NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 1928

ELAINE BELLEAU

VERSUS

MARK A. BOWLING AND LIBERTY MUTUAL INSURANCE COMPANY

Judgment Rendered: SEP 15 2006

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 501,936

Honorable Mary Terrell Joseph, Judge Pro Tempore Presiding[1]

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J. Rodney Messina **Baton Rouge, LA**	**Attorney for Plaintiff/Appellant,** **Elaine Belleau**
Keith S. Giardina **Baton Rouge, LA**	**Attorney for Defendants/Appellees,** **Mark A. Bowling and Liberty Mutual Insurance Company**

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BEFORE: CARTER, C.J., WHIPPLE AND McDONALD, JJ.

[1]While the judgment on the merits was signed by Judge Joseph, Judge Jewel E. Welch, Jr. actually presided over the trial and thereafter orally rendered judgment.

McDonald, J. concurs.

WHIPPLE, J.

In this appeal, plaintiff challenges the trial court's judgment, which awarded plaintiff damages for personal injury resulting from an automobile accident, but reduced those damages, which plaintiff contends were abusively low, by fifty percent for plaintiff's comparative fault. For the following reasons, we amend and affirm as amended.

FACTS AND PROCEDURAL HISTORY

This action arises out of an automobile accident that occurred on October 1, 2002, on Louisiana Highway 3245, O'Neal Lane, in Baton Rouge, Louisiana. The accident occurred at the intersection of O'Neal Lane and Strain Road. The portion of O'Neal Lane where the accident occurred is a two-lane highway with one northbound and one southbound lane of travel. Immediately past the intersection of O'Neal Lane and Strain Road, O'Neal Lane becomes a four-lane roadway, with two northbound and two southbound lanes of travel. While the northbound lane of O'Neal Lane widens slightly prior to the intersection, it is nonetheless still a two-lane roadway at that point with no designated right-turn lane.

On the day in question, plaintiff, Elaine Belleau, was proceeding north on O'Neal Lane, with defendant, Mark Bowling, traveling behind her also in the northbound lane. Upon reaching the intersection of O'Neal and Strain Road, plaintiff attempted to execute a right turn onto Strain Road when she collided with defendant's vehicle, as he was attempting to pass her vehicle on the right.

Following a bench trial, the trial court found that defendant was negligent in driving on the shoulder in an attempt to pass plaintiff on the right. The trial court further concluded that plaintiff was also negligent in failing to use her signal indicator prior to negotiating the right turn. The

court then apportioned fault fifty percent to plaintiff and fifty percent to defendant. The court awarded plaintiff $10,000.00 in general damages and $6,538.00 in special damages, subject to a fifty-percent reduction for her comparative fault.

From this judgment, plaintiff appeals, contending that: (1) the trial court committed legal error when it failed to consider the applicable Louisiana case law in its determination that plaintiff was fifty percent at fault; (2) the trial court erred when it found plaintiff fifty percent at fault in causing the accident; (3) the trial court erred when it failed to consider the testimony of Trooper Smith when determining the proper allocation of fault; and (4) the trial court erred when it limited plaintiff's general damage award to $10,000.00, considering the extent and severity of her injuries and the relevant Louisiana jurisprudence involving plaintiffs with similar injuries.

TROOPER SMITH'S TESTIMONY
(Assignment of Error No. 3)

Because resolution of this assignment of error could impact our consideration of plaintiff's assignments of error regarding apportionment of fault, we first consider plaintiff's third assignment of error, in which she contends that the trial court erred in refusing to consider and/or give weight to the testimony of Trooper Kevin Smith, the Louisiana State trooper who investigated the accident. Plaintiff contends on appeal that Trooper Smith, who has fifteen years of experience investigating accidents, was a credible witness and that the trial court, thus, erred in failing to consider or give any weight to Trooper Smith's opinion testimony.

Louisiana Code of Evidence article 701 permits non-expert testimony in the form of opinions or inferences that are rationally based on the perception of the witness and helpful to a clear understanding of his

testimony or the determination of a fact in issue. Moreover, opinion testimony has been permitted by police officers who are not experts based on training, investigation, perception of the scene and observation of physical evidence. State v. LeBlanc, 2005-0885 (La. App. 1st Cir. 2/10/06), 928 So. 2d 599, 602-603; Cooper v. Louisiana State Department of Transportation and Development, 2003-1847 (La. App. 1st Cir. 6/25/04), 885 So. 2d 1211, 1214, writ denied, 2004-1913 (La. 11/8/04), 885 So. 2d 1142. However, if a law officer such as a state police trooper is not qualified as an accident reconstruction expert, his testimony in the form of opinions is limited to those opinions based upon his rational perception of the facts and recollections pertaining to the accident scene. State v. LeBlanc, 2005-0885, 928 So. 2d at 603.

Trooper Smith, the investigating officer of the accident, was not qualified as an accident reconstruction expert. However, he testified that he had been an officer for fifteen years and had participated in hundreds of motor vehicle accident investigations. Trooper Smith testified by deposition that he had determined from his investigation that defendant was at fault in causing the accident in attempting to pass plaintiff on the right.[2]

Regarding plaintiff's contention that the trial court failed to consider the testimony of Trooper Smith, we note that when the trial court rendered oral reasons for judgment regarding fault and apportionment of fault, the following exchange occurred:

> [PLAINTIFF'S COUNSEL]: WELL, THE ONLY THING I WOULD ASK THE COURT IS TO READ THE TROOPER'S DEPOSITION.
>
> THE COURT: I DID READ THE TROOPER'S DEPOSITION.

[2]Pursuant to LSA-C.E. art. 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not to be excluded solely because it embraces an ultimate issue to be decided by the trier of fact."

Thus, we reject plaintiff's contention that the trial court failed to consider Trooper Smith's testimony. Moreover, we note that the trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Smith v. Roussel, 2000-1028 (La. App. 1st Cir. 6/22/01), 809 So. 2d 159, 164.

With regard to plaintiff's failure to utilize her signal indicator, Trooper Smith stated that he did not indicate in his report whether plaintiff had used her signal indicator and did not recall whether he had asked plaintiff that question. However, he stated that he does ask drivers that question when investigating an accident, "because it is a contributing factor." When further asked whether he would have indicated in his report plaintiff's failure to use her signal indicator if she had indicated such to him, Trooper Smith responded, "Correct, yes, definitely. It's not in there, so evidently she must have had it on because I do ask those questions on that because people do that all the time."

However, the testimony at trial clearly demonstrated that plaintiff did not utilize her signal indicator prior to attempting to make the right turn at issue.[3] Thus, considering this evidence, we find no abuse of discretion in the trial court's implicit partial rejection of Trooper Smith's testimony, which was clearly based in part on incomplete or erroneous information.

This assignment of error lacks merit.

TRIAL COURT'S ALLOCATION OF FAULT
(Assignments of Error Nos. 1 and 2)

In these assignments of error, plaintiff challenges the trial court's

[3]When questioned about how the accident occurred, plaintiff stated, "I went to turn my blinker on and I struck a vehicle that was crossing my path at the intersection." Upon further questioning by defense counsel, plaintiff acknowledged that she was "beginning to turn her blinker on" and that she did not have her blinker on to provide a warning that she was going to make a right turn for any period of time. Defendant also testified that plaintiff did not have her right signal indicator on prior to negotiating the turn.

assessment of fifty percent fault to her in causing the accident for her failure to use her signal indicator. Plaintiff concedes in her appellate brief "the possibility that she is not without fault." However, she contends that her fault was "far less" than fifty percent.

In her first assignment of error, plaintiff contends that the trial court committed legal error in its apportionment of fault, when it incorrectly failed to apply the First Circuit case of McCollister v. Cunningham, 315 So. 2d 391 (La. App. 1st Cir. 1975). In McCollister, the plaintiff was operating a motorcycle and traveling in the same direction and in the same lane behind the defendant. The defendant attempted to turn right onto a private driveway when she first turned her wheels slightly to the left to facilitate an easier right turn. The plaintiff misjudged the defendant's intention when he observed the slight turn to the left, and he then attempted to pass the defendant on the right, close to the curb. When the defendant then turned her vehicle to the right, the plaintiff's motorcycle collided with her vehicle. McCollister, 315 So. 2d at 392.

The plaintiff in McCollister contended that the defendant was negligent because of the absence of proof that her signal indicators were operating. However, the trial court found that while the defendant was negligent, the plaintiff was contributorily negligent in causing the accident. Thus, the plaintiff was barred from recovery. This court affirmed the findings of the trial court, concluding that the plaintiff was negligent in failing to observe traffic conditions ahead of him. McCollister, 315 So. 2d at 392-393.

With regard to plaintiff's contention herein that the trial court committed legal error in failing to apply the precepts of McCollister, we find no merit to that argument. We note that in McCollister, as in the present

case, the trial court concluded that both parties were negligent. Moreover, to the extent that McCollister was decided under the law of contributory negligence, rather than comparative fault, we fail to see how the trial court herein legally erred in failing to apply McCollister to the case herein. Thus, we find no merit to assignment of error number one.

In her second assignment of error, plaintiff contends that the trial court committed manifest error in its factual findings as to apportionment of fault. In Watson v. State Farm Fire and Casualty Insurance Co., 469 So. 2d 967, 974 (La. 1985), the Louisiana Supreme Court set forth five factors to be considered in apportioning fault: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) the extent of the risk created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. A determination by the trier of fact as to allocation of fault is a factual finding which cannot be overturned in the absence of manifest error. Guidroz v. State, through Department of Transportation and Development, 94-0253 (La. App. 1st Cir. 12/22/94), 648 So. 2d 1361, 1366.

In the instant case, the trial court concluded that defendant was negligent in improperly attempting to pass plaintiff on the right, a violation

of LSA-R.S. 32:74.[4] The court further found that plaintiff was also negligent in failing to utilize her signal indicator prior to making the right turn, a violation of LSA-R.S. 32:104(B).[5] The court then apportioned fault fifty percent to each party.

In considering whether the trial court committed manifest error in this apportionment of fault, we note that the conduct of both parties presumably involved an awareness of the risk of harm. However, while the conduct of failing to signal a right turn creates the risk that a following motorist will be unaware of the intended movement of a forward vehicle, the risk created by defendant's conduct in improperly passing to the right immediately prior to and through an intersection was great. Clearly, there is a great likelihood of vehicles executing a turn at an intersection of two roadways. Moreover, as this court noted in McCollister, 315 So. 2d at 392, if plaintiff was not

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[4]Louisiana Revised Statute 32:74 provides as follows:

> A. The driver of a vehicle may overtake and pass upon the right of another vehicle only under the following conditions:
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> (1) When the vehicle overtaken is making or about to make a left turn;
>
> (2) Upon a one-way street, or upon a highway on which traffic is restricted to one direction of movement, where the highway is free from obstructions and of sufficient width for two or more lines of moving vehicles;
>
> (3) Upon multiple-lane highways.
>
> B. The driver of a vehicle may overtake and pass another vehicle upon the right only under conditions permitted such movement in safety. In no event shall such movement be made by driving off the pavement or main traveled portion of the highway.

None of the conditions listed in subsection (A) were present herein. Thus, defendant clearly violated this statute when attempting to pass plaintiff on the right at the intersection in question.

[5]Louisiana Revised Statute 32:104(B) provides as follows:

> Whenever a person intends to make a right or left turn which will take his vehicle from the highway it is then traveling, he shall give a signal of such intention in the manner described hereafter and such signal shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning.

utilizing her signal indicators, that circumstance should have increased defendant's uncertainty of plaintiff's intentions. Defendant simply misjudged plaintiff's intentions, assuming that she was going to turn left or proceed straight, and, without regard for the uncertainty of the situation, nonetheless executed an improper attempt to pass to plaintiff's right. Finally, we note that the only significance of what was sought by defendant's conduct was that he wished to pass plaintiff as soon as possible, rather than simply waiting until they had traveled through the intersection, where the roadway widened to four lanes. The record is devoid of any evidence that he was required to proceed in haste, without proper thought. Accordingly, considering the foregoing, we must conclude that the trial court manifestly erred in its apportioning of only fifty percent fault to defendant.

Where a court of appeal finds a "clearly wrong" apportionment of fault, it should adjust the percentage only to the extent of lowering or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. Toston v. Pardon, 2003-1747 (La. 4/23/04), 874 So. 2d 791, 803; Clement v. Frey, 95-1119 c/w 95-1163 (La. 1/16/96), 666 So. 2d 607, 611. Based on our review of the Watson factors, we conclude that the lowest percentage of fault that the trial court could have allocated to defendant was eighty percent. Accordingly, we reapportion fault eighty percent to defendant and twenty percent to plaintiff. See Toston, 2003-1747, 874 So. 2d at 804.

GENERAL DAMAGES
(Assignment of Error No. 4)

In her final assignment of error, plaintiff contends that the trial court abused its discretion in awarding her only $10,000.00 in general damages

given the severity of her injuries.[6] Plaintiff contends that she suffers from radiculopathy caused by impingement of the S1 nerve root. She also notes that an MRI demonstrated bulging of the discs at L4-5, L5-S1, L5 and S1. According to plaintiff, she suffers from sensory loss and numbness to her right leg, that will continue to cause her great pain for the remainder of her life. Plaintiff contends that an award of $40,000.00 in general damages would be more appropriate.

The discretion vested in the trier of fact in fashioning an award of general damages is great, even vast, so that an appellate court should rarely disturb an award of general damages. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. 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).

In the instant case, the accident was a low-speed collision resulting in minor damage to the two vehicles. However, plaintiff testified that upon impact, her chest struck the steering column.[7] Plaintiff did not immediately seek medical attention, but was given prescription pain medication by her father, an anesthesiologist and pain management physician. Approximately two and one-half weeks after the accident, plaintiff sought treatment from a chiropractor, who performed traction, nerve stimulation and ultrasound for cervical and lower back complaints.

Thereafter, plaintiff sought treatment from Dr. Saiyid Wahid, an

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[6]Plaintiff was also awarded $6,538.00 in medical expenses, an award which she does not challenge herein.

[7]Because of the age of plaintiff's vehicle, the seat belt consisted only of a lap belt with no shoulder harness.

internal medicine doctor; Dr. Charles Kaufman, a neurologist; and Dr. Anthony Ioppolo, a neurosurgeon. When Dr. Wahid examined plaintiff on October 21, 2002, plaintiff complained of back pain from a motor vehicle accident. Dr. Wahid's examination of plaintiff did not yield any objective findings. Thus, he prescribed non-narcotic pain medication at that time. When he next saw plaintiff on November 12, 2002, she was complaining of severe pain radiating into the right thigh. Despite the absence of objective findings, Dr. Wahid changed plaintiff's pain medication to a narcotic medication at that time. Dr. Wahid also ordered an MRI of plaintiff's lumbar spine to determine if there was an objective explanation for plaintiff's complaints.

Four days later, on November 16, 2002, plaintiff was seen by Dr. Wahid's nurse practitioner and specifically requested a shot of Demerol, a narcotic, for her pain, which she was given. Plaintiff then returned to the nurse practitioner the following day, November 17, 2002, requesting another shot of Demerol. She was again given the injection.

Dr. Wahid then saw plaintiff on November 18, 2002, at which time she complained that she was "hurting all over." Dr. Wahid noted that plaintiff complained that she could not stand or walk, a complaint which he found to be suspect given that he witnessed plaintiff walking that day without a problem.

During that visit, Dr. Wahid questioned plaintiff about whether she had specifically requested a Demerol injection from the nurse practitioner, because of his concerns about such a request. At that point, plaintiff's husband started screaming in the presence of other patients that his wife was not a drug addict. Dr. Wahid then dismissed plaintiff as a patient.

With regard to the MRI results, Dr. Wahid stated that the MRI revealed evidence of bulging discs at L4-5 and L5-S1, with moderate bulging at L5 and S1, but no nerve root impingement or herniation.

Plaintiff then sought treatment from Dr. Kaufman on one occasion, i.e, January 15, 2003. Plaintiff related that following the automobile accident of October 1, 2002, she experienced severe pain such that she could not stand or walk. She complained of pain in her upper back, lower back, legs and shoulder, and she also contended that, at times, her right leg would give way. Additionally, plaintiff complained of headaches.

Dr. Kaufman opined that "there was a great deal of embellishment" during the initial examination. He noted that when she was lying on the exam table, she appeared to be in a great deal of pain. However, he later witnessed her walk to the bathroom and out of the office with no limp or abnormality. He stated that he saw a "marked discrepancy" in plaintiff's gait in her normal walk, which was "absolutely fine," and in the way she walked when she knew he was watching, at which time she walked with a limp.

Dr. Kaufman further noted that the only objective finding on examination was an absent ankle jerk on the right, which he thought could be indicative of an S1 radiculopathy. However, Dr. Kaufman stated that an S1 impingement was not borne out on the MRI that had been performed. Also, an MRI of the cervical spine ordered by Dr. Kaufman revealed arthritis in the neck, but no spinal stenosis or nerve root compromise. Dr. Kaufman noted that plaintiff, who was forty-one years old at the time, had arthritis in her spine due to her age and her weight. He acknowledged that a traumatic event such as an automobile accident could exacerbate the situation and cause some discomfort. However, he was of the opinion that

plaintiff's complaints of pain were not consistent with his examination and findings.

Thereafter, plaintiff sought treatment from Dr. Ioppolo, who first saw plaintiff on May 17, 2004. Plaintiff complained of right-sided lower back pain radiating into her right leg and sensory loss and numbness in the right leg. On physical examination, Dr. Ioppolo also noted the absent ankle reflex on the right side, which indicated the possibility of S1 nerve root involvement. Dr. Ioppolo ordered a current MRI of the lumbar spine, the results of which were consistent with the prior lumbar MRI ordered by Dr. Wahid.

Because the MRI did not indicate the presence of nerve root impingement, Dr. Ioppolo then ordered a lumbar myelogram and post-myelographic CT scan to determine if, in fact, plaintiff was suffering from any nerve root impingement. These tests also indicated that plaintiff did not have any definite nerve root compromise. However, there was some protrusion of the disc into the L5 and L5-S1 area on the right side. Because these tests did not demonstrate any nerve root compression, Dr. Ioppolo did not recommend surgery for plaintiff. He opined that plaintiff had suffered some type of concussion or prior compression of the nerve, causing right-sided S1 nerve root dysfunction that was not surgically correctable. Dr. Ioppolo stated that while he hoped the nerve would heal with time, sometimes these problems become chronic and permanent. In such a situation, the patient would have to learn to live with the problem with activity modification.

When questioned about symptom magnification, Dr. Ioppolo stated that he did not notice any signs that plaintiff was embellishing her complaints when he examined her. However, with regard to causation, Dr.

Ioppolo explained that the MRI indicated that plaintiff had degenerative changes in her lumbar spine that took place over time. These degenerative changes were not caused by the accident. Dr. Ioppolo also opined that these types of degenerative changes could become symptomatic after an intervening trauma. Because plaintiff related the onset of her pain to the automobile accident, Dr. Ioppolo likewise related plaintiff's pain complaints to the accident.

Noting the credibility issues raised by Drs. Wahid and Kaufman, the trial court found that plaintiff had suffered an aggravation of a preexisting condition, making the condition more symptomatic. Based upon its review of the evidence and obvious credibility determinations, the trial court awarded plaintiff $10,000.00 in general damages for her injuries. After our review of the record herein and mindful of the great discretion afforded the trial court in rendering such an award, we cannot conclude that the trial court abused its discretion in the amount of general damages awarded to plaintiff.

CONCLUSION

For the above and foregoing reasons, the January 31, 2005 judgment is amended to provide that defendant, Mark Bowling, was 80% at fault in causing the accident, and plaintiff, Elaine Belleau was 20% at fault. In all other respects, the judgment is affirmed. Costs of the appeal are assessed to defendants.

AMENDED IN PART AND, AS AMENDED, AFFIRMED.