PRATIMA SHAH AND JAYESHKUMAR SHAH	*	**NO. 2016-CA-1109**
	*	
VERSUS		**COURT OF APPEAL**
	*	
GOVERNMENT EMPLOYEES INSURANCE COMPANY AND JAMES L. MAYO	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-05078, DIVISION "B"
Honorable Regina H. Woods, Judge
* * * * * *

Judge Daniel L. Dysart

* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

BELSOME, J., CONCURS IN PART AND DISSENTS IN PART
JENKINS, J., DISSENTS WITH REASONS

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AFFIRMED IN PART, REVERSED IN PART AND REMANDED

AUGUST 23, 2017

This is an appeal of a trial court judgment rendered in favor of plaintiffs, Pratima Shah and Jayeskumar Shah, following a bench trial. For the reasons that follow, we affirm in part, reverse in part, and remand.

FACTS AND PROCEDURAL HISTORY

On October 24, 2014, an automobile accident occurred between vehicles driven by Mrs. Shah and the defendant, Dr. James Mayo, while both vehicles were executing left turns from Causeway Boulevard to Jefferson Highway in Metairie, Louisiana.[1] Mrs. Shah filed the instant lawsuit against Dr. Mayo and his insurer, Government Employees Insurance Company ("GEICO"), seeking damages for injuries she suffered as a result of the accident.[2]

The matter was set for trial on May 3, 2016 and then re-set for July 13, 2016. On July 11, 2016, two days before trial, plaintiffs filed a Motion to Exclude Live Trial Testimony and for Costs, seeking to preclude Dr. Mayo from testifying in

[1] Venue in Orleans Parish is alleged to be based on Dr. Mayo's residency. While Dr. Mayo's Answer denied the "allegations as to residence and venue," the issue of venue was never thereafter raised.

[2] Mrs. Shah's husband was joined as a plaintiff in this lawsuit, seeking loss of consortium damages.

person at trial. According to this motion, on April 8, 2016, a perpetuation deposition of Dr. Mayo was taken in New York by counsel for GEICO and Dr. Mayo based on Dr. Mayo's unavailability for trial. During that deposition, Dr. Mayo testified that he would be moving to Florida in July (2016). Shortly before trial, counsel for plaintiffs learned that Dr. Mayo would, in fact, be present for the July 13, 2016 trial; he then filed the motion to exclude Dr. Mayo's live testimony and to be reimbursed for the expenses incurred in traveling to New York for the perpetuation deposition.

On the morning of trial, the trial court indicated that Dr. Mayo would be allowed to testify and it reserved ruling on an award of costs until the close of trial. After hearing the testimony of the only two witnesses at trial (Mrs. Shah and Dr. Mayo), the trial court gave oral findings of fact and reasons for judgment. First, it found Dr. Mayo to have been the sole cause of the accident. It then found that Mrs. Shah was entitled to damages for her personal injuries in the amount of $1,500.00, in addition to medical expenses of $1,385.00. The trial court denied plaintiffs' request for costs and noted that all parties were to bear their own costs.[3]

On July 28, 2016, the trial court issued a written judgment awarding damages to plaintiffs in accordance with trial judge's oral judgment and stating that "[e]ach party are [sic] to bear their own costs." This appeal timely followed.

[3] There was no award for Mr. Shah's loss of consortium claim; however, Mr. Shah failed to raise this issue as an assignment of error on appeal. Thus, that issue is not before the Court.

DISCUSSION

Dr. Mayo and GEICO have not filed a cross-appeal or otherwise appealed the trial court's judgment finding that Dr. Mayo was solely at fault in causing the accident sued upon; the issue of fault, therefore, is not before this Court. The only issues presented by this case concern the award of damages, which plaintiffs contend is "abusively low," and the failure of the trial court to award costs to plaintiffs, including the costs associated with the perpetuation deposition of Dr. Mayo in New York. We address each issue in turn.

Damages

The standard of review of a trial court's judgment is well-established; a trial court's findings of fact are reviewed under "the manifest error-clearly wrong standard, which precludes the setting aside of a district court's finding of fact unless that finding is clearly wrong in light of the record reviewed in its entirety." *Latter & Blum, Inc. v. Ditta*, 17-0116, p. 3 (La. App. 4 Cir. 6/22/17), --- So.3d. ---, ---, 2017 WL 26877382017 at * 7, quoting *Hall v. Folger Coffee Co.*, 03-1734, p. 9 (La. 4/14/04), 874 So.2d 90, 98. As this Court recently reiterated in *R.L. Lucien Tile Co. v. Solid Rock Co.*, 16-0690, p. 5 (La. App. 4 Cir. 3/29/17), 215 So. 3d 710, 714, "[u]nder the manifest error standard of review, in order to reverse a fact finder'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 fact finder is clearly wrong or manifestly erroneous." The issue for a reviewing court to resolve is not

whether the judgment of the trial court was right or wrong, "but whether the fact-finder's conclusion was a reasonable one; even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility." *Minor v. Bryan*, 16-0323, p. 10 (La. App. 4 Cir. 12/15/16), 206 So.3d 1070, 1077, *writ denied*, 17-0336 (La. 4/7/17), 218 So.3d 115.

The manifest-error principles apply equally to a trial court's award of damages. *Bouquet v. Wal-Mart Stores, Inc.*, 08-0309, p. 4 (La. 4/4/08), 979 So.2d 456, 459 ("[t]he standard of review applicable to a general damages award is the abuse of discretion standard"). As the *Bouquet* Court noted, "[t]he trier of fact is afforded much discretion in assessing the facts and rendering an award because it is in the best position to evaluate witness credibility and see the evidence firsthand." *Id.* Thus, because of the vast discretion afforded to the trial court in awarding damages, on appeal, an "appellate court may disturb [this award] only after an articulated analysis of the facts reveals an abuse of discretion." *Id.*, p. 5, 979 So.2d 459. The appellate court's role in reviewing a general damages award "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." *Id.*

In the instant matter, the record reflects that Mrs. Shah testified that, following the accident, she had pain in her neck and shoulders, and she tried treating herself at home with Epsom salts, a heating pad and a "very mild medicine with Tylenol." She eventually sought treatment with a chiropractor, Dr. Joseph

Stagni, beginning on February 10, 2015, about three weeks after her husband returned from a six-month deployment to Afghanistan. Dr. Stagni's records reflect that Mrs. Shah was seen on ten occasions through May 29, 2015 (four times in February, and twice for the months of March, April and May).

In awarding Mrs. Shah only $1,500.00 in general damages, the trial judge commented:

> The Court is concerned by the fact that the plaintiff did not seek medical treatment for several months. Then the medical treatment – and I understand that she is a teacher and high stakes testing was taking place, but still in all if you are [in] pain, you're still going to find the time to alleviate that pain by going to seek medical treatment. The medical treatment was spotty at best….
>
> And in terms of general damages, because I just honestly don't believe the plaintiff's testimony that she was in that much pain, **I don't find it to be credible. I find it to be incredible.** If [she] were suffering with that much pain, despite the emotional state that [she was] in as it relates to worrying about [her] children's emotion[s], if [she] was in pain [she's] going to seek medical treatment, and so the Court finds it concerning that the medical treatment was spotty, was not at the onset of the accident, and the Court is going to award $1500 in terms of damages. (Emphasis added).

It is clear that the trial court's judgment was based on its determination of the evidence in the record, coupled with its determination of Mrs. Shah's credibility. While this Court may have viewed the evidence differently than the trial court, we are constrained to a review of the record for manifest error, which reveals no abuse of discretion in this matter. *See*, *Gonzales v. Gonzales*, 08-0258, pp. 4-5 (La. App. 4 Cir. 9/30/09), 20 So.3d 557, 560, quoting *Rosell v. ESCO*, 549 So.2d 840, 844-845 (La.1989). "[w]hen the findings are based on determinations

regarding the credibility of witnesses, the manifest error-clearly wrong standard demands greater deference to the trier of facts' findings [ ] for only the factfinder can be aware of the variations in demeanor and tone of choice that bear so heavily on the listener's understanding and belief in what is said...").

Costs

Like an award of damages, the trial court is vested with much discretion in the allocation of costs, and the trial court's assessment of costs will not be disturbed unless the appellate record shows an abuse of discretion. *Logan v. Brink's Inc*., 09-0001, p. 16 (La. App. 4 Cir. 7/1/09), 16 So.3d 530, 542, (citations omitted). "Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause." La. C.C.P. art. 1920. Article 1920 likewise provides that "the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable." As this Court has noted, "the general rule is that all costs, both the prevailing side's and his or her own, are to be paid by the party cast, although the court may make an 'equitable' different provision for costs." *Clarkston v. Louisiana Farm Bureau Cas. Ins. Co*., 07-0158, p. 40 (La. App. 4 Cir. 7/2/08), 989 So.2d 164, 191.

In this matter, the trial judge ordered all parties to bear their own costs, despite having found entirely in favor of the plaintiffs, and denied the plaintiffs' request to be reimbursed for the costs associated with the perpetuation deposition of Dr. Mayo in New York. The deposition of Dr. Mayo ultimately proved to have been unnecessary given that Dr. Mayo was available and testified at the trial of the

merits. Dr. Mayo and GEICO contend that "[t]here was no evidence put forward to suggest any bad faith by [them] to make Plaintiffs-Appellants incur the costs of [Dr.] Mayo's deposition." They cite no case law to support the contention that the good faith of either party is a factor in a court's determination as to the assessment of costs.

In this matter, the trial court did not indicate on the record the basis for not following the general rule that costs be awarded to the prevailing party; nor did it articulate what the "equitable" considerations were for deviating from this rule. Based on the special circumstances of this case, we find that cost should have been awarded to plaintiffs, including those costs incurred by plaintiffs' counsel in traveling to New York for the deposition of Dr. Mayo. Because the record does not contain evidence of those costs and expenses, we remand this case to the trial court for a hearing on costs and expenses.

CONCLUSION

Based on the foregoing, we affirm the damages awarded by the trial court judgment. However, we reverse that part of the judgment ordering the parties to bear their own costs, finding that costs should have been assessed against defendants. We remand this matter to the trial court for a hearing to determine reasonable costs and expenses.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED