NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

GH

2014 CA 0428

CHAD WEHRLIN AND MICHELLE WEHRLIN, INDIVIDUALLY, AND ON BEHALF OF THEIR MINOR CHILDREN, BAILEY WEHRLIN AND KOREY MILLER

VERSUS

THE MANITOWOC COMPANY, INC., H&E EQUIPMENT SERVICES, INC. AND XYZ CORPORATION

Judgment rendered: JAN 3 1 2017

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C590976

The Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

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WJC by, concurs
JEW CH, concurs without reasons

HOLDRIDGE, J.

This is a products liability action wherein a crane operator was injured in the course and scope of his employment. The operator, along with his family members, sued various parties including the manufacturer of the crane and the lessee of the crane. After a jury trial was held, the jury assigned all of the parties a percentage of fault and awarded damages to the plaintiffs. All parties subsequently appealed. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

In 2006, Grove U.S. LLC (Grove) manufactured, sold, and delivered a Grove RT890E crane (Grove crane) to H&E Equipment Services, Inc. (H&E), one of its authorized distributors. In October 2006, H&E leased the Grove crane to Dow Chemical Company (Dow) for use at its facility in Taft, Louisiana. On April 11, 2008, Grove issued to H&E notice of a Product Improvement Program (PIP),[1] advising its distributors of an issue regarding the boom extension[2] on the Grove crane. The PIP identified structural deficiencies in the welding of the boom extension base as it had been "determined that some of the welds on the lacings [of the boom extension] may not be to specifications or may be missing." The PIP required that the welds on the lacings be inspected and repaired as necessary, in accordance with the attached instructions. As an authorized Grove distributor, H&E was authorized to perform the repair outlined in the PIP to the Grove crane that it leased to Dow.

On December 22, 2009, H&E's service manager contacted Craig Hitt, Dow's crane supervisor, and requested access to the Grove crane in order to make

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[1] PIPs were issued by Grove to advise its distributors to modify, improve, or repair specified cranes.

[2] A boom extension is also referred to in the industry as a "folding boom extension" or "jib" and is a structure that can be affixed to the end of a crane's main boom to provide additional reach.

the necessary repairs in accordance with the PIP. Instead of allowing H&E to remove the parts to be repaired, Mr. Hitt indicated that Dow would remove the parts "since [Dow] commonly [had] experience with jibs and rigging." Mr. Hitt assigned a crew of crane operators to remove the boom extension. The plaintiff, Chad Wherlin, an employee of Union Carbide Corporation, a wholly-owned subsidiary of Dow (collectively referred to as Dow), was one of the crew members assigned to perform the removal of the boom extension on the Grove crane.

With Mr. Wehrlin taking the lead, the crew members assumed their respective roles in removing the boom extension from the Grove crane. Mr. Wehrlin was to rig the boom extension for lifting, and after the rigging was complete, he was to remove a pin from one end of the boom extension to detach it from the Grove crane's main boom.

In deciding how to rig and remove the boom extension from the Grove crane, Mr. Wehrlin relied on a label affixed to the boom extension and he also relied on the placement of four metal eyelets welded to the top of the boom extension during the manufacturing process. The label showed the boom extension and stinger/fly sections of the boom extension, and provided data for determining the center of gravity for both sections of the boom extension.[3] However, Mr. Wehrlin interpreted the label as providing the center of gravity data for the boom extension alone (and not for both sections) and determined his rigging method accordingly. Mr. Wehrlin also assumed that the four metal eyelets were "lifting lugs" and assumed that they were positioned on the top of the boom extension so as to provide the correct center of gravity for lifting the boom extension alone. Based on his two assumptions regarding the label and the metal eyelet placements

[3] The boom extension on the Grove crane has two components, a base section constructed of metal lacing, sometimes referred to as the "jib" and a "fly section" constructed of solid metal, sometimes referred to as the "stinger."

on the defective boom extension, Mr. Wehrlin rigged the load for lifting with an incorrect center of gravity, which ultimately lead to Mr. Wehrlin being injured. As a result of the incident, Dow made medical and indemnity benefit payments to Mr. Wehrlin as his worker's compensation provider.

In May 2010, Mr. Wehrlin and his wife, Michelle Wehrlin, filed suit individually and on behalf of their minor children, Bailey Wehrlin and Korey Miller,[4] (plaintiffs) against the manufacturer of the crane, Grove,[5] alleging that it was liable under the Louisiana Products Liability Act (LPLA), La. R.S. 9:2800.51, *et seq*.[6] In March 2011, Dow intervened in the proceedings to recover medical and indemnity benefits paid to the plaintiffs after the incident.

Following extensive pre-trial proceedings,[7] the matter was ultimately set to be tried before a jury in August 2013. The plaintiffs filed a motion in limine requesting that specific evidence be excluded concerning the Grove crane's labeling, collateral sources of income, tax consequences, insurance premiums, and any alleged negligence of H&E. Grove also filed two motions in limine to prohibit the plaintiffs from offering certain evidence at trial. Grove's first motion in limine sought to preclude the plaintiffs from introducing evidence or testimony that was allegedly prejudicial to Grove, including "any arguments of a post-sale duty to warn claim." Grove's second motion in limine sought to prohibit the plaintiffs

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[4] Korey Miller is Mrs. Wehrlin's son from a previous marriage.

[5] In their original petition, the plaintiffs named "The Manitowoc Company, Inc." as a defendant, identifying that entity as the manufacturer of the crane. Grove answered the petition, stating that it had been incorrectly named in the petition. The plaintiffs subsequently amended their petition to name Grove as the manufacturer of the crane.

[6] The plaintiffs also named the owner of the crane, H&E, as a defendant in their petition; however, prior to the trial on the merits, the district court granted summary judgment dismissing the plaintiffs' claims against H&E, with prejudice. See Wehrlin v. Manitowoc Co., Inc., 2012-0893 (La. App. 1 Cir. 5/7/13) (unpublished), writ denied, 2013-1227 (La. 9/20/13) 123 So.3d 172.

[7] The district court granted Grove's motion for partial summary judgment after a hearing on January 30, 2012 and dismissed the plaintiffs' manufacturing defect claim, express warranty defect claim, and general negligence claim against Grove.

from offering any evidence at trial regarding the plaintiffs' manufacturing defect claims. All three motions were heard on August 19, 2013, following which the district court ruled in open court that it was granting the motion in limine filed by the plaintiffs and granting in part and denying in part the motions in limine filed by Grove.[8]

Thereafter, following a nine-day jury trial, the jury returned a verdict finding Grove 25% at fault, the plaintiffs 35% at fault, and Dow 40% at fault. The district court signed a judgment in accordance with the jury verdict on October 1, 2013.[9] From this judgment, Grove suspensively appealed. The plaintiffs and Dow[10] have also devolutively appealed.

DISCUSSION

Grove's Appeal

Grove, in its appeal, argues that the district court erred in denying its "Motion for Application of the Law of the Case."[11] Grove asserts that the district court's findings in Wehrlin, 2012-0893 (La. App. 1 Cir. 5/7/13) (unpublished), writ denied, 2013-1227 (La. 9/20/13) 123 So.3d 172 "were essential to this Court's opinion ... were fully litigated by Plaintiffs [and] the law of this case that the Trial

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[8] The district court granted Grove's motion to exclude any arguments of "a post-sale duty to warn claim" and allowed the parties to only refer to the Grove crane's "boom extension" as a "recall" and not a "defect" as a result of Grove's PIP.

[9] In response to a Rule to Show Cause order issued on July 16, 2014 by this court, the trial court signed an amended judgment specifying the amount of credit referenced in the original judgment on August 18, 2014.

[10] Dow adopted the brief filed on behalf the plaintiffs in this matter and have adopted all allegations of fault as to Grove.

[11] Grove also argues on appeal that the district court erred in denying its motion for directed verdict because the plaintiffs failed to present sufficient evidence to prove their claims under the LPLA. We find that the district court properly denied Grove's motion based on the principles set forth in La. R.S. 9:2800.51, *et seq.*, as the record shows that there was sufficient evidence presented to allow the matter to be decided by the jury. See LAD Services of Louisiana, L.L.C. v. Superior Derrick Services, L.L.C., 2013-0163 (La. App. 1 Cir. 11/7/14), 167 So.3d 746, 751, writ not considered, 2015-0086 (La. 4/2/15), 162 So.3d 392.

Court was bound to follow." (pl. brief 18) The Louisiana Supreme Court stated in Arceneaux v. Amstar Corp., 2010-2329 (La. 7/1/11), 66 So.3d 438, 448:

> The law of the case refers to a policy by which the court will not reconsider prior rulings in the same case. The law of the case principle relates to (a) the binding force of trial court rulings during later stages of the trial, (b) the conclusive effects of appellate rulings at trial on remand, and (c) the rule that an appellate court will ordinarily not reconsider its own rulings of law on a subsequent appeal.
>
> Among reasons assigned for application of the policy are: the avoidance of indefinite relitigation of the same issue; the desirability of consistency of the result in the same litigation; and the efficiency, and the essential fairness to both sides, of affording a single opportunity for the argument and decision of the matter at issue. However, even when applicable, the law of the case is discretionary and should not be applied in cases of palpable error or where application would result in injustice. [Internal citations omitted.]

Thus, the law of the case principle is to be applied as a discretionary guide, not as a matter of inflexible law. The principle should not be applied where its application would render a manifest injustice, or where the former appellate decision was manifestly erroneous. See State ex rel. Division of Administration, Office of Risk Management v. National Union Fire Insurance Co. of Louisiana, 2013-0375 (La. App. 1 Cir. 1/8/14), 146 So.3d 556, 562; see also Gaudet v. G.D.C., Inc., 477 So.2d 731, 734 (La. App 1 Cir. 1985).

In the present case, it is well established that a different duty is owed by each party, as Grove is the manufacturer of the Grove crane and H&E is the owner of the Grove crane. In denying Grove's motion, the district court stated:

> I do not believe that the language in the First Circuit opinion is, in fact, law of the case. It's not a ruling from the court on individual issues that are needed for this case to go forward. It is their dicta as to support for how they ruled ... on a different issue with a different party, and so I'm going to deny the motion.

We agree with the district court that Grove's argument is misplaced and that the law of the case principle is inapplicable in this matter because the two cases include separate issues and separate parties involving different rules of statutory

construction.[12] When different duties are owed, different legal issues are involved in determining causes of action against either of the two parties and as a result of which the law of the case principle is inapplicable. See Gaudet v. G.D.C., Inc., 477 So.2d 731, 734 (La. App. 1 Cir. 1985). Accordingly, this assignment of error has no merit.

The Plaintiffs' & Dow's Appeals[13]

The plaintiffs assert in their first assignment of error that the district court abused its discretion in granting Grove's motion in limine, thereby prohibiting them from introducing evidence concerning Grove's statutory post-sale duty to warn under La. R.S. 9:2800.57(C),[14] which the plaintiffs assert impaired the jury's duty to properly allocate fault.

A manufacturer's responsibilities to warn under the LPLA are set forth in La. R.S. 9:2800.57. Subsection C establishes that a manufacturer's duty under the LPLA to provide an adequate warning of dangerous characteristics extends to knowledge acquired after the product left the manufacturer's control. La. R.S. 9:2800.57(C). The plaintiffs argue on appeal that the district court should have denied Grove's motion in limine because Grove was aware that the Grove crane was unreasonably dangerous after leaving its control, but failed to adequately warn its users, thereby making Grove liable under La. R.S. 9:2800.57(C).

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[12] This court's May 7, 2013 decision addressed the plaintiffs' custodial liability and negligence claims against H&E, who is not a party to this appeal. See footnote 6.

[13] Dow adopted all arguments made by the plaintiffs in their brief.

[14] Louisiana Revised Statute 9:2800.57(C) provides:

> A manufacturer of a product who, after the product has left his control, acquires knowledge of a characteristic of the product that may cause damage and the danger of such characteristic, or who would have acquired such knowledge had he acted as a reasonably prudent manufacturer, is liable for damage caused by his subsequent failure to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.

Grove counters that the district court correctly granted its motion in limine, precluding the plaintiffs from asserting any arguments in support of a post-sale duty to warn claim as the plaintiffs: (1) have never pled such a claim, (2) did not include such a claim in their recitation of claims in the joint pre-trial order; and (3) have presented no evidence to support such a claim. Grove further argues that the plaintiffs' post-sale duty to warn claim is unduly and unfairly prejudicial to Grove, as it was not timely notified of the plaintiffs' intentions to pursue such a claim.

The district court has great discretion in its consideration of evidentiary matters such as a motion in limine. On review, the appellate court must determine whether the district court abused its great discretion in ruling on a motion in limine. Cooper v. Public Belt Railroad, 2002-2051 (La. App. 4 Cir. 1/22/03), 839 So.2d 181, 183. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, or waste of time. La. C.E. art. 403; Taylor v. Dowling Gosslee & Associates, Inc., 44,654 (La. App. 2 Cir. 10/7/09), 22 So.3d 246, 253, writ denied, 2009-2420 (La. 2/5/10), 27 So.3d 299. The party alleging prejudice by the evidentiary ruling of the district court bears the burden of so proving. On appeal, the reviewing court is required to consider whether the particular ruling complained of was erroneous and if so, whether the error prejudiced the complaining party's cause. If a substantial right was not prejudiced or affected by the evidentiary ruling, a reversal is not warranted. See La. C.E. art. 103. Therefore, we must determine whether the alleged erroneous evidentiary ruling, when compared to the record in its totality, had a substantial effect on the outcome of the case to the defendants' detriment. Schexnayder v. Bridges, 2015-0786 (La. App. 1 Cir. 2/26/16), 190 So.3d 764, 770-71.

In the instant matter, the plaintiffs' petition for damages alleges a failure to adequately warn under La. R.S. 9:2800.51. The petition does not cite La. R.S. 9:2800.57- much less 9:2800.57(C). Additionally, none of the plaintiffs' experts or the plaintiffs' pre-trial order assert a post-sale duty to warn claim. On October 31, 2011, the plaintiffs filed a motion for partial summary judgment against Grove and neither the plaintiffs' motion nor memorandum in support made reference to La. R.S. 9:2800.57(C). Rather the plaintiffs expressly referenced La. R.S. 9:2800.57(A) in regards to a manufacturer's duty to warn under the LPLA. Thus, the first time the plaintiffs raised the issue of a post-sale duty to warn claim was when the plaintiffs submitted a revised proposed jury verdict form.

After reviewing the record, we find that the district court did not abuse its discretion in granting Grove's motion in limine and excluding evidence of a post-sale duty to warn claim, as the district court determined that the probative value of such evidence was outweighed by its prejudicial impact. The untimely assertion of a new theory of liability justifies the district court's exercise of its discretion to strike such a claim. See La. C.E. art. 103. Therefore, this assignment of error is without merit.

In their second assignment of error, the plaintiffs assert that the district court abused its discretion in ruling that the prior testimony of Eric Fidler, Grove's product safety director, was inadmissible as impeachment evidence.[15] The plaintiffs further assert that they "were deprived of the ability to overcome the presumption of Mr. Fidler's truthfulness so that the jury could appropriately weigh

[15] The plaintiffs also assert that the district court abused its discretion in precluding the plaintiffs from introducing evidence of additional PIPs concerning the Grove crane. However, we agree with the district court that it is "unfair and prejudicial" to introduce the additional PIPs into evidence, as they are irrelevant to the case. Therefore, the district court did not abuse its discretion and this argument has no merit. See Maddox v. Bailey, 2013-0564 (La. App. 1 Cir. 5/19/14), 146 So.3d 590, 594.

and discount his testimony when apportioning fault." Specifically, the plaintiffs assert that they were precluded from submitting Mr. Fidler's deposition testimony for impeachment purposes because it ran afoul of the district court's earlier decision to exclude evidence characterizing the required repair at issue herein as a "defect."[16] According to the plaintiffs, the impeachment deposition testimony in question involved Mr. Fidler initially testifying that Grove had never placed defective products in the market, but then modifying his testimony when confronted with other PIPs showing otherwise. The plaintiffs maintain that the impeachment evidence goes only to Mr. Fidler's veracity and should have been allowed. However, Grove contends that the district court correctly concluded that the evidence was not "proper for impeachment for purposes of this trial."

In excluding the impeachment evidence, the district court stated:

> [N]one of it is really relevant to the case in front of you[r] jury, because all we're taking about is ... this guy lying or is he not lying; [it] is extremely confusing to the jury. And it would be extremely prejudicial to [Grove] ... to have to go through an exercise, which may be impossible to correct. And so for that reason, and because of what I have seen from the deposition, I do not believe it's proper impeachment for purposes of this trial[.]

We agree with the district court that Mr. Fidler's prior testimony was inadmissible for impeachment purposes because its probative value was substantially outweighed by the dangers of unfair prejudice, confusion of the issue, or misleading the jury. See La. C.E. arts. 401, 402, 403. Because the district court is granted broad discretion in making evidentiary rulings, which is not to be disturbed absent clear abuse, we find that the decision to exclude Mr. Fidler's prior testimony as impeachment evidence was not an abuse of discretion. See Travis v. Spitale's Bar, Inc., 2012-1366 (La. App. 1 Cir. 8/14/13), 122 So.3d 1118, 1126,

[16] The district court granted Grove's motion in limine, which prohibited the plaintiffs from using the word "defect" to characterize the repair required for the Grove crane. This ruling was made to avoid jury confusion and any prejudice that may arise.

writ denied, 2013-2409 (La. 1/10/14), 130 So.3d 327, and writ denied, 2013-2447 (La. 1/10/14), 130 So.3d 329. Therefore, this assignment has no merit.

Further, in their third assignment of error the plaintiffs allege that that the jury committed manifest error in their allocation of fault to the parties based on the evidence presented at trial. The plaintiffs pray that the allocation of fault be re-apportioned as follows: Grove 50%, the plaintiffs 25%, and Dow 25%. The Louisiana Supreme Court in Duncan v. Kansas City Southern Railway Co., 2000-0066, (La. 10/30/00), 773 So.2d 670, 680, stated that the standard of review applicable to comparative fault determinations is as follows:

> As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. Therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award, and then only to the extent of lowering it or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. [Internal citations omitted.]

Thus, the allocation of fault is within the sound discretion of the trier of fact and will not be disturbed on appeal in the absence of manifest error. See Townes v. Liberty Mutual Insurance Co., 2009-2110 (La. App. 1 Cir. 5/7/10) 41 So.3d 520, 529. As to the allocation of fault, the trier of fact is bound to consider the nature of each party's wrongful conduct and the extent of the causal relationship between that conduct and the damages claimed. Watson v. State Farm Fire and Casualty Insurance Co., 469 So.2d 967, 974 (La. 1985). Factors to be considered in determining the portion of fault attributable to the parties include: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was 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. Id.

Our review of the record in its entirety convinces us that the jury's findings as to the allocation of fault are reasonable. In reviewing the record in its entirety and applying the Watson factors to the conduct of the parties, we must agree with the trier of fact's apportionment of fault considering that Dow, a company with highly qualified crane operators, volunteered to remove the necessary parts so that the Grove crane could be repaired. H&E contacted Dow to allow it to make the necessary repairs on the Grove crane. It was Dow and its employee, Mr. Wehrlin, who assumed the task of removing the jib on the Grove crane, even though H&E would have preferred to do the work. Had Dow allowed H&E to remove the jib from the Grove crane, Mr. Wehrlin would not have been injured. This court cannot find that the jury was manifestly erroneous in allocating more fault to Dow and to its employee, Mr. Wehrlin, than to the manufacturer, Grove, because Dow volunteered to remove the jib from the Grove crane and Mr. Wehrlin's assumptions and actions ultimately caused his injuries. Therefore, because the plaintiffs have failed to show that the jury's allocation of fault was manifestly erroneous, the plaintiffs' third assignment of error lacks merit. See Stobart v. State through Department of Transportation and Development, 617 So.2d 880, 882-83 (La. 1993).

CONCLUSION

For the foregoing reasons, we find that the jury's verdict was reasonably supported by the evidence presented in this case. Therefore, we affirm the judgment of the district court. Costs of this appeal are to be evenly split between

the parties, Chad and Michelle Wehrlin, Grove U.S. LLC, and Union Carbide Corporation and the Dow Chemical Company.[17]

AFFIRMED.

[17] Union Carbide Corporation and the Dow Chemical Company are to split one-third of the costs.