NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0223

STEPHAN AUGUST

VERSUS

GOAUTO INSURANCE COMPANY, LEE KEBREANNE AND PROGRESSIVE SECURITY INSURANCE COMPANY

DATE OF JUDGMENT: OCT 31 2016

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 631933, DIVISION D, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE JANICE CLARK, JUDGE

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BEFORE: HIGGINBOTHAM, THERIOT AND CHUTZ, JJ.

Disposition: AMENDED AND, AS AMENDED, AFFIRMED.

Theriot, J. concurs with reasons

CHUTZ, J.

This appeal is taken from a judgment apportioning 100% fault to defendant, Kebreanne Lee, for an automobile accident that occurred as plaintiff, Stephan August, attempted to execute a left turn. The issues raised are apportionment of fault and quantum. For the following reasons, we amend the apportionment of fault and affirm the amount of damages awarded.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of June 16, 2014, Mr. August was driving a 2010 Toyota Corolla west on Louisiana Highway 1040 in Tangipahoa Parish en route to making a delivery for his employer, Domino's Pizza. The portion of Highway 1040 in question is a two-lane roadway divided by a dashed yellow line with a posted speed limit of 55 m.p.h.

As Mr. August proceeded on Highway 1040, he was followed by a 2001 Toyota Camry driven by Ms. Lee, which was also proceeding west. Ms. Lee observed the large, illuminated Domino's Pizza sign on the roof of Mr. August's vehicle. Further, she testified she followed Mr. August's vehicle for some time and that he was driving fast, then slowing down, then speeding up again. She surmised he was uncertain where he was going.

Eventually, Ms. Lee pulled into the left lane and sped up in an attempt to pass Mr. August's vehicle, which was going approximately 25-35 m.p.h. She estimated her own speed to be between 30-45 m.ph. Mr. August also pulled into the left lane, beginning a maneuver to turn left onto an upcoming street, Lowes Lane. The vehicles collided in the left, eastbound lane of Highway 1040, approximately one and one-half feet from the center line and six to eight feet before the junction of Highway 1040 and Lowes Lane. Ms. Lee's vehicle traveled a "long" distance after the impact, flipped over three times, and came to rest upside

down.[1] Mr. August hit his head on the inside of the driver's side door of his vehicle during the collision. The vehicle itself was seriously damaged, with damages totaling $5,400.00.[2]

On July 10, 2014, Mr. August filed a personal injury suit against Ms. Lee and GoAuto Insurance Company (GoAuto) (the liability insurer of the Camry driven by Ms. Lee).[3] Following a bench trial, the district court rendered judgment in favor of Mr. August, finding Ms. Lee to be 100% at fault in causing the accident. The district court awarded Mr. August $12,500.00 in general damages and $1,889.05 in special damages for medical expenses, for a total of $14,389.05, plus legal interests and court costs. Ms. Lee and GoAuto (appellants) have taken a suspensive appeal, arguing in two assignments of error that the trial court erred (1) in allocating 100% fault to Ms. Lee and (2) in awarding excessive general damages.

APPORTIONMENT OF FAULT

Appellants argue the district court was clearly wrong in finding Mr. August free from any fault and in assessing Ms. Lee with 100% fault in causing the accident. They assert 30% was the highest reasonable percentage of fault that could be allocated against Ms. Lee and the remaining 70% of fault should have been allocated against Mr. August.

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[1] Both at trial and on appeal, Mr. August's counsel argued Ms. Lee's estimate that she was going 30-45 m.p.h. at the time of the accident was highly suspect in view of the fact that her vehicle travelled a long distance and flipped over multiple times after the impact. We note, however, that counsel did not introduce any testimony, expert or otherwise, to establish the accident could not have occurred as it did at the speed Ms. Lee testified she was driving.

[2] The vehicle Mr. August was driving was owned by his mother; property damages are not at issue in this appeal.

[3] Mr. August also named Progressive Security Insurance Company (Progressive) (the uninsured/underinsured carrier insuring the vehicle driven by Mr. August) as a defendant in the suit. Subsequently, Mr. August filed a motion to voluntarily dismiss his claims against Progressive, without prejudice, which the district court granted.

In ***Gohres v. Dryer***, 09-0473 (La. App. 1st Cir. 11/18/09), 29 So.3d 640, 644-45, this court set forth the law applicable both to left-turning motorists and motorists passing on the left, as follows:

> Under Louisiana Revised Statutes 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 safely. The giving of a signal, however, is immaterial if at the time the driver of the turning vehicle did not have the opportunity to make the turn safely. He must make certain the turn can be made without danger to normal overtaking or oncoming traffic and he must yield the right of way to such vehicles.
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> The statutory duties of an overtaking vehicle are found in LSA–R.S. 32:73 and 32:75. The driver of an overtaking vehicle must be alert to the actions of the motorists preceding him on the highway. 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. A presumption of negligence is generally not applied to either driver. However, a presumption may arise if it is shown that the left turning motorist had crossed the centerline at the time of impact.

[Citations omitted; footnotes omitted.]

The allocation of fault between the parties is a finding of fact subject to the manifest error or clearly wrong standard. ***Dakmak v. Baton Rouge City Police Department***, 12-1468 (La. App. 1st Cir. 9/4/14), 153 So.3d 498, 503-04; see ***Gohres***, 29 So.3d at 645-46. The proper inquiry in applying this standard is not whether this court may have made a different factual determination, but rather whether the facts found by the trier-of-fact are based on reasonable evaluations of credibility and reasonable inferences drawn from the evidence. ***Rosell v. ESCO***, 549 So.2d 840, 844 (La.1989); ***Gohres***, 29 So.3d at 646.

After reviewing the record, we find merit in appellants' contention that the district court was clearly wrong and committed manifest error in finding Mr. August free of fault. The record, including Mr. August's own testimony, clearly establishes he was partially at fault in causing the accident.

As previously noted, La. R.S. 32:104 requires a left-turning motorist to signal his intent to turn at least 100 feet before executing the turn. At trial, Mr. August testified he activated his left turn signal and looked over his left shoulder before beginning his left turn. However, he was unable to recall how far in advance he activated the turn signal. In contrast, Ms. Lee testified the turn signal was not on when she began her passing maneuver. She indicated Mr. August activated the turn signal only at the last minute before he crossed the center line, when she was already in the process of passing his vehicle.

Mr. August also candidly admitted that even though he looked over his left shoulder before beginning the turn, he failed to see the headlights on Ms. Lee's vehicle. Mr. August offered no explanation for his failure to see the headlights, which he did not dispute were turned on.

A left-turning motorist has a strong duty of care that requires not only looking before turning, but also seeing what is observable. ***Guitreau v. City of Gonzales***, 12-0794 (La. App. 1st Cir. 2/13/13) (unpublished); ***Barlow v. State Farm Mutual Automobile Insurance Company***, 93-2385 (La. App. 1st Cir. 11/10/94), 645 So.2d 1256, 1259, writ denied, 94-2980 (La. 2/3/95), 649 So.2d 406. Under the circumstances, Mr. August was at fault in failing to see Ms. Lee's headlights and beginning his left-turn maneuver without ascertaining it was safe to do so. Additionally, the fact that the impact occurred six to eight feet before the junction of Highway 1040 and Lowes Lane demonstrates Mr. August crossed the center line and traveled in the eastbound, left lane prematurely. To avoid unnecessary travel in the opposing lane of travel, he should have waited until he reached the junction of Highway 1040 and Lowes Lane to execute his left turn. See La. R.S. 32:104. The district court's finding that Mr. August was free from fault constitutes manifest error.

As to Ms. Lee's conduct, we find no error in the district court's finding that her conduct was a cause of the accident. Appellants argue the law does not require passing motorists to be clairvoyant and it was unreasonable to require her to anticipate Mr. August would turn left. However, the evidence shows that, having followed behind Mr. August's vehicle for some time, Ms. Lee observed his pattern of speeding up, then slowing down, then speeding up. She also admitted she saw the large, illuminated Domino's Pizza sign on Mr. August's vehicle. According to her trial testimony, she correctly surmised that Mr. August "was trying to figure out where he was going to go."

Even in areas where passing is permissible, 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. See ***Gohres***, 29 So.3d at 645. The facts known to Ms. Lee in the instant case indicated Mr. August was in the process of attempting to make a pizza delivery either at an unfamiliar location or a location he was having difficulty finding. Therefore, Ms. Lee should have reasonably anticipated it was just as likely that the location Mr. August was looking for was located on the left side of the highway, requiring him to make a left turn, as on the right side of the highway. In attempting to pass Mr. August's vehicle, she breached the applicable standard of care by failing to ascertain from all the circumstances that it was safe to do so.[4]

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[4] Mr. August's counsel contends Ms. Lee was also guilty of violating La. R.S. 32:76(A)(2), which prohibits a motorist from driving on the left side of the highway when approaching within 100 feet of an "intersection." However, under the jurisprudence, not every highway junction is considered an intersection within the contemplation of La. R.S. 32:76. ***Walker v. Milton***, 253 So.2d 566, 568 (La. App. 1st Cir. 1971), affirmed, 263 La. 555, 268 So.2d 654 (1972); see ***Fontenot v. Pan American Fire & Casualty Company***, 209 So.2d 105, 109 (La. App. 3d Cir.), writ refused, 252 La. 460, 211 So.2d 328 (1968) ("A considerable line of jurisprudence holds that some highway junctions are not 'intersections'.") In determining whether a highway junction constitutes an intersection for purposes of La. R.S. 32:76, a court should consider all facts and circumstances relating to the junction, including facts as to the character and appearance of the crossing, the width and type of each of the intersecting thoroughfares, and the presence or absence of any signs or markings that would indicate to an approaching motorist that there is an intersection at that point. ***United States Fidelity and Guaranty Company v. Duet***, 177 So.2d 302, 307-08 (La. App. 1st Cir. 1965); ***Fontenot***, 209 So.2d at 109. In the instant case,

Accordingly, the record establishes Mr. August and Ms. Lee were both at fault. The district court committed manifest error and was clearly wrong in apportioning 100% to Ms. Lee. When an appellate court finds a district court was manifestly erroneous and clearly wrong in apportioning fault, it should adjust the award, but can do so only to the extent of lowering or raising it to the highest or lowest point, respectively, that is reasonably within the trial court's discretion. ***Clement v. Frey***, 95-1119 (La. 1/16/96), 666 So.2d 607, 611; ***Gohres***, 29 So.3d at 646.[5]

In this case, the risk created by each party's conduct was probably equal. However, due to her observation of Mr. August's driving pattern over a period of time, Ms. Lee should have had a greater awareness of the danger created by her conduct. In contrast, because Mr. August did not see Ms. Lee's vehicle, he was totally unaware of the danger his turning maneuver created. Moreover, Ms. Lee's conduct was motivated purely by impatience. Considering these facts, together with the entire record, we conclude the highest apportionment of fault the district court reasonably could have assessed against Ms. Lee was 60%. The lowest apportionment of fault that reasonably can be assessed against Mr. August is 40%. The district court judgment will be amended accordingly.

DAMAGES

Appellants contend the general damage award to Mr. August of $12,500.00 is excessive, considering the severity and duration of his injuries. They argue the highest reasonable award for his injuries is $4,500.00.

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the record contains insufficient information about Lowes Lane for this court to determine the applicability of La. R.S. 32:76. Therefore, Mr. August failed to establish Ms. Lee violated this statutory provision.

[5] In assessing the nature of the parties' conduct, various factors may influence the degree of fault assigned, including: (1) whether the conduct results 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. ***Watson v. State Farm Fire & Casualty Insurance Company***, 469 So.2d 967, 974 (La. 1985); ***Gohres***, 29 So.3d at 646.

The district court is vested with vast discretion in awarding damages, so that an appellate court should rarely disturb an award of general damages. La. C.C. art. 2324.1; ***Youn v. Maritime Overseas Corporation***, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994); ***Gohres***, 29 So.3d at 647. Reasonable persons frequently disagree about the measure of general damages in a particular case. 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; ***Gohres***, 29 So.3d at 647.

During the June 16, 2014 accident, Mr. August struck his head against the inside of the driver's side door of his vehicle. Two days later he went to the emergency room at Baton Rouge General Hospital, complaining he had been having headaches since the accident. He was given pain medication and released. On June 24, 2014, Mr. August began treatment with Dr. Joseph Pritchett, DC, at Louisiana Medical Clinic. At that time, Mr. August's chief complaint was headaches, and he described the pain as "a constant dull ache, with episodes of sharp pain." Mr. August further reported that his injury interfered with his ability to sleep. Mr. August was treated at the Louisiana Medical Clinic a total of ten times. His last visit was on August 6, 2014, approximately seven weeks after the accident.

Considering these facts, though we find the award of $12,500.00 in general damages to be on the higher end of the range of reasonable awards, we cannot say the award is excessive or an abuse of the district court's vast discretion. However, this award of general damages to Mr. August, as well as the special damages he was awarded, must be reduced in proportion to his 40% percentage of fault. La. C.C. art. 2323(A).

CONCLUSION

For the above reasons, the judgment of the district court is hereby amended to lower the allocation of fault assessed against Kebreanne Lee from 100% to 60% and to raise the allocation of fault assessed against Stephan August from 0% to 40%. Pursuant thereto, the total damages awarded in favor of Stephan August are reduced by 40% from $14,389.05 to $8,633.43. We also amend the portion of the district court judgment imposing 100% court costs on Kebreanne Lee and GoAuto Insurance Company to provide that the parties split court costs, 60% to Kebreanne Lee and GoAuto Insurance Company and 40% to Stephan August. The judgment of the district court is affirmed in all other respects. Kebreanne Lee and GoAuto are to pay 60% of the costs of this appeal and Stephan August is to pay 40% of those costs.

AMENDED AND, AS AMENDED, AFFIRMED.

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THERIOT, J., concurring and assigning reasons.

I concur in the majority's determination that the trial court manifestly erred in apportioning 100% fault to the defendant, Kebreanne Lee, and agree that the trial court's judgment should be amended to assign 60% fault to Ms. Lee and 40% fault to the plaintiff, Stephan August. I write separately to explain my reasoning regarding Mr. August's negligence.

The duty of a left-turning motorist is governed by La. R.S. 32:104. Subsection (A) of that statute provides: "No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in R.S. 32:101, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety." Subsection (B) states: "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."

In this case, Mr. August testified that he activated his turn signal and looked over his shoulder before he began to turn his vehicle left from Louisiana Highway 1040 towards Lowes Lane. Mr. August acknowledged that he believed the headlights of Ms. Lee's vehicle were turned on around the time of the accident, but that he did not see her headlights before attempting the left-hand turn. Mr. August also admitted that he could not recall how far in advance of the turn he activated his turn signal; the sole evidence pertaining to same was provided by Ms. Lee, who testified that Mr. August did not activate his turn signal until the "last minute" before he crossed the center line of Louisiana Hwy. 1040. In addition, Ms. Lee testified that Mr. August did not activate his turn signal until she was already in the process of "trying to go around" his vehicle.

In today's opinion, the majority cites the signal distance requirement imposed upon left-turning motorists by La. R.S. 32:104(B) in its application of the law to the facts. However, in my opinion, the trial court may have reasonably concluded that Mr. August complied with the applicable signal distance requirement set forth by La. R.S. 32:104(B). Ms. Lee's testimony that Mr. August did not activate his turn signal until the "last minute" must be considered in light of Mr. August's uncontested representation that he was traveling "around thirty, thirty-five miles per hour" immediately before the accident. Simple physics tells us that a vehicle moving at thirty miles per hour covers approximately forty-four feet per second, such that Mr. August's vehicle would have travelled the requisite one hundred feet in approximately two-and-one-quarter seconds.

Nevertheless, in accordance with the generalized duty imposed upon left-turning motorists by La. R.S. 32:104(A), I agree that the trial court manifestly erred in its determination that Mr. August was free from fault.

Critically, as noted above, Mr. August acknowledged that he believed the headlights of Ms. Lee's vehicle were turned on at the time of the accident, but that he did not see her headlights before executing the left-hand turn. Thus, Mr. August began to turn his vehicle left off of Louisiana Hwy. 1040 before ascertaining whether the maneuver could be made with reasonable safety in clear violation of La. R.S. 32:104(A). Moreover, it should be noted that the giving of a signal is immaterial if the turning vehicle did not have the opportunity to make the turn safely, such as where the passing motorist has establish herself in the passing lane prior to the accident. See and compare **Gohres v. Dryer**, 09-0473 (La. App. 1 Cir. 11/18/09), 29 So.3d 640, 645; **Thibodeaux v. Ace American Ins. Co.**, 13-577 (La. App. 3 Cir. 11/27/13), 127 So.3d 132, 138-39.

For these reasons, I respectfully concur.