NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0253

PATRICIA AND RONALD FINN

VERSUS

KEMPER INSURANCE COMPANY, CINTAS CORPORATION, NICHOLAS VACCARO AND GREYHOUND LINES, INC.

DATE OF JUDGMENT: March 23, 2007

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 2001-004149

Honorable M. Douglas Hughes, Judge

* * * * * * *

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Mutual Casualty Co.

* * * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Welch J. dissents with reasons.

Kuhn, J.

In this personal injury suit arising from a rear-end collision, plaintiffs-appellants, Patricia and Ronald Finn, appeal a judgment that adopted the jury's findings and dismissed their claims against Nicholas Vaccaro, his employer, Cintas Corporation ("Cintas"), and their alleged liability insurer, Lumbermens Mutual Casualty Company ("Lumbermens"). Mr. and Mrs. Finn also appeal a trial court judgment that denied their motion for judgment notwithstanding the verdict ("JNOV") or, in the alternative, for a new trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 12, 2001, Mrs. Finn was a passenger on a Greyhound bus that was en route from Metairie to New Orleans traveling southbound in heavy traffic on Causeway Boulevard. A car, driven by Mr. Vaccaro, was also traveling southbound from Veterans Boulevard in a lane that merged onto Causeway Boulevard. Mr. Vaccaro merged in front of the bus, and the bus struck the rear of Mr. Vaccaro's vehicle. While both the bus and car sustained very minimal damages,[1] some of the bus passengers claimed injury. Mr. and Mrs. Finn filed this suit against Greyhound Lines, Inc. ("Greyhound"), Mr. Vaccaro, Cintas, and Lumbermens, claiming that Mrs. Finn sustained serious injury as a result of the accident and that Mr. Finn was entitled to damages for loss of consortium.

At trial, the jury heard the testimony of Mrs. Finn, Mr. Vaccaro, and Cheryl Pernell, another bus passenger who claimed injury from the collision.[2] Mrs. Finn testified that at the time of the accident, she was sitting near the front of the bus on

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[1] A rear-brake light lens was repaired on Vaccaro's car at a cost of $122.76. The only damage to the bus revealed by the record is that paint from Vaccaro's car was left on the bus's front bumper. The bus repairs totaled $139.15.

[2] Based on plaintiffs/appellants' designation of the contents of the record, the record before us contains the trial testimony of only Mrs. Finn, Vaccaro, and Pernell. Although the court minutes reflect that other witnesses were called to testify at trial, the defendants/appellees did not file a separate designation of the record. See La. C.C.P. art. 2128.

the passenger side. She recalled looking out of the window, seeing a car coming towards her, and thinking that the car was going to hit the bus. She stated that she went down "into the seat," and as she went down, the bus driver "slammed on [the] brakes." She stated she hit her head on the back of the seat in front of her, and she felt something "pop" in her neck and her back. Mrs. Finn testified she had no idea how fast the car and bus were moving at the time of the accident, but she stated, "I don't think we was moving that fast …." She related that she and other passengers noticed the car, and that the bus driver "could have seen it." She also testified that when the car was coming towards the bus, she noticed that the driver of the car was "talking on a car phone."

Mrs. Finn stated that the bus driver exchanged information with the driver of the car, and then the bus proceeded to New Orleans. Mrs. Finn returned to work the next day, but a few days later reported neck and back pain to Greyhound.

In March of 2001, Mrs. Finn was involved in another automobile collision when she rear-ended a vehicle. The impact of the collision caused her airbags to inflate. The estimate of repair costs for her vehicle was over $4,000.00, resulting in her vehicle being declared a total loss.

Following these accidents, Mrs. Finn underwent neck surgery on December 3, 2001, and she testified that she sustained damage to her vocal cords as a result of the surgery. Since the surgery, she has undergone myelogram testing and has had injections for both back and neck pain.

During the trial, Mr. Vaccaro testified that it was "rush hour traffic, bumper to bumper" as he merged into the right-hand lane of Causeway Boulevard. He stated he was traveling at a "very slow" rate of speed. He could not recall whether a yield sign was present as he approached Causeway Boulevard, but he acknowledged that he and the other vehicles in the approach lane were required to

yield to the traffic traveling on Causeway Boulevard. Mr. Vaccaro testified that he saw the bus traveling on Causeway Boulevard, and he merged into the lane in front of the bus. He did not recall whether he had his blinker engaged. Mr. Vaccaro initially denied that he had been talking on a cell phone when the accident happened and then later testified that he did not recall that he had done so. He stated, however, that when the accident occurred, he had already crossed over into the right-hand lane of Causeway Boulevard. Mr. Vaccaro described that the bus hit the back of his car.

Mr. Vaccaro described the damage of the impact to his vehicle as a "small crack in [a rear brake] lense (sic)." He further described it as "[v]ery, very minor," but Mr. Vacarro's testimony does not indicate which rear brake lens was cracked.[3] Mr. Vaccaro initially did not report the accident to his employer because it was "such a trivial matter," but he reported it later.

Cheryl Pernell testified that she was seated towards the front of the bus on the right-hand, passenger side when the accident occurred. She described the traffic conditions at the time of the accident as heavy, "bumper to bumper" and "moving slow." She testified, initially, "It was a little bit like, cat and mouse with the car trying to get in and the bus trying to move. ... [The] car just decided to take a spot and he ran ... into the bus." Pernell later testified, however, that although the bus driver "stomped ... on his brakes," she did not feel an impact from the collision and she thought that Mr. Vaccaro's car had merged safely in front of the bus. She also testified that she did not see Mr. Vaccaro using a cell phone. Pernell stated that as Mr. Vaccaro tried to merge in front of the bus, he had

[3] Although Vacarro answered questions regarding the damage while referring to a photograph during his direct examination, more than one photograph was introduced into evidence. The record does not make clear which photograph or which taillight Vacarro referenced during his testimony. Additionally, the photographs in question show both taillights of Vacarro's vehicle and do not clearly portray damage to either taillight. While the pictures show the left taillight more prominently than the right taillight, and although an inference might be drawn that the left taillight was the one that was damaged, the evidence does not establish this fact.

a blinker on, and "he had his eye on the bus." When asked whether Mr. Vaccaro's car had moved onto Causeway Blvd. in front of the bus before the impact, Pernell stated, "Yes." Further, when Pernell was asked whether the bus had hit the rear left taillight of the car, Pernell responded, "I don't know what area that the bus hit the car, but I do know the ... right side of the [front] bus bumper had this car's paint on it."

According to the trial court minutes, on the third day of the four-day jury trial, the jury was informed that Greyhound was no longer a part of the litigation, and thereafter, plaintiffs' petition against Greyhound was dismissed with prejudice. When plaintiffs and the remaining defendants had rested their respective cases, the trial court instructed the jury and submitted to it a verdict form that included the following interrogatories, in pertinent part:

> 1. Was Nicholas Vaccaro negligent?
> _____Yes _____No
>
> If you (sic) answer to question No. 1 is no, please sign and date this form and return to the courtroom. If you (sic) answer is yes, go on to question No. 2.
>
> 2. Was Nicholas Vaccaro's negligence the cause of the accident in question?
> _____Yes _____No
>
> If your answer to question No. 2 is no, please sign and date this form and return to the courtroom. If your answer is yes, go on to question No. 3.
>
> 3. Was Dwight Moody's (sic), the greyhound bus driver, negligent?
> _____Yes _____No
>
> 4. Was Dwight Moody's negligence the cause of the accident in question?
> _____Yes _____No
>
> 5. Was Patricia Finn negligent?
> _____Yes _____No
>
> 6. Was Patricia Finn injured as a result of the accident of February 12, 2001?
> _____Yes _____No

If your answer to question 6 is no, please sign and date this form and return to the courtroom? (sic) If you answer to question No.6 if (sic) yes, go on to question No. 7.

7. Was Nicholas Vaccaro's negligence a cause of any injuries sustained by Patricia Finn?

_____Yes _____No

8. Was Dwight Moody's negligence the cause of any injuries sustained by Patricia Finn?

_____Yes _____No

9. Was Patricia Finn's negligence the cause of any injuries sustained by her?

_____Yes _____No

10. What percentage of fault, if any, do you attribute to the following persons or entities for any injuries sustained by Patricia Finn proximately resulting from the accident of February 12, 2001?

Nicholas Vaccaro/Cintas _____% Total must add up To 100%

Dwight Moody/Greyhound _____%

Patricia Finn _____%

The court minutes reflect that after approximately one hour of deliberations, the jury returned with the following question for the court, "May the Jury award damages to the Plaintiff even though Nicholas Vaccaro is not the cause of the accident?" The minutes also reflect that the court responded "No," and the jury returned to its deliberations. Approximately twenty minutes later, the jury returned with the following verdict:

1. Was Nicholas Vaccaro negligent?

_____X_____Yes _____No

If you (sic) answer to question No. 1 is no, please sign and date this form and return to the courtroom. If you (sic) answer is yes, go on to question No. 2.

2. Was Nicholas Vaccaro's negligence the cause of the accident in question?

_____Yes _____X_____No

In accordance with the jury's verdict, the trial court rendered judgment in favor of the remaining defendants, dismissing plaintiffs' claims.

Plaintiffs' filed a motion for JNOV or, in the alternative, for a new trial, urging: 1) the jury verdict form was flawed and demonstrated juror confusion; and 2) the jury verdict was inconsistent. Additionally, the plaintiffs filed a supplemental motion, contending, "[T]he court should allow depositions and/or a hearing with testimony" to "make an appropriate inquiry into the possibility of juror misconduct" as an additional ground for a JNOV or a new trial.

The trial court held a June 13, 2005 hearing on the motions filed by plaintiffs, during which plaintiffs and defendants introduced various affidavits addressing the issue of the alleged juror misconduct. On that date, the trial court denied both motions.

Mr. and Mrs. Finn have appealed the trial court's judgments, urging: 1) the trial court erred in failing to give the requested jury charge respecting failure to yield pursuant to La. R.S. 32:123; 2) the trial court erred by failing to order a hearing into juror misconduct and by failing to grant a JNOV or a new trial in this matter due to the inconsistent jury verdict; and 3) the jury erred in rendering an inconsistent verdict.

II. ANALYSIS

During the trial, plaintiffs requested that the trial court give a jury charge regarding the duties of a driver approaching a yield sign based upon La. R.S. 32:123.[4] The trial court denied this request. Plaintiffs urge on appeal that the central issue in this case is Mr. Vaccaro's failure to yield. As such, plaintiffs contend that the court's jury instructions did not adequately address a motorist's

[4] Louisiana Revised Statutes 32:123(D) sets forth, in pertinent part, that a driver approaching a yield sign "shall slow down to a speed reasonable for the existing conditions, or shall stop if necessary" and "shall yield the right of way ... to any vehicle ... approaching on another highway so closely as to constitute an immediate hazard."

duty at an intersection controlled by a "yield" sign and that "the failure to give the [requested] charge probably contributed to the erroneous verdict." Plaintiffs further submit, "[A] photograph of the 'Yield' sign that [Mr. Vaccaro] disobeyed was stipulated into evidence."

In ***Nicholas v. Allstate Ins. Co.***, 99-2522, pp. 6-10 (La. 8/31/00), 765 So.2d 1017, 1022-24, the supreme court addressed whether certain jury instructions given by the trial court had misled the jury in its assessment of the tort of intentional infliction of emotional distress. The supreme court found that the trial court had failed to instruct the jury regarding an essential element of the tort claim and that such error had more likely than not contributed to the verdict. In addressing this issue, the court discussed the following applicable law before interdicting the jury verdict:

> Louisiana jurisprudence is well established that an appellate court must exercise great restraint before it reverses a jury verdict because of erroneous jury instructions. The basis for this rule of law is that trial courts are given broad discretion in formulating jury instructions and it is well accepted that a trial court judgment will not be reversed so long as the charge correctly states the substance of the law. However, when a jury is erroneously instructed and the error probably contributed to the verdict, an appellate court must set aside the verdict. In the assessment of an alleged erroneous jury instruction, it is the duty of the reviewing court to assess such impropriety in light of the entire jury charge to determine if they adequately provide the correct principles of law as applied to the issued (sic) framed in the pleadings and evidence and whether they adequately guided the jury in its deliberation. Ultimately, the determinative question is whether the jury instructions misled the jury to the extent that it was prevented from dispensing justice. (Citations omitted.)

The record in this appeal contains a photograph of the intersection in question. The photograph depicts a yield sign controlling the traffic that merges onto Causeway Boulevard. Despite plaintiffs' claims, however, the appeal record does not contain any stipulations regarding the photograph, and there is no evidence establishing that the photograph is an accurate depiction of the intersection on the date of the bus/car collision. Mr. Vaccaro testified that he did

not recall whether the yield sign was in place on the date of the collision. He acknowledged, however, that vehicles in the approach lane were required to yield to the Causeway Boulevard traffic, and that he had that burden on the day in question.

Our examination of the jury charge reveals that although the trial court refused to give the requested instruction addressing La. R.S. 32:123, the trial court gave the following pertinent instruction regarding the traffic situation at issue:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic, a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane unless the driver has first ascertained that such movement can be made safely.

Because the record does not clearly establish that a yield sign controlled the intersection in question on the date of the collision, because Mr. Vaccaro admitted his obligation to yield, and because the trial court gave another instruction that generally addressed Mr. Vaccaro's duty upon changing lanes from the merging lane to the right hand lane of Causeway Boulevard, we conclude the jury charge adequately provided the jury with the correct principle of law and adequately guided the jury in its deliberation. Hence, we conclude that the jury instructions did not mislead the jury to the extent that it was prevented from dispensing justice. We find no merit in this assignment of error.

B. Juror Misconduct

Next, we address the plaintiffs' contention that the trial court erred in refusing to order a hearing or grant them a new trial on the basis of "potential juror misconduct." La. C.C.P. art. 1972(3) provides that a new trial shall be granted "[w]hen the jury ... has behaved improperly so that impartial justice has not been done." Counsel for plaintiffs assert that "the possibility that one juror – whose direct supervisor is named Vaccaro – and who lobbied extensively for [Mr.

Vaccaro] – was guilty of misconduct" was brought to his attention by another juror after the trial, and that a hearing was warranted on this issue.

The record establishes, however, that the trial court held a hearing to address plaintiffs' post-trial motions and that during this hearing, both plaintiffs and defendants introduced evidence regarding the issue of juror misconduct. In support of their claim, plaintiffs introduced the affidavit of Eddie Fisher, who swore that: 1) he had served as a juror during the trial of this matter; 2) he and others had wanted to make an award to Mrs. Finn but that one juror had "fought hard" for Mr. Vaccaro; 3) he did not recall the juror's name; 4) the female juror in question had worked at the Tangipahoa Parish School Board office in the Special Education Department; 5) he learned that the supervisor of the juror in question was named Diane Vaccaro, and he thought she was related to Mr. Vaccaro; and 6) he believes that these relationships unfairly affected the jury deliberations.

The defendants countered plaintiffs' affidavit with the affidavits of Mr. Vaccaro and Diane Vaccaro. Mr. Vaccaro's affidavit states, in pertinent part, that: 1) he is originally from Baton Rouge, Louisiana, but he now resides in Hammond, Louisiana where he has lived for 20 years; 2) he is married to Pamela Vaccaro; 3) he has a distant relative named Jerry Vaccaro; 4) he believes that his grandfather and Jerry Vaccaro's grandfather were distant cousins; 5) he knows a Diane Vaccaro, who is married to Jerry Vaccaro; 6) he does not call, visit, or socialize with either Diane or Jerry Vaccaro; 7) he sees Diane Vaccaro only very occasionally in places such as a store or a ball park; 8) he has seen Diane Vaccaro once within the last year at a gym where his grandson was playing basketball; 9) he did not tell Diane Vaccaro that he was involved in an automobile accident or that he was involved in a lawsuit; 10) he did not know that Diane Vaccaro either knew or worked with anyone who was serving on the jury in this lawsuit until his

attorney advised him that the plaintiffs had filed a post-trial motion alleging that a juror worked with Diane Vaccaro; and 11) he does not know anyone named "Kathy Gueldner."

Diane Vaccaro's affidavit set forth that: 1) she has resided for 28 years in Tickfaw, Louisiana; 2) her maiden name is "Canale," and she is currently married to Gerald Vaccaro; 3) she is employed by the Tangipahoa Parish School Board as the Supervisor of Special Education, and her secretary is Kathy Gueldner; 4) Gueldner requested time off of work to serve jury duty; 5) she "gave [Gueldner] the time off," but she did not discuss with her anything relating to the jury duty, including the type of case or the names of the parties involved; 6) Gueldner served jury duty for one week; 7) during the trial, she neither talked to Gueldner about the trial nor did she discuss the names of the parties to the lawsuit; 8) she did not learn that anyone named "Vaccaro" was involved in the trial until after Gueldner returned to work and inquired whether she knew someone named "Nicholas Vaccaro"; 9) she held no further discussions with Gueldner about the trial; 10) she knows two individuals named "Nicholas Vaccaro," both of whom are distant relatives of her husband to whom she speaks occasionally; 11) and she does not know which "Nicholas Vaccaro" was involved in the lawsuit for which Gueldner served as a juror.

Under Louisiana law, the party seeking a new trial based on jury misconduct must prove that the level of behavior was of such a grievous nature as to preclude the impartial administration of justice. ***Simoneaux v. Amoco Production Co.***, 02-1050, p. 10 (La. App. 1st Cir. 9/26/03), 860 So.2d 560, 566, ***writ denied***, 04-0001 (La. 3/26/04), 871 So.2d 348. Considering the evidence presented at the hearing, we find that plaintiffs' evidence did not meet this substantial burden, and we find

no error in the trial judge's refusal to grant a new trial on the basis of jury misconduct.

C. Jury Verdict

Plaintiffs argue that the jury verdict was inconsistent because the jury found that Mr. Vaccaro was negligent but also found that his negligence was not the cause of the accident. Plaintiffs assert that the jury must have erroneously determined that "even though Mr. Vaccaro was negligent, they could not award damages unless they found him 100% at fault." They further urge that because the jury raised a question during deliberations regarding whether an award could be made to plaintiff despite Mr. Vaccaro not being the cause of the accident, the jury obviously wanted to award damages to Mrs. Finn. Plaintiffs contend the trial court erred in failing to grant a JNOV or new trial as a result of the verdict.

Initially, we note the plaintiffs failed to voice any objection to the proposed verdict form even though the trial court specifically questioned whether the parties objected to it.[5] Because no objection to the proposed jury verdict form was made before the jury retired to deliberate, plaintiffs' objection to the wording of the jury verdict form was waived. See La. C.C.P. art. 1812, ***Moore v. Safeway, Inc.***, 95-1552, p. 13 (La. App. 1st Cir. 11/22/96), 700 So.2d 831, 842, ***writs denied***, 97-2921 & 97-3000 (La. 2/6/98), 709 So.2d 735 & 744; ***Parker v. Centenary Heritage Manor Nursing Home***, 28,401, p. 8 (La. App. 2d Cir. 6/26/96), 677 So.2d 568, 574, ***writ denied***, 96-1960 (La. 11/1/96), 681 So.2d 1271. This issue may not be

[5] The transcript sets forth the following pertinent colloquy between the trial court and plaintiffs' counsel:

> BY THE COURT:
>
> .... [I]t's my understanding that from both sides that there is no objection to the proposed verdict form; is that right, Mr. Richardson?
>
> BY MR. RICHARDSON[PLAINTIFFS' COUNSEL]:
>
> Yes, sir, that's correct.

raised for the first time on appeal. ***Moore v. Safeway, Inc.*** 95-1552 at p. 13, 700 So.2d at 842.[6]

Additionally, we further find no inconsistency in the jury's verdict and, thus, we find that the trial court did not err in failing to grant plaintiffs' JNOV or motion for new trial. La. C.C.P. art. 1811 provides for the trial court's use of JNOV. A trial court may grant a JNOV on an issue of liability. La. C.C.P. art. 1811. In ***Smith v. State, Dep't of Transp. & Dev.***, 04-1317, p. 12 (La. 3/11/05), 899 So.2d 516, 524-525 (citing ***Trunk v. Medical Center of Louisiana at New Orleans***, 04-0181, pp. 4-5 (La. 10/19/04), 885 So.2d 534, 537, the supreme court set forth the applicable standard for determining when a JNOV is proper:

> [A] JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the trial court believes that reasonable persons could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. In making this determination, the trial court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.

The supreme court has further emphasized that the JNOV strict criteria is predicated on the rule that "when there is a jury, the jury is the trier of fact." ***Trunk v. Medical Center of Louisiana at New Orleans***, 04-0181 at p. 5, 885 So.2d at 537.

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[6] Moreover, we note that we find no merit in plaintiffs' suggestion that the jury's question during deliberation indicated that the jurors were confused and that they wanted to make a monetary award to plaintiffs but were thwarted by the wording of the jury interrogatories. The jurors may have believed that Mrs. Finn was injured as a result of the car/bus collision, but they may have also determined that the accident was caused solely by the actions of the Greyhound bus driver. Because Greyhound was initially involved in the trial proceedings but midway through the trial was no longer present, the jurors may have been confused about the effect of Greyhound's absence during the remainder of the trial. The April 6, 2005 minutes indicate that the court only informed the jury, "Greyhound is no longer a part of the litigation."

Plaintiffs herein argue, "Reasonable persons [having found Vaccaro negligent] simply could not arrive at a contrary conclusion to the question of whether his negligence was at least **a** cause of the accident." We disagree. Although it was disputed as to whether Mr. Vaccaro was talking on a cell phone as he approached Causeway Blvd, Mrs. Finn testified that he did so. Accordingly, the jury's finding of negligence may have been based upon a finding that he was talking on the cell phone while driving in heavy traffic as he approached the intersection in question. However, the jury apparently did not find that Vaccaro's action of talking on the cell phone was the cause of the accident. If he were using a cell phone at the time of the accident, the evidence does not overwhelmingly demonstrate that Mr. Vaccaro was inattentive to his surroundings such that it caused the collision.

Further regarding causation of the accident, the record supports the jury's conclusion that any negligence on the part of Mr. Vaccaro did not cause the accident. The testimony of Mr. Vaccaro and Mrs. Pernell established that the traffic was moving slowly and was "bumper to bumper." Mr. Vaccaro testified that the vehicles were moving very slowly as he maneuvered his vehicle into the right-hand lane of travel in front of the bus. Mrs. Pernell testified that Mr. Vaccaro's blinker was operating as he merged in front of the bus. Further, the testimony is undisputed that the bus hit the rear of Mr. Vaccaro's vehicle.

Because some of the bus passengers had seen Mr. Vaccaro's vehicle merging in front of the bus and because all of the traffic was moving slowly, the jury could have reasonably concluded that the bus driver should also have seen that Mr. Vaccaro's vehicle had entered the travel lane in front of the bus. All motorists have a never-ceasing duty to maintain a sharp lookout and to see that which in the exercise of ordinary care should be seen. ***Theriot v. Bergeron***, 05-1225, p. 6 (La.

App. 1st Cir. 6/21/06), 939 So.2d 379, 383. Accordingly, the evidence supports a finding that the bus driver's action of failing to drive more prudently once another vehicle had entered the lane of travel was the sole cause of the rear-end collision. We find the evidence does not point so strongly in favor of plaintiffs such that reasonable persons could not reach different conclusions; the record contains evidence opposing the motion that is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. Thus, the trial court properly denied the JNOV and the alternative motion for new trial. The trial court gave appropriate deference to the jury as the factfinder.

III. CONCLUSION

We find no merit in plaintiffs' assignments of error. The trial court adequately instructed the jury based on correct principles of law as applied to the facts and issues presented in this case, plaintiffs did not establish jury misconduct that would have precluded the impartial administration of justice, and we conclude that the trial court properly denied plaintiffs' motion for JNOV and their alternative motion for new trial. Thus, we affirm the trial court's judgment dismissing plaintiff's claims. Appeal costs are assessed against plaintiffs-appellants.

AFFIRMED.

PATRICIA AND RONALD FINN NUMBER 2006 CA 0253

FIRST CIRCUIT

VERSUS

KEMPER INSURANCE COMPANY, CINTAS CORPORATION, NICHOLAS VACCARO AND GREYHOUND LINES, INC. COURT OF APPEAL

STATE OF LOUISIANA

JEW WELCH, J., DISSENTING.

This is a two-vehicle merging accident[1] in which the jury found that merging driver was negligent, yet also found that negligence did not cause the accident. Unlike a multi-vehicle accident, in a *two*-vehicle accident, finding one driver negligent, necessarily leads to a conclusion that the driver was at least *a* cause of the accident. I find the jury's error was the result of an inconsistent and misleading verdict form.

The jury found Vaccaro to be negligent, but was instructed to stop the inquiry unless it found his negligence was ***the*** cause of the accident. Finding Vaccaro's negligence was not ***the*** cause of the accident, the jury stopped as directed, when it should have assessed some percentage of fault to that negligence. Not doing so was inconsistent. See **Rivera v. United Gas Pipeline Company,** 96-502 (La. App. 5th Cir. 6/30/97), 697 So.2d 327, where the plaintiff argued on appeal that the jury verdict was internally inconsistent because "in Interrogatories No. 1 and 3, the jury found the defendants to be negligent, but in Interrogatories No. 2 and 4, the jury found that defendants' negligence was not a proximate cause of the incident." The court dismissed the assignment of error as moot, noting that the trial court had *correctly* issued a JNOV declaring the defendants' negligence was the proximate cause and therefore "cured any inconsistency which may have been in the jury verdict." **Rivera**, 697 So.2d at 337.

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[1] Discussed later herein I detail my disagreement with the majority's characterization of the accident as a "rear-end" accident.

In my opinion, the majority dismisses this issue, speculating that "the jury's finding of negligence *may have been based* upon a finding that he was talking on the cell phone while driving in heavy traffic" but that his use of the cell phone did not cause the accident. My disagreement with this conclusion, again, is based on the evidence in the record. In my opinion as noted above, the record contains physical impact evidence and testimony conclusively establishing a "merging" rather than a "rear-end" accident. The evidence regarding Vaccaro's cell phone use was wholly inconclusive: one passenger (Ms. Pernell) testified he was not on the phone; the plaintiff testified that he was on the phone; and, Vaccaro testified at first, that he was not on the phone, and later he could not recall if he had been on the phone. Taking consideration of the totality and the strength of the evidence presented, even if the jury attributed negligence to Vaccaro for being on the phone, it simply could not ignore the other evidence of negligence by Vaccaro, which renders its finding that his negligence was not at least **a** cause of the accident inconsistent as a matter of law.

Moreover, the record contains sufficient evidence to support the jury's finding that Vaccaro was not ***the*** (sole) cause of the accident: the jury may have found that the bus driver, either in failing to allow the car to merge or in slamming on the brakes was negligent and also a cause of the accident; or, the jury may have found that the plaintiff, in her attempted evasive maneuver was also contributorily negligent. Indeed, the jury verdict contained this inquiry; however, it was not reached by the jury which was instructed to stop after finding Vaccaro was not ***the*** cause of the accident. The inquiry should have been whether the negligence of Vaccaro was ***a*** cause, rather than ***the*** cause of the accident. This would have allowed the jury to proceed and assess all fault accordingly, preventing the inconsistency. Instead, after specifically finding Vaccaro to be negligent, the jury was prohibited by the verdict form from assessing some percentage of fault, short

of 100%, to that negligence.

The majority finds that the failure to object prohibits the plaintiff from assigning error on appeal; I disagree. When there is a plain and fundamental error in the jury verdict, which prevents the jury from properly applying the law, as in this case, where the inquiry should have stated "a" rather than "the" cause of the accident, the application of objection requirement is relaxed and a failure to object is not considered a waiver. See **Trans-Global Alloy Limited v. First national Bank of Jefferson Parish**, 583 So.2d 443 (La. 1991); see also **Branch-Hines v. Hebert**, 939 F.2d 1311 (5th Cir. 1991).

It is well settled that misleading or confusing interrogatories may constitute reversible error if they are so inadequate or incorrect as to preclude the jury from reaching a verdict based on the law and the facts. **James v. Autozone, Inc.**, 2003-1255 (La. App. 1st Cir. 4/2/04), 879 So.2d 162. As illustrated above, in this case, the jury verdict form was so inartfully worded as to be misleading and it also prevented the jury from properly reaching relevant inquiry and assessing a percentage of fault to a finding of negligence.

I also disagree with the majority's characterization of this accident in the very first line of the opinion as a "rear-end collision." **If** there were sufficient evidence in the record to support this, I would agree wholeheartedly with the majority's resolution of the issue presented. However, after reviewing the entire record and all of the evidence presented, the only reasonable conclusion any juror could have reached is that the accident was a "classic" merging accident, where the merging driver breached his duty to merge safely.

I find the *only* evidence to support the majority's conclusion that this was a rear-end accident was the self-serving testimony of Vaccaro himself, that the bus hit the back of his vehicle after he had safely merged into the left lane in front of the bus. However, this testimony is directly and wholly contradicted by the

evidence related to the physical damage to the vehicles. The damage to the bus, as reflected by photographs and described in a repair summary, was very minor and limited to the side of the right front bumper. According to the testimony of Vaccaro, the damage to his vehicle was very minor and limited to one rear taillight. The photographs in evidence reveal the damage to Vaccaro's vehicle was also very minor and limited to the corner of the left rear taillight. In this regard, I must note my complete disagreement with footnote 3 of the majority opinion as I feel that it mischaracterizes the photographic evidence in the record. In both photos contained in the record, the left rear taillight of Vaccaro's vehicle and the damage thereto, albeit slight, is *clearly* visible. Vaccaro testified that only one taillight was damaged. Thus, the statement by the majority that only an inference can be drawn that the left taillight was the one damaged because no clear picture of the *right* taillight was presented, implicitly and improperly places a burden on the plaintiff to prove negative evidence – that the right taillight was *not* damaged, when there was no evidence, even by Vaccaro's testimony, that more than one taillight was damaged.

A review of the entire record reveals the testimony most consistent with physical evidence presented is the testimony of Cheryl Pernell, an uninterested witness who was also a passenger in the Greyhound bus at the time of the accident. When asked to describe how the accident happened, she testified:

> Okay. We were headed into the destination in Louisiana, the terminal, and we were on Causeway and Veterans. The bus was headed on Causeway; the Veterans traffic was trying to merge into the Causeway traffic. It was a little bit like, cat and mouse with the car trying to get in and the bus trying to move.
>
> So, this car just decided to take a spot and he ran smack-dead, into the bus.[2]

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[2] Ms. Pernell stated that at the moment of impact, the bus driver, who had one foot on the accelerator, had to make an emergency stop by slamming on the brakes. According to Mrs. Finn,, when this happened, she was thrown forward and hit her forehead on the chair in front of her. Ms. Pernell also testified that she later noticed the front right corner of the bus had paint on it from the vehicle that hit it.

The testimony of all other witnesses is consistent with the characterization that Vaccaro's vehicle and the Greyhound bus were engaged in a "cat and mouse" type of situation, not uncommon in bumper-to-bumper traffic. However, the ultimate legal responsibility when merging into traffic as occurred here, and as admitted to by Vaccaro, lies with the merging vehicle. That an accident ensued, and the evidence establishes that the side of the right bumper of the bus impacted the left rear taillight of Vaccaro's vehicle conclusively establishes that Vaccaro breached his ultimate duty as the driver of the merging vehicle to do so safely.

Accordingly, in my opinion, the evidence reveals that Vaccaro *was* indeed negligent and the jury manifestly erred in not attributing at least some legal fault to the negligence of Mr. Vaccaro. On either basis, reversal of the judgment is warranted and I respectfully dissent.