

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0347

MICHAEL GAITHER

VERSUS

**WARREN G. WEBRE, LAFOURCHE SHERIFF'S OFFICE
AND NATIONAL FIRE INSURANCE OF HARTFORD**

Judgment Rendered: FEB 17 2017

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On Appeal from the Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
No. 122360

Honorable Steven M. Miller, Judge Presiding

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BEFORE: WHIPPLE, C.J., GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

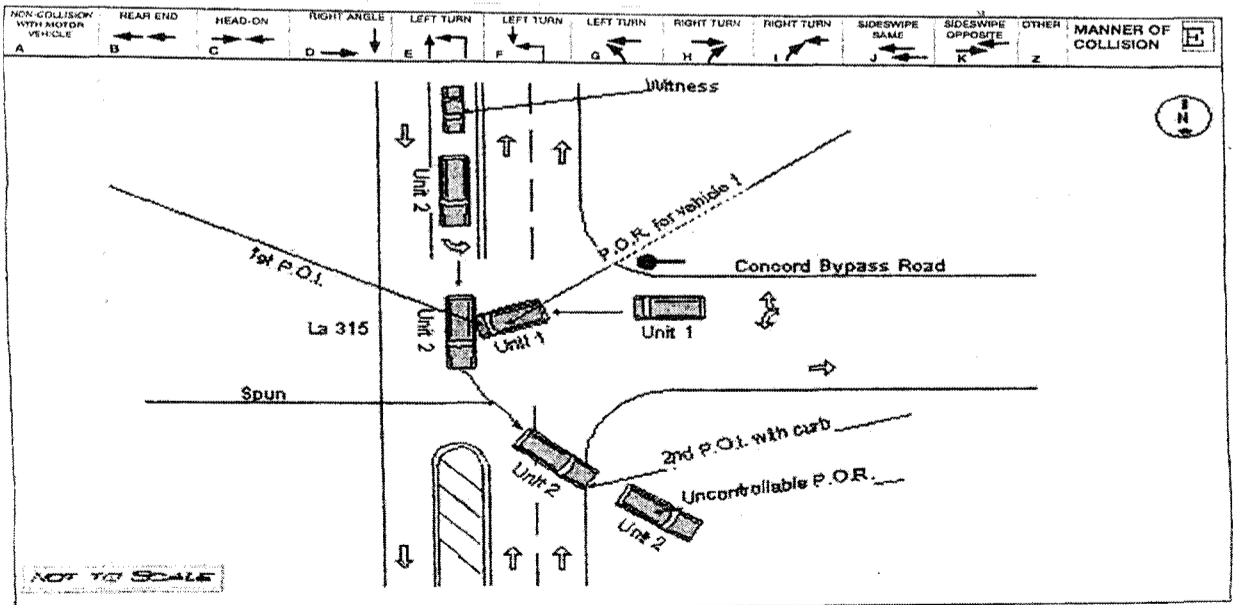
Plaintiff appeals a trial court’s judgment following a bench trial, challenging the trial court’s allocation of fault and amount awarded for medical specials and general damages. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

This lawsuit arises from a motor vehicle accident that occurred on October 8, 2012, in Terrebonne Parish at the intersection of Louisiana Highway 315 and Concord Bypass Road involving a pickup truck driven by Michael Gaither and a utility van driven by Deputy Warren Webre.

Concord Bypass Road ends at its intersection with Louisiana Highway 315; a stop sign is placed at the end of Concord Bypass Road to control traffic at the intersection. At its intersection with Concord Bypass Road, Louisiana Highway 315 has four lanes—two lanes of travel in each direction. The left lane, or innermost lane of the outer lanes of travel, in which Mr. Gaither was traveling, ends at the intersection and is to be used only for turns at the intersection.

Deputy Webre was attempting to make a left turn from Concord Bypass Road onto Louisiana Highway 315. At that time, Mr. Gaither was using the turning lane to attempt to pass slower traffic when Deputy Webre’s vehicle struck his vehicle. The following is the investigating officer’s depiction of the accident, as contained in the accident report:¹



¹ The accident report was introduced at trial as plaintiff’s exhibit 10.

The investigating officer issued a citation to Deputy Webre for failure to stop and yield and also issued a citation to Mr. Gaither for improper lane usage.

On March 12, 2013, Mr. Gaither filed suit for injuries allegedly sustained in the accident, naming Deputy Webre, the Lafourche Parish Sheriff's Office (Deputy Webre's employer and the van's owner), and National Fire and Insurance of Hartford (the van's liability insurer) as defendants.

The matter proceeded to a bench trial on June 24, 2015. The trial court took the matter under advisement and subsequently issued oral reasons for judgment on September 10, 2015. Therein, the trial court assessed Mr. Gaither with 80% of fault and Deputy Webre with 20% of fault for causing the accident. The trial court awarded Mr. Gaither damages totaling \$38,868.90, representing medical specials in the amount of \$15,668.90, lost wages in the amount of \$7,200.00, and general damages in the amount of \$16,000.00. The trial court signed a judgment on October 21, 2015, awarding Mr. Gaither \$7,773.78, which represented 20% of the total award of \$38,868.90.

Mr. Gaither has appealed, assigning the following as error:

The trial court committed legal error by failing to account for testimony and evidence where Mr. Webre admitted that he did not adequately check for oncoming traffic nor notice Mr. Gaither's vehicle until a passenger got his attention after he started making a left turn.

Where there was no Independent Medical Examination and no contrary medical opinion whatsoever the trial court erred by failing to account for uncontroverted medical testimony by all treating physicians stating that Mr. Gaither's medical treatment was attributed to this accident[,] the medical expenses for such treatment should be included in damages.

DISCUSSION

Allocation of Fault

In his first assignment of error, Mr. Gaither challenges the trial court's assessment of fault. Mr. Gaither contends that the accident could have been completely avoided had Deputy Webre paid proper attention and yielded to Mr. Gaither's vehicle. Mr. Gaither notes that Deputy Webre did not see Mr. Gaither's vehicle until a guest passenger in Deputy Webre's van notified Deputy Webre of the vehicle's presence. Mr. Gaither also avers that there is nothing to indicate that the lane he used

to pass was designated solely as a turning lane. Nevertheless, Mr. Gaither avers that even if he were turning left onto Concord Bypass Road, the accident would have occurred because his car would have inevitably been hit in the intersection by Deputy Webre's left turning van. As such, Mr. Gaither concludes that Deputy Webre should have been assessed more fault.

In an action for damages where a person suffers injury, death, or loss, the percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined. LSA-C.C. art. 2323. It is well settled that we must give great deference to the allocation of fault as determined by the trier of fact. **Edmond v. Cherokee Ins. Co.**, 14-1509 (La.App. 1 Cir. 4/24/15), 170 So.3d 1029, 1036. 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. **Id.** at 1036-37. If the factfinder's findings are reasonable after reviewing the record, we cannot reverse those findings even if we may have decided differently had we been sitting as the trier of fact. **Id.** at 1037.

Comparative negligence is determined by the reasonableness of the party's behavior under the circumstances. **Id.** at 1037. 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. **Id.** (citing **Watson State Farm Fire and Cas. Ins. Co.**, 469 So.2d 967, 974 (La. 1985)). In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (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. **Watson**, 469 So.2d at 974.

All motorists owe a general duty to observe what should be observed. **Edmond**, 170 So.3d at 1037 (citing **Mart v. Hill**, 505 So.2d 1120, 1123 (La.1987)). Additional duties arise depending on the motorist's movements on the roadway in relation to other

vehicles. **Edmond**, 170 So.3d 1037. As noted by Mr. Gaither, the law considers a left turn to be one of the most dangerous maneuvers a motorist may execute, and a driver attempting a left turn has a duty to make certain the turn can be completed safely. See Mack v. Wiley, 07-2344 (La.App. 1 Cir. 5/2/08), 991 So.2d 479, 488, writ denied, 08-1181 (La. 9/19/08), 992 So.2d 932. On the other hand, “[a] vehicle in a dedicated left-turn lane at an intersection shall turn at the intersection only as designated by posted pavement marking, signing, or traffic signal indication.” LSA-R.S. 32:83C. Further, “[v]ehicles shall not be driven across dedicated left-turn lanes at intersections or across areas delineated with pavement markings consisting of solid lines and filled in with diagonal striping.” LSA-R.S. 32:83D. See also LSA-R.S. 32:77.²

In assigning fault, the trial court reasoned as follows:

[Deputy Webre] didn't see [Mr. Gaither's] vehicle until [Deputy Webre] was well into the turn. ... I do agree that the testimony [reflects] that one of the passengers ... alerted him to [Mr. Gaither's] vehicle. Saw that vehicle first. I also note that Mr. Webre talked about being a bus driver for years, basically having his head in a swivel, that he was attentive.

And based on what I found happened there would have been very little time for him to notice [Mr. Gaither's] vehicle because of the lane switch. Quint Liner testified about being a witness. He gave a statement. Talked about traffic coming off the bridge, everyone in the right lane. That the truck, [Mr. Gaither's] truck, went in the left lane to pass other traffic coming off the bridge. That he got into that turning lane or the middle lane he said which has arrows which mark it to be a left turning lane. He indicated that six, seven, or eight cars were in front of [Mr. Gaither] as he came down on the bridge and he went into that middle lane, the turning lane, to make the pass. The van was turning left and [Mr. Gaither] was turning into that turning lane about the same time was his testimony.

As far as knowledge goes, knowledge of the roadway, [Mr. Gaither] testified that countless times he's been there. He's very familiar with the roadway. So any questions about whether or not it's a turning lane or whether or not you could go across that intersection where I had indicated previously was marked to prevent travel, he was familiar with all

² Louisiana Revised Statutes 32:77 provides:

- A. The Department is hereby authorized to determine those portions of any highway where overtaking and passing or driving to the left of the roadway would be especially hazardous, and shall by appropriate signs or markings on the roadway indicate the beginning and end of such zones, and when such signs and markings are in place and are clearly visible to an ordinary observant person, every driver shall obey the directions thereof.
- B. Where signs or markings are in place to define a no-passing zone as set forth in paragraph A, no driver shall at any time drive on the left side of the roadway within such zone, or on the left side of any pavement striping, designated to mark such no-passing zone, throughout its length.

of that. There was nothing to indicate that there were any recent changes or anything of that nature.

Mr. Liner indicated that [Mr. Gaither] sped up when he got in the turning lane which would make sense if he's attempting to pass other vehicles. Kraig Morales testified. He was with the Houma Police Department. He said the Plaintiff admitted to driving in the turning lane and intending to go straight. And go straight means go straight through the intersection over the part of the roadway that's marked to prevent traffic into what would develop into a second lane going in the direction that he was going in.

Michael Gaither testified. He said early on that he didn't know the left lane was a turning lane. That he thought he could pass traffic in that lane. That's just flat out untrue. That was one of the things that hurt his credibility. He was familiar with it. ... He was very familiar with the road conditions and the road markings and the lane configurations. He said he didn't see any arrows, the markers were dull, but, again, this is of no moment. He was familiar with the roadway.

...[Mr Gaither] said every day for ten or fifteen years he travelled that route which indicated to me he'd know he was in a turning lane. He would know he could not go through that lane to get to the other side where the roadway expanded from one to two lanes. And it had narrowed from two to one and then it opened up into two lanes after that intersection or neutral ground area.

[Mr. Gaither] claimed he felt he could get in the turning lane and go straight. He felt he had the right to do that but he knew that it was marked otherwise. That's just extraordinarily reckless. That's like getting [on] the shoulder to pass people in my estimation.

He said he first saw the van when he merged left, was coming out of Concord Road. So what he is saying if I accept his testimony at this point is that he first saw the Sheriff's Office van when he was jumping off into the turning lane which would have been, you know, seconds at the most before the collision occurred. Which means the driver of the van would only have those same seconds at most to see the plaintiff coming into that lane.

[Mr. Gaither] said he was going about 40 miles an hour when they hit and he didn't slow down. He seemed to indicate to me that he was trying to get back in the lane that he should have been so Webre and the van kind of turns – attempts to turn left. They didn't have a lot of time to do much of anything it sounded like to me. And Mr. Gaither was trying to get back in the lane he had been in before as if he had successfully passed up the vehicles. He was unable to make that maneuver.

I found that [Mr. Gaither] was not in a favored lane once he left his lane to pass slower vehicles on a part of the roadway where he knew he could not drive. The left lane was for turning left and then on the other side the intersection marked to indicate it was not to be traveled upon.

With regard to [Deputy] Webre, counsel picks up one of the only things that indicates that maybe [Deputy] Webre could have seen more than he saw which would be the person in the van yelling for him to

watch out. But it was a split second. And I don't know what could have been avoided.

You've also, counsel, raised the other issue that I had in the back of my mind during the trial which is ... when [Mr. Gaither] stuck himself right in the middle of the neutral ground. Maybe he shouldn't have been there if the person was turning left as should have been as the lane should have been used for it may have been -- the collision [sic]. But that's not what was happening because he wasn't making that turn and if [Mr. Gaither] was making that left turn, he would have been slowing down to negotiate the turn and I don't know that this accident would have happened. But I don't think it's 100 percent on [Mr. Gaither]. I think there's a degree of fault that should be assigned to the Sheriff's Office and [Deputy] Webre.

I think Mr. Gaither was reckless and I think [Deputy] Webre was doing something that most anybody would do, most likely, but may not have been entirely proper in the way he positioned himself in that lane. I think the Sheriff's Office and [Deputy] Webre would be 20 percent at fault and I think 80 percent of the fault should be assigned to [Mr. Gaither].

Following our review of the record and considering the pertinent factors and requisite duties of the respective drivers, we cannot conclude that the trial court was manifestly erroneous in apportioning fault. Mr. Gaither's first assignment of error is without merit.

Damages

In his second assignment of error, Mr. Gaither contends that the only medical evidence in the record is from his treating physicians, who all attributed Mr. Gaither's medical treatment to the accident in this case. Mr. Gaither avers that there was never an independent medical exam performed or contrary medical opinion rendered that his injuries were unrelated to the accident. Mr. Gaither contends that the medical expenses for all treatment should be included in his award for medical specials, and the general damage award should be raised.

Mr. Gaither notes that on the night of the accident, he sought medical treatment for back and neck pain. Thereafter, he began chiropractic treatment three times per week. Mr. Gaither avers that during his testimony, Dr. Joseph Bozzelle, Mr. Gaither's physician, directly linked Mr. Gaither's symptoms to the October 2012 accident. Further, Mr. Gaither avers that his treating orthopedist, Dr. John Sledge, and his treating chiropractor, Dr. Gregory Pizzolato, testified that the pain and suffering caused by the herniated discs are a direct result of the October 2012 accident. Mr. Gaither

asserts that the medical causation is uncontroverted and that no physician or expert has refuted this causation.

The defendants note, however, that prior to the October 2012 accident at issue, Mr. Gaither had been involved in a 2011 accident when the dump truck he was driving flipped, resulting in injuries to Mr. Gaither's neck and back. As a result, Mr. Gaither was examined by Dr. Gordon P. Nutik, M.D., an independent medical examiner, on August 18, 2011. Mr. Gaither reported to Dr. Nutik that, at the scene, Mr. Gaither complained of low back pain and mid back pain on the left and neck pain. In August 2011, he complained to Dr. Nutik that he had pain in the back of his neck, that he had pains going down the front of his right and left arms, that sometimes his hands would "go dead" for four or five minutes, that he had pain in the mid-back all the way up to his neck, that his back swelled in the mid-back, that he gets pain through his whole legs to his ankles, and that he sometimes had numbness in his knees. Even so, Dr. Nutik's impression was that Mr. Gaither could do at least a medium level of work and was capable of driving a truck.

Moreover, prior to the accident at issue, there were MRIs taken of the thoracic spine and lumbar spine on August 8, 2011. The thoracic spine MRI revealed "a T2-3 level ... dorsal disk bulge lateralizing to the left with mild compression of the thecal sac and no cord impingement." The lumbar spine MRI showed no significant issues.

MRIs were also taken subsequent to the accident on January 22, 2013. The cervical MRI revealed an apparent "central protrusion-herniation appearing to indent upper ventral thoracic cord" at the T2-3 level. The lumbar MRI revealed mild bulging within the lumbar spine but no significant canal or foraminal stenosis.

Dr. Pizzolato, the chiropractor, who first saw Mr. Gaither on October 15, 2012, one week after the accident at issue, opined that Mr. Gaither suffered a sprain/strain in the cervical, thoracic, and lumbar spine regions, along with lumbar radiculopathy. Mr. Gaither informed Dr. Pizzolata about mild disc issues he previously had as a result of the 2011 accident, but Mr. Gaither indicated that those "symptoms were under control and he was doing fine and his normal activities without any problems up until the new accident." Without drawing any conclusion as to the cause of the injuries, Dr. Pizzolota

indicated that if Mr. Gaither did have pre-existing injuries centered around his cervical, thoracic, and lumbar spines, then it was more probable than not that the accident at issue aggravated those injuries. Dr. Pizzolota provided chiropractic care to Mr. Gaither for 15 months.

Dr. Bozzelle, who specializes in physical medicine and rehabilitation, first treated Mr. Gaither on November 9, 2012. Dr. Bozzelle believed Mr. Gaither's injuries were related to the accident, or at least aggravated by the accident, since Mr. Gaither did not have a history of specific symptoms before the accident. Dr. Bozzelle admitted, however, that Mr. Gaither did not report any history of problems prior to the accident at issue. Dr. Bozzelle diagnosed Mr. Gaither as having cervical pain with muscle spasms, thoracic pain with muscle spasms, lumbosacral pain with muscle spasms, and pain and numbness in the lower extremities. Mr. Gaither treated with Dr. Bozzelle for several months, and his last visit with Dr. Bozzelle was on March 19, 2013.

Dr. Sledge, an orthopedic surgeon, first treated Mr. Gaither on April 3, 2013. Dr. Sledge explained that Mr. Gaither had informed him of the 2011 dump truck accident and had indicated that for eleven months prior to the accident at issue "he was occasionally sore at times but it was essentially at baseline." Dr. Sledge diagnosed Mr. Gaither with "post-traumatic lumbar pain, sprain and strain in the lumbar spine, post-traumatic cervical pain and sprain, strain of the cervical spine." On November 13, 2013, Dr. Sledge performed facet injections at C7-T1, T1-T2, T2-3, L4-5, and L5-S1. Mr. Gaither felt significant relief after those injections, and he continued to treat with Dr. Sledge.

On June 18, 2014, Mr. Gaither was involved in a car accident on his way to Dr. Sledge's office, which exacerbated Mr. Gaither's symptoms. Dr. Sledge again treated Mr. Gaither on December 17, 2014, and in March 2015. Because of exacerbation of his symptoms, Dr. Sledge recommended another set of facet injections to return Mr. Gaither to baseline.

Although there were no significant issues reflected in the lumbar MRI taken prior to the accident at issue in this litigation, we recognize that the lumbar MRI taken after

the accident revealed mild bulging within the lumbar spine but no significant canal or foraminal stenosis.³

After considering all of the evidence, the trial court found that Mr. Gaither's damage consisted mainly of an eight-month soft tissue injury, despite continued treatment for a period thereafter. We observe that the trial court specifically found that Mr. Gaither was not a credible witness. For example, the trial court noted that Mr. Gaither consistently rated his pain level as a ten when reporting to his treating physicians, yet he performed many acts of manual labor, including cutting grass, lifting lawn mowers, and cleaning tankers.⁴ Additionally, the trial court may have taken into account Mr. Gaither's prior and subsequent accidents.

On appeal, Mr. Gaither argues that the total of all medical expenses should have been awarded. Here, however, the trial court concluded that not all claims of medical expenses were attributable to the accident at issue. From the record, we cannot conclude that the trial court was manifestly erroneous in declining to award all medical specials claimed. As such, we find no merit in Mr. Gaither's argument that the trial court was required to award all medical expenses claimed.

Likewise, we cannot conclude that the trial court abused its discretion in awarding \$16,000.00 in general damages. The discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993). Following our review of the record and given the deference owed the trial court's factual findings, including those based on credibility, we cannot conclude that the trial court abused its vast discretion in the amount awarded for general damages.

Mr. Gaither's second assignment of error is without merit.

³ Disc bulging relative to T2-3 were present in the MRI taken prior to the accident at issue.

⁴ Despite Mr. Gaither's testimony at trial that he was unable to perform many of these manual tasks, the defendants introduced the testimony of a private investigator, Douglas Smith, who personally observed Mr. Gaither cleaning tankers. While Mr. Gaither acknowledged that he was able to mow grass with a self-propelled lawnmower, Mr. Gaither indicated that he could not load or unload the mower onto a pickup truck by himself. However, according to the investigator, he videoed Mr. Gaither picking up the lawn mower and loading it into the back of a truck by himself.

CONCLUSION

For the foregoing reasons, the trial court's October 21, 2015 judgment is affirmed. Costs of this appeal are assessed to the appellant, Michael Gaither.

AFFIRMED.