NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 2351

ADRIAN SLAUGHTER

VERSUS

SAFEWAY INSURANCE COMPANY OF LOUISIANA, ET AL.

Judgment Rendered: September 14, 2007

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Appealed from the
Eighteenth Judicial District Court
In and for the Parish of Pointe Coupee
State of Louisiana
Docket Number 37,876

Honorable James J. Best, Judge

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Adrian Slaughter

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Safeway Insurance
Company of Louisiana
and Brian S. Lemoine

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

In this matter, an insurer appeals a trial court's judgment in favor of a left-turning motorist. Having thoroughly reviewed the evidence in the record before us, and finding no error in the determinations of the trial court, we affirm.

FACTS AND PROCEDURAL HISTORY

This tort suit stems from an automobile accident that occurred on November 9, 2002, on Highway 1 in Lettsworth, Louisiana, in Pointe Coupee Parish. At the time of the accident, Adrian Slaughter, a deputy with the Pointe Coupee Parish Sheriff's Department, was responding to a dispatched assignment driving a marked patrol vehicle. As Slaughter was attempting to turn into the parking lot of a local drinking establishment, a 2002 Ford Pickup Truck driven by Brian S. Lemoine struck the rear left quarter of his vehicle. As a result of the collision, Slaughter sustained injuries to his neck, side and shoulder for which he sought compensation by filing a petition for damages against Lemoine and Safeway Insurance Company of Louisiana, Lemoine's automobile liability insurer (collectively "defendants"). The defendants answered the petition denying all liability and alternatively asserting the comparative fault of Slaughter.

A trial on the merits of Slaughter's petition was held on June 27, 2006. The trial court rendered judgment in favor of Slaughter awarding him general damages in the amount of $15,000 and special damages in the amount of $319 in a written judgment signed July 14, 2006, from which judgment the defendants suspensively appeal.

ASSIGNMENTS OF ERROR

The defendants herein have set forth the following assignments of error:

> (1) The trial court erred in concluding that the accident at issue herein was solely the fault of defendant, Brian Lemoine. The finding was clearly contrary to the testimony of the plaintiff, Adrian Slaughter.

(2) The trial court abused its discretion in awarding excessive general damages to Adrian Slaughter.

DISCUSSION

In their first assignment of error, defendants contend that the trial court erred in failing to assess Slaughter with any fault in causing the underlying accident. The trier of fact apportions fault after considering both the nature of each party's conduct and the correlation between that conduct and the damages claimed. The allocation of a particular percentage of fault to a party is a finding of fact. On review, an appellate court will not reverse a trial court's finding of fact unless it is manifestly erroneous or clearly wrong. Dickens v. Commercial Union Insurance Company, 99-0698, p. 7 (La. App. 1st Cir. 6/23/00), 762 So. 2d 1193, 1198. Under the manifest error standard of review, an appellate court must review the record in its entirety to determine whether a reasonable factual basis existed for the finding of the trial court and whether the trial court's finding was not clearly wrong. Mart v. Hill, 505 So. 2d 1120, 1127 (La. 1987); Arceneaux v. Domingue, 365 So. 2d 1330, 1333 (La. 1978).

Louisiana jurisprudence holds that both the left-turning motorist and the overtaking, passing motorist must exercise a high degree of care because such maneuvers are dangerous. Coleman v. Parret, 98-121, p. 5 (La. App. 5th Cir. 7/28/98), 716 So. 2d 463, 466. Under La. R.S. 32:104, a left-turning motorist must signal his intent to turn at least 100 feet from the turning point and take steps to ensure that the maneuver can be made without endangering a passing vehicle. A driver may not make a left turn unless it can be done without danger to normal overtaking traffic. Bryant v. Newman, 39,437, p. 8 (La. App. 2d Cir. 4/20/05), 900 So. 2d 343, 348. The driver of an overtaking vehicle must also be alert to the actions of the motorist ahead of him on the road. Before attempting to pass, the passing driver has a duty to ascertain from all circumstances of traffic, the lay of

the land, and conditions of the highway, that passing can be completed with safety. The turning motorist has the right to assume the following driver will observe all duties imposed by law and common sense. Bryant, 39,437 at 8, 900 So. 2d at 349.

The only evidence offered at trial in this matter was the testimony of Slaughter, a copy of the Uniform Motor Vehicle Traffic Crash Report, documents relating to the DWI arrest of Lemoine, documentation regarding Slaughter's medical treatment following the accident, and a copy of the Safeway insurance policy for Lemoine's vehicle.

According to Slaughter, at approximately 2:20 a.m., he was driving to Logger's Lounge in response to a report that the drinking establishment was open beyond the allowable time. On direct examination, Slaughter testified that he activated his turn signal about 10 to 20 yards before making the left-hand turn towards the Logger's Lounge parking lot. Later, on cross examination, Slaughter was rehabilitated on this issue by his testimony in which he stated that he was not certain of the actual distance at which he activated his turn signal. He explained that the distance from which he first activated his turn signal to where he began to make the turn was the distance "from the corner of St. Mary's to Loggers' Lounge," and that that distance "would probably be a hundred feet or more."

Slaughter had checked the speed and location of following vehicles, in this case Lemoine's vehicle, and judged that the left turn could be made safely. In making this determination, Slaughter was entitled to assume that a following motorist would observe all the duties imposed on him by law and common sense, including proceeding within the speed limit and not crossing a yellow line in a traffic lane marked as a "no passing" zone.

The portion of the roadway on which the collision occurred was designated a no-passing zone and was marked as such with double yellow-striped lines on the pavement. The state police officer who investigated the accident further recorded

that the accident occurred in a no-passing zone in the Uniform Motor Vehicle Traffic Crash Report he completed. As the accident occurred in the opposing lane of travel and the damage to Slaughter's vehicle was on the rear left quarter panel, the evidence strongly indicates that had Lemoine not illegally attempted to pass Slaughter in a no-passing zone, this accident would not have occurred, despite Slaughter's alleged negligence.

At the time of the accident, Slaughter testified that when Lemoine exited his vehicle, he could "hardly stand up" and that he smelled alcohol on Lemoine. According to the DWI arrest report, the state police officer also perceived that Lemoine was under the influence of alcohol because he performed field sobriety and chemical tests on Lemoine, resulting in Lemoine's arrest for violating La. R.S. 14:98.[1]

Lemoine's unlawful intoxication while driving clearly could have been viewed by the trial court as hindering his ability to observe and appreciate Slaughter's actions in slowing down and signaling to make a left turn. We therefore find that there was sufficient evidence presented to the trial court to support its finding regarding fault and accordingly reject the defendants' first assignment of error.

In their second assignment of error, the defendants contend the general damages awarded Slaughter were excessive. Much discretion is left to the judge in the assessment of general damages. La. C.C. art. 2324.1. In reviewing an award of general damages, the court of appeal must determine whether the trier of fact has abused its much discretion in making the award. Youn v. Maritime Overseas Corp., 623 So. 2d 1257, 1260 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct.

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[1] Louisiana Revised Statute 14:98 defines the crime of "Operating a Vehicle while Intoxicated," in part, as the operation of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when the operator's blood alcohol concentration is 0.08 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood. According to Lemoine's chemical test results, his blood alcohol concentration was 0.164.

1059, 127 L.Ed.2d 379 (1994). 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, 623 So. 2d at 1261. Only after it is determined that there has been an abuse of discretion is a resort to prior awards appropriate, and then only to determine the highest or lowest point of an award within that discretion. Coco v. Winston Industries, Inc., 341 So. 2d 332, 335 (La. 1976).

At trial, Slaughter testified that he had no physical problems or complaints prior to the accident. Following the accident, Slaughter was treated at the Pointe Coupee General Hospital for complaints of pain in his neck, side, and shoulder. Four or five days later, he sought follow-up treatment from his family physician, Dr. Ramsey, for continued shoulder pain and was prescribed Ibuprofen and Loritab for his pain. Slaughter testified that his neck and side only hurt for a few days following the accident; however, his shoulder pain grew progressively worse, and then after three months, became a non-constant, intermittent pain that he still suffered from at the time of trial. His testimony, which the trial court apparently found credible, was that the shoulder injury never completely resolved and was easily aggravated by any type of exertion related to work or leisure activities. He testified that he took Tylenol, Aleve, or similar medications to relieve the pain when he experienced aggravation of his shoulder condition.

Although the award is higher than this court may have granted under these facts, we cannot substitute our judgment for that of the trier of fact. It was the trier of fact who reviewed the evidence at trial and heard, first-hand, the testimony of Slaughter. Specifically, the trier of fact evidently believed Slaughter was truthful with respect to his testimony regarding his pain continuing on an intermittent basis even until the point of trial. Having reviewed the entirety of the evidence in this

record in the light most favorable to the prevailing party, we cannot conclude that a rational trier of fact could not have fixed the award of general damages at the level set by the trial court or that this is one of those exceptional cases where such awards are so gross as to be contrary to right reason. Youn, 623 So. 2d at 1261. Therefore, we cannot say that the trial court abused its vast discretion. Youn, 623 So. 2d at 1260.

CONCLUSION

After a thorough review of the record in its entirety, we find that the record before us contains sufficient evidence to support the trial court's allocation of fault and its award of general damages. Accordingly, the judgment is affirmed. All costs of this appeal are assessed against Safeway Insurance Company of Louisiana.

AFFIRMED.