded the full amount of medical expenses sought by these plaintiffs, it must have found as a matter of fact that the medical expenses awarded were medically necessary for injuries the plaintiffs suffered in the motor vehicle accident. Further, the record presents a reasonable basis for such a finding.

Both plaintiffs testified that their respective complaints (Mr. Stewart's low back pain and Ms. Jackson's neck pain) arose following the accident and that they sought medical treatment within days of the accident. Also, the medical evidence in the record relates their respective injuries to the April 24, 2008 accident. Therefore, we find no merit in the defendants'

contention, in their answer to this appeal, that the medical expenses should not have been awarded.

Next, we address the plaintiffs' contention that damages for pain and suffering, mental anguish, and/or loss of enjoyment of life should have been awarded. Plaintiffs contend that since the jury ruled in their favor, finding that they each had sustained physical injury and awarded each of them their medical expenses, it was clear error to also fail to award general damages. Under the facts and circumstances of this case, we agree.

The parties have identified the following supreme court cases as being controlling on the issue before the court: **Green v. K-Mart Corp.**, 2003-2495 (La. 5/25/04), 874 So.2d 838, and **Wainwright v. Fontenot**, 2000-0492 (La. 10/17/00), 774 So.2d 70.

In **Wainwright v. Fontenot**, the supreme court recognized the irregularity presented in such a case:

There is no question that the abuse of discretion standard of review applies when an appellate court examines a factfinder's award of general damages. We are here, however, faced with the somewhat anomalous situation in which a jury has determined that the defendant is both legally at fault for the plaintiff's injuries and liable to him for his medical expenses incurred, yet has declined to make any award at all for general damages, i.e., pain and suffering. Such a verdict has not heretofore been addressed by this court.

Wainwright v. Fontenot, 2000-0492 at p. 6, 774 So.2d at 74. The supreme court further stated that a jury verdict awarding medical expenses, but simultaneously denying damages for pain and suffering, will most often be inconsistent in light of the record, but that such a perceived inconsistency does not always amount to legal error. Additionally, the court related that, under certain circumstances, the evidence in a case may support both an award of medical expenses and a concurrent denial of general damages. The **Wainwright** court concluded that the ultimate question for an appellate

court is whether the factfinder made inconsistent awards and thus abused its discretion. See **Wainwright v. Fontenot**, 2000-0492 at pp. 6-7, 774 So.2d at 75. Furthermore, a reviewing court faced with such a verdict must ask whether the jury's determination that a plaintiff is entitled to certain medical expenses, but not to general damages, is so inconsistent as to constitute an abuse of discretion, while being mindful that the particular facts of each case are ultimately determinative. See **Wainwright v. Fontenot**, 2000-0492 at p. 8, 774 So.2d at 76.

In **Wainwright**, the defendant pharmacy had incorrectly filled a psychiatric medication prescribed for a child, by placing dosing instructions on the label at four times the dosage actually prescribed by the doctor. The child's parents asserted that they administered the first three daily doses, and after each dose the child became increasingly combative and aggressive. After the third dose, the child's doctor was consulted, the error was discovered, and the child was admitted to the hospital for overnight observation; no physical injury was found. Upon trial of the plaintiffs' case against the pharmacy, the jury awarded the medical expenses incurred for the medical consultation and overnight hospital stay, but no additional medical expenses or general damages were awarded. On review of this award, the supreme court determined that the record provided a reasonable basis for the jury to have concluded the incident did not cause physical or additional psychiatric damage to the child. The court noted that the evidence showed that while the child's doctor had intended that the child have a lower dosage of the medication, the higher dosage he received was not inappropriate for a child of his age. Further, the medical testimony established that the medication at issue does not reach an effective dosage level, or "steady state" in a patient's bloodstream, until well after three days

of exposure, so the jury could have found that the troublesome behavior exhibited by the child was not related to the drug, as his parents claimed. Additionally, the parents' testimony concerning the child's behavior during the three-day time period was uncorroborated, and there was testimony that the child had exhibited similar violent and manic tendencies in the months preceding the incident (which had necessitated the psychiatric and prescription drug treatment). The supreme court concluded that the jury could have chosen not to believe the testimony of the parents, or they could have concluded that the child's behavior during the weekend of the "overdose" was actually no worse than it had been prior to that time, and ruled that the jury's credibility determinations should not be disturbed. See Wainwright v. Fontenot, 2000-0492 at p. 10, 774 So.2d at 77.

In **Green v. K-Mart Corp.**, a plaintiff who sustained a brain injury, after being struck in the head by falling merchandise in the defendant store, was awarded, by a jury: \$49,000 for past medical expenses, \$1,000,000 for future medical expenses, \$26,000 for past loss of income, \$357,000 for loss of future earning capacity, and \$10,000 each to plaintiff's two children for loss of consortium. The jury did not award any general damages. On appeal, the appellate court increased the award for future medical expenses from \$1,000,000 to \$3,458,453, awarded \$500,000 in general damages, and increased the loss of consortium awards from \$10,000 to \$25,000 per child. See Green v. K-Mart Corp., 2003-2495 at pp. 1-2, 874 So.2d at 840-41. On review by the supreme court, the appellate court's increase in future medical expenses was reversed, but its award of \$500,000 in general damages was affirmed. Citing **Wainwright**, the supreme court held:

[T]he court of appeal correctly determined that the jury abused its discretion in failing to award general damages while awarding a substantial amount for past and future medical

expenses. In this case, the jury determined that plaintiff suffered injuries causally related to the accident which required medical attention, and is still suffering an injury that will, in fact, require medical attention in the future. Failing to make a general damage award in such circumstances was an abuse of discretion.

Green v. K-Mart Corp., 2003-2495 at p. 8, 874 So.2d at 844. The **Green** court reasoned that the extensive changes in the plaintiff's physical, psychological, and emotional state, along with attendant changes in her life style, mandated the award of \$500,000 for pain and suffering and loss of enjoyment of life; the \$500,000 award was affirmed. **Id.**

In so holding, the **Green** court distinguished the **Wainwright** result on its facts, pointing out that it held in **Wainwright** that "the jury could have reasonably concluded that it was a reasonable precaution for prudent parents to place their minor son in the hospital for observation after finding out that the defendant pharmacy had erroneously filled their son's prescription resulting in his ingestion of four times the medication prescribed for him." Therefore, the **Green** court recognized that, in cases such as **Wainwright**, no abuse of jury discretion occurs, in awarding medical expenses but not general damages, when the medical expenses were incurred only to determine whether injuries were, in fact, sustained; however, where a plaintiff is actually injured as a result of the accident, general damages should be awarded.³ See **Green v. K-Mart Corp.**, 2003-2495 at pp. 7-8, 874 So.2d at 844.

³ Other such cases noted in **Green** were: **Coleman v. U.S. Fire Insurance Company**, 571 So.2d 213 (La. App. 3 Cir. 1990), and **Olivier v. Sears Roebuck & Company**, 499 So.2d 1058 (La. App. 3 Cir. 1986), writ denied, 501 So.2d 198 (La. 1986), wherein the appellate court found that the juries in those cases could reasonably have found that, although the plaintiffs did not receive any injuries in the accidents at issue, they were entitled and justified in getting a medical checkup after the accidents. In **Coleman**, the jury rejected the plaintiff's claims of injury resulting from a minor automobile accident, as not credible, but found that she was entitled and justified in getting a medical checkup after the accident; therefore, even though the jury awarded the plaintiff the medical expenses for the check up, the failure to award general damages was affirmed. See **Coleman v. U.S. Fire Insurance Company**, 571 So.2d at 215. Likewise in **Olivier v. Sears Roebuck & Company**, the appellate court determined that the jury found the plaintiff had not been injured in the automobile accident at issue in that case, but that she was justified in getting a

This court has adhered to the principles expressed in **Wainwright** and **Green**. See **Graffia v. Louisiana Farm Bureau Casualty Insurance Company**, 2008-1480 (La. App. 1 Cir. 2/13/09), 6 So.3d 270; **Harris v. Delta Development Partnership**, 2007-2418 (La. App. 1 Cir. 8/21/08), 994 So.2d 69; **Leighow v. Crump**, 2006-0642 (La. App. 1 Cir. 3/23/07), 960 So.2d 122, writs denied, 2007-1195, 2007-1218 (La. 9/21/07), 964 So.2d 337, 341. In sum, the jurisprudence directs that where special damages have been incurred (such as for precautionary medical examination(s)) without attendant physical pain and suffering, a trier-of-fact may find that general damages are not warranted; however, a trier-of-fact abuses its discretion in failing to award general damages when it finds that a plaintiff has suffered injuries causally related to the accident that required medical attention. See **Harris v. Delta Development Partnership**, 2007-2418 at 20, 994 So.2d at 83.

In the instant case, the jury clearly found as a matter of fact that the plaintiffs both suffered physical injury that required medical treatment as a result of the April 24, 2008 accident. Thus, the jurisprudence herein discussed mandates an award of general damages.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be measured definitively in terms of money. The primary objective of general damages is to restore the party in as near a fashion as possible to the state he/she was in at the time immediately preceding injury. Pain and suffering, both physical and mental,

medical check-up, and thus the award of the \$150 medical expense for the check-up was not inconsistent with the failure to award general damages (there was ample medical testimony in the record for the jury to have found all of the plaintiff's medical problems were pre-existing). See **Olivier v. Sears Roebuck & Company**, 499 So.2d at 1063.

refers to the pain, discomfort, inconvenience, anguish, and emotional trauma that accompanies an injury. The elements of physical pain and suffering and associated mental anguish are conceptually related and to a large extent overlapping, and therefore difficult to precisely distinguish. Accordingly, in correcting the jury's abuse of discretion, we choose to make one undifferentiated award of general damages. See Harris v. Delta Development Partnership, 2007-2418 at p. 21-22, 994 So.2d at 83-84.

After a thorough review of the record on appeal, we find the lowest general damage amount reasonably within the jury's discretion and consistent with Mr. Stewart's special damage award that could have been made to him was \$8,500, and that the lowest general damage amount reasonably within the jury's discretion and consistent with Ms. Jackson's special damage award that could have been made to her was \$9,000. See Sallinger v. Robichaux, 2000-2269 (La. 1/5/01), 775 So.2d 437. Therefore, we amend the trial court's judgment to include these awards.

CONCLUSION

For the reasons assigned herein, the appellants' scheduling motion is denied as moot. Further, the judgment of the trial court is hereby amended to award Harold Stewart \$8,500 in general damages and to award Tonya Jackson \$9,000 in general damages. As amended, the judgment is affirmed. All costs of this appeal are to be borne by the defendants, Richard Haley and Farmers Insurance Exchange.

SCHEDULING MOTION DENIED AS MOOT; JUDGMENT AMENDED; AFFIRMED AS AMENDED.

HAROLD STEWART AND
TONYA JACKSON

STATE OF LOUISIANA

COURT OF APPEAL

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NUMBER 2011 CA 0584

JAN 12 2012

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McDONALD, J. CONCURRING:

The majority has analyzed this case very well in concluding to award general damages to both plaintiffs. While I agree with the result, I respectfully concur to highlight several additional points concerning the award to Ms. Jackson. This accident occurred on April 24, 2008. On September 15, 2008, Ms. Jackson was involved in another accident when she fell off a motorcycle that she was operating. In addition the \$4,403.51 in medical expenses she incurred for chiropractic treatments by Dr. Foss, she incurred over \$5,000.00 for treatment by Oschner Medical Center, and treatment by Lewy Physical Therapy in excess of \$6,700.00. At trial, she sought over \$15,000.00 in medical expenses. It is patently obvious that only the chiropractic bills could have resulted from the April 24 incident. However, Ms. Stewart tried to tie all these expenses to it. She did not receive treatment from Dr. Parmar at Oschner until October 23, 2008, about five weeks after the September 15 motorcycle accident. The records from this visit indicate she advised Dr. Parmar that her cervical symptoms began four weeks prior, after the motorcycle accident. She began treatment at Lewy on September 25, 2009, and informed them that her cervical problems began in October, 2008. She attributed her problems to the September 2008 motorcycle accident. Apparently the jury was not impressed with her testimony and did not believe any of her treatments after the September 15, 2008, motorcycle accident were attributable to the April automobile accident. The jury was well within its

discretion to reject much of her testimony. Even Judge Morvant commented that “there were some inconsistencies in the testimony, especially that of Ms. Jackson, regarding injuries, the type of treatment. The treatment was based primarily on subjective complaints.” The health care provider (Dr. Foss in this case) can only treat what the patient presents him with. If the patient claims they are injured, then he treats the subject complaints. That is what happened here. It is very difficult for the defendant to rebut the number or type of treatments that have been provided. Evidently the jury had some problem with Ms. Jackson’s testimony. However, they must have concluded that she sustained some amount of injury as a result of the vehicle accident because they awarded over \$4,000.00 to her for her chiropractic medical bills. As the majority succinctly points out, the failure to award any general damages was error and we have sought to correct it. For these reasons I respectfully concur.