NOT DESIGNATED FOR PUBLICATION

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STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 1472

BRIAN ROSS RICHARD

VERSUS

PATRICK GISLER; EAN HOLDINGS, LLC; RENTAL INSURANCE SERVICES, INC.; ACE AMERICAN INSURANCE COMPANY; LANCE BOUDREAUX AND USAA CASUALTY INSURANCE COMPANY

Judgment rendered: AUG 16 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. 621506, Sec. 26

The Honorable Donald Johnson, Judge Presiding

* * * * *

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BEFORE: WELCH, CRAIN, AND HOLDRIDGE, JJ.

Crain J. concurs

HOLDRIDGE, J.

In this personal injury action, USAA Casualty Insurance Company appeals a judgment of the trial court rendered in accordance with the jury verdict, which determined that Patrick Gisler was not at fault. USAA also appeals the trial court's denial of its post-verdict motion seeking a judgment notwithstanding the verdict (JNOV) or, alternatively, a new trial. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

This matter involved a two vehicle collision that occurred on May 16, 2012 on Highland Road near an intersection with LSU Avenue in Baton Rouge, Louisiana. Lance Boudreaux was driving his 2004 BMW and allegedly took a left turn onto Highland Road from a parking lot. Brian Ross Richard was riding as a guest passenger in Mr. Boudreaux's vehicle at the time of the accident. At or about the same time, Mr. Gisler was operating a 2012 Chevrolet Tahoe traveling eastbound on Highland Road and merging into the left turning lane, when his vehicle collided with Mr. Boudreaux's vehicle. Mr. Gisler was vacationing in the United States from Switzerland in a rental vehicle when the collision occurred.

As a result of the collision, Mr. Richard filed a petition for damages against several defendants[1] including Mr. Gisler; his insurer, Ace American Insurance Company; Mr. Boudreaux; and his insurer, USAA, alleging that he suffered from severe physical injuries.[2] In his petition, Mr. Richard alleged that the collision was caused by: Mr. Gisler proceeding in the wrong lane of travel; ignoring traffic signals/markers; failing to maintain a proper lookout; cutting into oncoming traffic

[1] Mr. Richard also named as defendants EAN Holdings, LLC, the owner of the Chevrolet Tahoe, and its insurer, Rental Insurance Services, Inc. Both defendants were dismissed without prejudice from the instant matter.

[2] At the time of the accident, Ace American Insurance Company provided insurance coverage for third-party bodily injury and property damage claims up to a combined single limit of $1,000,000.00 for the vehicle operated by Mr. Gisler. USAA provided a liability and underinsured/uninsured motorist insurance policy on the vehicle driven by Mr. Boudreaux at the time of the accident.

causing a head on collision; and, other acts of neglect or other fault which would be shown at trial.

Mr. Gisler, a resident of Switzerland, was served with citation pursuant to the provisions of the Louisiana long-arm statute, La. R.S. 13:3201 *et seq.*[3] Mr. Gisler filed an answer, availing himself to the jurisdiction of the state of Louisiana. In his answer, Mr. Gisler stated that he "was driving in [his] lane following the flow of traffic and that [he] took the correct lane to turn left." He further stated that he had full control over the vehicle at all times and that he did not drive on or over the double yellow line in the road that separates traffic.

After several pre-trial motions, the case was tried to a jury. The jury was presented with two conflicting versions of how the collision occurred. Mr. Boudreaux claimed that after he exited the parking lot, he turned left onto Highland Road and was traveling westbound when Mr. Gisler attempted to move into the left turn lane eastbound, came across the double yellow line and caused the collision. However, Mr. Gisler maintained that he never crossed the double yellow line on Highland Road and remained in the turning lane at all times when the collision occurred.

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[3] Louisiana Revised Statutes 13:3201 provides, in pertinent part:

> A. A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident:
>
> (3) Causing injury or damage by an offense or quasi offense committed through an act or omission in this state.

Louisiana Revised Statutes 13:3204 states, in part:

> A. In a suit under R.S. 13:3201, a certified copy of the citation ... and of the petition ... shall be sent by counsel for the plaintiff, or by the plaintiff if not represented by counsel, to the defendant by registered or certified mail, or actually delivered to the defendant by commercial courier, when the person to be served is located outside of this state or by an individual designated by the court in which the suit is filed, or by one authorized by the law of the place where the service is made to serve the process of any of its courts of general, limited, or small claims jurisdiction.

At the conclusion of the trial, the jury returned a verdict finding Mr. Boudreaux 100% at fault for the accident and awarded Mr. Richard $434,000.00 in damages for his injuries. The trial court subsequently signed a judgment on March 28, 2016 in accordance with the jury verdict dismissing all claims against Mr. Gisler and Ace American Insurance Company with prejudice. USAA, Mr. Boudreaux's insurer, filed a motion for new trial and/or JNOV, which the trial court denied. USAA now appeals assigning as error:

1. The trial court committed reversible error in denying [its] Motion for New Trial/JNOV.[4]

2. The jury's verdict was inconsistent and clearly contrary to the law and evidence.

3. The trial court committed reversible error in improperly allowing the admission of ACE American's exhibit Defense-13, (Exhibit "A" to deposition of Lance Boudreaux) and in allowing testimony concerning the diagram contained thereon.

DISCUSSION

Assignment of Error Number Three

In its third assignment of error, USAA argues that the trial court erred in allowing ACE American Insurance Company to admit into evidence exhibit Defense-13 (diagram) because it was confusing and misleading. The exhibit contained a photograph of the location of the accident with a hand-drawn diagram below it drawn by Mr. Boudreaux. The diagram was drawn by Mr. Boudreaux during his deposition to show where the collision occurred between the two vehicles.

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[4] This court notes that USAA appealed the June 14, 2016, judgment denying its motion for JNOV or motion for new trial. The denial of a motion for JNOV or new trial is an interlocutory and non-appealable judgment. La. C.C.P. art. 1914(C). However, an appellate court may consider interlocutory judgments, such as the denial of a motion for new trial/JNOV, as part of an unrestricted appeal from a final judgment. Because USAA's challenge of the trial court's denial of its motion for new trial/JNOV is part of the appeal from the final judgment, we may consider the issue on appeal. *See* GE Commercial Finance Business Property Corp. v. Louisiana Hospital Center L.L.C., 2010-1838 (La. App. 1 Cir. 6/10/11), 69 So.3d 649, 653 n.4.

USAA alleges that the trial court erred in admitting the diagram into evidence because it "was irrelevant [and] did not depict what [Mr. Boudreaux] intended it to depict." Specifically, USAA argues that the depiction in the diagram was not to scale and did not accurately show the events that took place. USAA further argues that the diagram was a significant factor in the jury's determination of fault because one of the main issues in the case was whether or not the accident occurred in the westbound lane of travel or the eastbound turning lane. Thus, USAA alleges that the jury improperly relied on the diagram and it is "the only explanation for [the jury's] inconsistent verdict."

Ace American Insurance Company and Mr. Gisler counter that the diagram admitted into evidence was not the sole reason that the jury found in favor of Mr. Gisler because "[Mr.] Boudreaux was afforded ample opportunity to explain his [diagram] to the jury and to correct any possible issues regarding the 'scale' of the drawing." They further argue that although the jury heard testimony from Mr. Boudreaux that the diagram he drew was not to scale, he testified that the diagram was "accurate in terms of where the accident took place with relation to the vehicles to each other." Therefore, Ace American Insurance Company and Mr. Gisler argue that the trial court did not error in admitting the diagram into evidence.

When the jury makes a factual finding based on admissible evidence, that finding will not be reversed unless it is clearly wrong or manifestly erroneous. Ryan v. Case New Holland, Inc., 51,062 (La. App. 2 Cir. 12/22/16), 211 So.3d 611, 620. If a trial court commits consequential error by denying the jury relevant, admissible evidence, or by admitting evidence that should have been excluded, the fact finding process is interdicted; thus, the verdict is tainted. Maldonado v.

Kiewit Louisiana Co., 2012-1868 (La. App. 1 Cir. 5/30/14), 152 So.3d 909, 918, writ denied, 2014-2246 (La. 1/16/15), 157 So.3d 1129.

A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. *Id.* at 918. If the admission or exclusion of evidence tainted a jury verdict, this court steps into the shoes of the factfinder and conducts a *de novo* review of all of the admissible evidence. Absent a tainted verdict, review is limited to determining whether the jury committed manifest error. *Id.* at 918-19.

In the instant matter, the record reveals that it was made clear to the jury during Mr. Boudreaux's testimony at trial that the diagram was not drawn to scale. Mr. Boudreaux was fully cross-examined concerning the diagram allowing the jury to determine the weight and credibility of that evidence. The following colloquy occurred between Mr. Boudreaux and counsel at trial:

> Q. YOU DR[EW] SOME DIAGRAMS IN THIS CASE BEFORE; CORRECT?
> A. I WAS ASKED TO AT THE DEPOSITION, YES.
> Q. NOT TO SCALE?
> A. OF COURSE NOT.
> ***
> Q. WERE THEY ACCURATE?
> A. THEY WERE ACCURATE IN TERMS OF WHERE THE ACCIDENT TOOK PLACE WITH RELATION TO THE VEHICLES TO EACH OTHER.
> ***
> Q. AND THE DOCUMENT THAT MR. SALLEY SHOWED YOU A MINUTE AGO WAS IT TO SCALE AS AN EXACT ACCIDENT RECONSTRUCTION OR WAS IT DONE UNDER AGREEMENT AT THE DEPOSITION THAT IT WASN'T TO SCALE.
> A. THE AGREEMENT WAS, IT WAS NOT TO SCALE.
> ***
> Q. AND, IN FACT, YOU REMEMBER THIS DIAGRAM THAT YOU DREW?
> A. I DO.
> Q. AND, IN FACT, IT INDICATES YOU WENT PAST ONE VEHICLE, CORRECT?
> A. AGAIN, I INDICATED THAT IT'S NOT TO SCALE AND IT WAS

THE RELATIONSHIP OF JUST THE TWO CARS AND EVERYTHING ELSE WAS JUST, YOU KNOW, THERE AND THAT'S IN MY DEPOSITION.

Accordingly, we find that USAA has failed to show that the trial court erred in admitting the diagram into evidence. Since the parties presented conflicting evidence and testimonies as to the location of the collision, the jury had a duty to resolve that conflicting evidence and weigh the testimonies regarding its credibility. The jury resolved the conflicting evidence in a straightforward, non-contradictory way finding Mr. Boudreaux 100% at fault. Based upon the testimony presented at trial regarding the circumstances surrounding the accident, we do not find that the admission of the diagram, even if in error, caused such prejudice to USAA that it would form a basis requiring correction. *See* Eldridge v. Carrier, 2004-203 (La. App. 3 Cir. 11/17/04), 888 So.2d 365, 372, writ denied, 2004-3174 (La. 3/11/05), 896 So.2d 66. Therefore, the trial court did not err in admitting the diagram into evidence and this assignment of error has no merit.[5]

Assignment of Error Number One

USAA pleaded a motion for new trial alternatively with a judgment notwithstanding the verdict.[6] USAA argued that it was entitled to a new trial "since the entire verdict was fundamentally inconsistent and predicated upon the introduction of false and misleading evidence." Specifically, USAA argues that

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[5] We note USAA's objection to the admissibility of the diagram being admitted into evidence; however, the record reveals that at the beginning of trial and prior to any testimony, Ace American Insurance Company offered and admitted several exhibits into evidence, including the diagram, and no objection was made by USAA. It was not until cross-examination of Mr. Boudreaux that USAA's attorney objected to the admissibility of the diagram into evidence. To preserve the right to seek appellate review of an alleged trial court error, a party must state an objection contemporaneously with the occurrence of the alleged error, before the evidence is before the jury. *See* La. Code of Evid. art. 103(A)(1); State v. Smith, 2011-638 (La. App. 5 Cir. 3/13/12), 90 So.3d 1114, 1123. Therefore, USAA may have waived its objection because it was not timely asserted; however, we addressed the issue and found no error in allowing the exhibit into evidence.

[6] Louisiana Code of Civil Procedure article 1811(A)(2) provides that a motion for new trial may be joined with a JNOV request, or a new trial may be prayed for in the alternative.

the jury's reliance on the diagram drawn by Mr. Boudreaux was the only explanation for its inconsistent verdict.

Ace American Insurance Company and Mr. Gisler counter that the jury heard two versions of the accident at trial and found Mr. Gisler's testimony more credible than Mr. Boudreaux's. Therefore, they argue that USAA's assertion that the sole reason the jury found in favor of Mr. Gisler is because of the admission of the diagram prepared by Mr. Boudreaux is "nothing short of absurd."

Louisiana Code of Civil Procedure article 1972 states:

> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
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> (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.
> (3) When the jury was bribed or has behaved improperly so that impartial justice has not been done.

A discretionary ground for a new trial is set forth in La. C.C.P. art. 1973, which authorizes a trial court to grant a new trial in any case if there are good grounds therefor. Louisiana jurisprudence is clear that a new trial should be ordered when the trial court, exercising its discretion, is convinced by its examination of the facts that the judgment would result in a miscarriage of justice. Carroll Insulation & Window Co., Inc. v. Biomax Spray Foam Insulation, LLC, 50,112 (La. App. 2 Cir. 11/18/15), 180 So.3d 518, 526. The denial of a motion for new trial, whether on peremptory or discretionary grounds, should not be reversed unless there has been an abuse of the trial court's discretion. Magee v. Pittman, 98-1164 (La. App. 1 Cir. 5/12/00), 761 So.2d 731, 746, writ denied, 2000-1694 (La. 9/22/00), 768 So.2d 31, and writ denied, 2000-1684 (La. 9/22/00), 768 So.2d 602.

Applying these principles to the case before us, we do not find that the trial court abused its discretion in denying USAA's motion for new trial. The jury's verdict was based on credibility determinations and weighing conflicting evidence and testimonies presented to it at trial. The jury heard Mr. Gisler, Mr. Boudreaux, and Mr. Richard's testimonies as to how the collision occurred. Although the testimony of the witnesses conflicted, two permissible views existed and the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *See* Veroline v. Priority One EMS, 2013-865 (La. App. 3 Cir. 2/12/14), 153 So.3d 1050, 1052. The jury's verdict was supported by a fair interpretation of the evidence and there was sufficient evidence presented to the jury that could have led it to conclude that Mr. Boudreaux was 100% at fault. Accordingly, we find no abuse of the trial court's discretion in denying USAA's motion for new trial.

In the alternative, USAA moved for a JNOV. A JNOV is only warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. *See* Salama v. State, 2015-1992 (La. App. 1 Cir. 1/5/17), 211 So.3d 396, 399. If there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. Marroy v. Hertzak, 2011-0403 (La. App. 1 Cir. 9/14/11), 77 So.3d 307, 316. In making this determination, the 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. *Id.* When a JNOV is denied, the appellate court simply reviews the record to determine whether there is legal error or whether the trier of fact committed manifest error. Edmond v. Cherokee Ins. Co., 2014-1509 (La. App. 1 Cir. 4/24/15), 170 So.3d 1029, 1038-39.

In the instant matter, USAA argues that it is entitled to a JNOV because the facts and inferences point so strongly and overwhelmingly in its favor that reasonable minds could not have found Mr. Boudreaux 100% at fault. Specifically, USAA argues that a JNOV is warranted because "the jury ... was confused by the introduction of [the diagram] whose probative value was far outweighed by its potential for confusion[.]"

Mr. Gisler counters that USAA failed to show that the evidence presented at trial overwhelmingly absolved Mr. Boudreaux of any and all fault that reasonable persons could not arrive at a contrary verdict. Mr. Gisler further argues that USAA was not entitled to a JNOV because two conflicting versions of the accident were presented to the jury and neither party had a strong or overwhelming position as to the facts. *See* Scott v. Hospital Service District No. 1 of St. Charles Parish, 496 So.2d 270, 274 (La. 1986).

Considering all of the evidence and testimony presented at trial, we cannot say that the trial court was manifestly erroneous in denying USAA's JNOV. The trial court's admission of the diagram into evidence was not contrary to law and did not cause jury confusion or an impartial jury verdict, as the jury was aware that the diagram was not drawn to scale. The crux of this case was an issue of fact to be resolved by the fact finder, since Mr. Gisler, Mr. Richard, and Mr. Boudreaux had conflicting testimonies as to the location of the collision. The jury considered the conflicting testimony regarding their recollection of the collision and chose to agree with Mr. Gisler's testimony. Thus, the record supports the jury's determination, as it is reasonably based on the evidence presented at trial. Therefore, USAA's first assignment of error is without merit.

Assignment of Error Number Two

USAA argues in its second assignment of error that the jury verdict was "inconsistent and clearly contrary to the law and evidence." USAA specifically argues that based upon the statements made by Mr. Richard's counsel during opening statements at trial and Mr. Boudreaux's testimony, no reasonable jury could have found Mr. Boudreaux 100% at fault. USAA argues that Mr. Richard's counsel exonerated Mr. Boudreaux in his opening statement, which constituted a judicial confession,[7] when he stated "[Mr. Richard] will testify that Lance Boudreaux was not at fault in this accident. Did everything right, didn't see anything he did wrong, and he wasn't at fault." The record reveals that USAA never objected to Mr. Richard's opening statements at any point during the trial.

A party claiming an inconsistency in the jury's verdict must first raise the issue at trial; otherwise any objections are waived. La. C.C.P. art. 1793; Parker v. Centenary Heritage Manor Nursing Home, 28,401 (La. App. 2 Cir. 6/26/96), 677 So.2d 568, 574. This is because the trial court has the ability to take immediate remedial action by sending the jury back for further deliberations or ordering a new trial. Metz v. Howard, 631 So.2d 1248, 1251 (La. App. 5 Cir. 1994). Since USAA did not raise this issue at trial or in its motion for new trial/JNOV, it cannot raise it for the first time on appeal. *See* State v. Coates, 509 So.2d 438, 440 (La. App. 1 Cir. 1987).

Moreover, even if the remarks made by Mr. Richard's counsel during opening statements were improper, if this court is not firmly convinced that the jury was influenced by the remarks and that they contributed to the verdict, then the remarks do not require a reversal. State v. Jones, 99-1185 (La. App. 5 Cir.

[7] Louisiana Civil Code article 1853 states that "[a] judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it."

9/22/00), 769 So.2d 708, 718-19. Given the evidence presented at trial, USAA cannot show that the statements made by Mr. Richard's counsel during opening statements influenced the jury and improperly contributed to the jury verdict. If anything, the remarks made by Mr. Richard's counsel only aided USAA and strongly suggested that Mr. Boudreaux was not at fault in causing the accident. However, after hearing all of the evidence and considering all of the exhibits, the jury disagreed with USAA's argument. This court cannot overturn a jury's verdict based upon argument of counsel, which is not evidence and has no probative value. State v. Freeman, 539 So.2d 739, 744 (La. App. 3 Cir. 1989), writ denied, 543 So.2d 17 (La. 1989). Therefore, we decline to address this assignment of error.[8]

CONCLUSION

For these reasons, we affirm the trial court's judgment rendered in accordance with the jury's verdict, as well as its denial of the motion for JNOV or, alternatively, new trial. Appeal costs are assessed against defendant/appellant, USAA Casualty Insurance Company.

AFFIRMED.

[8] In Mr. Richard's brief on appeal, he requests sanctions against USAA for filing a frivolous appeal. Sanctions may not be awarded unless the requesting party appealed or answered the appeal. *See* St. St. Philip v. Montalbano, 2016-0254 (La. App. 1 Cir. 10/31/16), 206 So.3d 909, 916, writ denied, 2016-2110 (La. 1/13/17), 215 So.3d 255. Therefore, this request has no merit.