NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 1481

JAMIE LEONARD AND THOMAS VINCENT

VERSUS

JOSEPH HARRIS, U & R FARMS, LOUISIANA FARM BUREAU CASUALTY COMPANY, AND STATE FARM MUTUAL INSURANCE COMPANY

Judgment Rendered: MAR 2 6 2008

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Appealed from the
Twenty-third Judicial District Court
in and for the Parish of Assumption
State of Louisiana
Docket Number 28,414

Honorable Guy S. Holdridge, Judge

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

Plaintiff challenges a jury's verdict on the issues of allocation of fault and the amount of special damages awarded relative to an automobile accident. He further appeals a district court's judgment denying his motion for a new trial. For the reasons that follow, we reverse in part, amend, and affirm as amended.

FACTUAL AND PROCEDURAL HISTORY

In 2003, Jamie Leonard was a self-employed sheetrock finisher. On August 31st of that year, he was operating his pickup truck when he stopped at a red light. He was subsequently hit from the rear by a car traveling approximately 65 miles per hour. As a result of this accident, Mr. Leonard experienced intense back pain which resulted in his successive treatment by an emergency room physician, a chiropractor, an orthopedist, and a family practitioner. Mr. Leonard asserted a claim for medical expenses and property damages arising out of this accident.

Shortly thereafter, Mr. Leonard was involved in another automobile accident. On November 25, 2003, Mr. Leonard's pickup truck was forced off the road, hit a pole, and went airborne, flipped, and landed sideways in a ditch. Again, Mr. Leonard sustained injuries to his back. He ultimately filed a lawsuit seeking past, present, and future medical expenses, lost wages, and general damages for pain and suffering as a result of this accident.

Unfortunately, on November 28, 2003, Mr. Leonard was involved in yet another accident while driving his pickup truck eastbound on Highway 70. In front of him, also heading eastbound, was Joseph Harris, who was operating a tractor pulling two sugar cane trailers and proceeding at a slow rate of speed. Mr. Leonard attempted to pass Mr. Harris. Mr. Leonard claims that "suddenly and without warning, ... Joseph Harris turned left from the roadway into a private driveway." In so doing, Mr. Leonard maintains that Mr. Harris turned into his path, forcing him to swerve and sideswipe an unoccupied vehicle, which was parked on the

westbound shoulder of Highway 70, then continuing forward and impacting "the side of the tractor trailers before it had completed [its] turn."

As a result of this third automobile accident, Mr. Leonard filed suit in June 2004, naming as defendants Mr. Harris; U & R Farms, Mr. Harris' employer and owner of the tractor; and their liability insurer, Louisiana Farm Bureau Casualty Insurance Company.[1] Following a jury trial in October 2006, the jury allocated 50 percent fault for the accident to Mr. Leonard and 50 percent to Mr. Harris. It further awarded Mr. Leonard the following damages:

1. Past medical expenses	$30,000
2. Future medical expenses	$20,000
3. Past lost wages	$25,000
4. Future lost wages or earning capacity	-0-
5. Past, present and future pain and suffering, including mental anguish and inconvenience	$20,000
6. Loss of enjoyment of life	$20,000
TOTAL	$115,000

The trial court adopted the verdict reached by the jury and on October 30, 2006, signed a judgment in favor of Mr. Leonard, awarding him $57,500 in damages representing 50 percent of the jury verdict. Mr. Leonard sought post-trial relief, including a judgment notwithstanding the verdict or alternatively, a new trial; both of these motions were denied. This appeal by Mr. Leonard followed.

DISCUSSION

I. ALLOCATION OF FAULT

In his first assignment of error, Mr. Leonard contends that the jury erred in its allocation of fault. He maintains that Mr. Harris should have been assessed with 100 percent fault for the accident. In light of the law and the evidence presented herein, we are compelled to agree.

[1] Also named as a defendant was Mr. Leonard's UM insurer, State Farm Mutual Insurance Company. However, Mr. Leonard dismissed his claims against State Farm prior to trial.

The allocation of fault is a factual finding within the sound discretion of the trier of fact and is subject to the manifest error standard of review. **Haydel v. Hercules Transport, Inc.**, 94-1246, p. 19 (La. App. 1 Cir. 4/7/95), 654 So.2d 418, 430, writ denied, 95-1172 (La. 6/23/95), 656 So.2d 1019. Therefore, in order to reverse a jury's allocation of fault, an appellate court must review the record in its entirety and find that a reasonable factual basis does not exist for the finding, and further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. See **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882 (La. 1993). We have thoroughly reviewed the record in the instant case and conclude that a reasonable factual basis does not exist to support the jury's allocation of fault and that the jury was clearly wrong in determining that Mr. Leonard was at fault in causing the accident in question.

Both left-turning motorists and overtaking or passing motorists are required to exercise a high degree of care due to the dangerous nature of these maneuvers. **Fontenot v. Omni Ins. Group**, 99-504, p. 4 (La.App. 3 Cir. 10/13/99), 745 So.2d 716, 719. Based on LSA-R.S. 32:73 and 32:75, the jurisprudence holds that the driver of a following or overtaking vehicle must be alert to the actions of motorists preceding him on the highway. **Perkins v. Allstate Indem. Ins. Co.**, 36,044, p. 3 (La.App. 2 Cir. 6/12/02), 821 So.2d 647, 649. Generally, the driver of an overtaking or passing vehicle has the duty to ascertain before attempting to pass a preceding vehicle that, from all the circumstances of traffic, lay of the land, and conditions of the roadway, the passing can be completed with safety. **Palmieri v. Frierson,** 288 So.2d 620, 623 (La. 1974). See also **Boudreaux v. Farmer**, 604 So.2d 641, 650 (La.App. 1 Cir.), writs denied, 605 So.2d 1373, 1374 (La. 1992). Pursuant to LSA-R.S. 32:104(B), a left-turning motorist is required to signal his intent to turn at least 100 feet from the turning point. Furthermore, a driver may not make a left turn unless it can be done without danger to normal overtaking or

passing traffic. **Bryant v. Newman**, 39,437, p. 8 (La.App. 2 Cir. 4/20/05), 900 So.2d 343, 348.[2]

According to Trooper Kirk Foret, who investigated the accident, it was apparent that Mr. Harris had breached the foregoing duty imposed on a left-turning driver thereby causing the accident. When Trooper Foret arrived at the scene, he encountered both vehicles on the shoulder; it appeared they had not been moved. Trooper Foret took statements from Mr. Leonard and Mr. Harris and then examined the physical evidence. He concluded that Mr. Leonard's truck had taken possession of the westbound lane in a passing maneuver when Mr. Harris executed a left turn into Mr. Leonard's path. Mr. Leonard reacted by veering to the left to avoid a collision with the tractor, whereupon he sideswiped an unoccupied truck on the shoulder, then "bounced off" and hit the tractor.

Trooper Foret sketched a diagram reflecting his findings. The diagram, admitted into evidence as plaintiff's exhibit 1, indicated that the point of impact occurred on the shoulder at the edge of the westbound lane. It further showed that, at the time of the collision, the first trailer being pulled by Mr. Harris' tractor was still within the westbound lane of Highway 70 while the second trailer had not fully cleared the eastbound lane. Trooper Foret, an eleven year veteran with State Police who estimated he worked approximately 200 accidents per year, testified he had "no doubt" the accident was caused by Mr. Harris.

Both Mr Leonard and Mr. Harris testified. Their testimony was admittedly vague. However, it is undisputed that Mr. Harris was operating a tractor that was towing two consecutive sugarcane trailers and was traveling at a slow rate of

[2] In previous cases dealing with similar factual scenarios, the courts have required both the left-turning and passing drivers to exercise a high degree of care in executing their respective dangerous maneuvers but have failed to apply a presumption of negligence to either driver. **Bryant v. Newman**, 39,437(La.App. 2 Cir. 4/20/05), 900 So.2d 343; **Duncan v. Safeway Ins. Co. of Louisiana**, 35,240 (La.App. 2 Cir. 10/31/01); 799 So.2d 1161, 1163, **Summarell v. Ross**, 27,160 (La.App. 2 Cir. 08/23/95), 660 So.2d 112; **Craig v. Hebert**, 99-1222 (La.App. 3 Cir. 02/02/00), 758 So.2d 260; **Fontenot v. Omni Ins. Group**, 99-504 (La.App. 3 Cir. 10/13/99), 745 So.2d 716. But see **Thonn v. Cook**, 2003-0763 (La.App. 4 Cir. 12/10/03), 863 So.2d 628. In light of our conclusion herein, it is unnecessary for us to determine whether the general presumption of fault imposed on a left-turning motorist applies under these particular facts.

speed. It is further undisputed that the impact involved the right front panel of Mr. Leonard's truck and Mr. Harris' tractor tire.

According to Mr. Leonard, he ascertained that he could safely execute a pass, and had passed one or both of the sugarcane trailers and was beginning to pass the tractor, when Mr. Harris unexpectedly turned left and hit his truck, forcing Mr. Leonard to then hit the unoccupied vehicle parked on the shoulder. As a result, Mr. Leonard's truck then swung in the opposite direction, back toward the tractor. He stated that the tractor then drug his truck into the driveway. Implicit in Mr. Leonard's testimony is the contention that the collision occurred in the westbound lane.

Trooper Foret testified that Mr. Harris, in his original statement at the accident scene, told him he did not see Mr. Leonard before impact. However, at trial, Mr. Harris testified that he saw Mr. Leonard behind him, and indicated that he thought he had time to make his turn.

Under either scenario, Mr. Harris would have caused the accident. In short, regardless of whether Mr. Harris checked his mirror and saw Mr. Leonard behind him, if there was not enough time for Mr. Harris to clear the roadway with his tractor, then obviously there was not enough time for him to clear the roadway with the two cane trailers he was towing behind.

When documentary or objective evidence is so contradictory to the witness' story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness' story, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. **Doiron v. Wal-Mart Stores, Inc.**, 95-1705, p. 6 (La.App. 1 Cir. 4/4/96), 672 So.2d 249, 25; **Bryant**, 39,437 at p. 7, 900 So.2d at 348.

There is only one permissible view of the evidence in the instant case: Mr. Leonard was executing a legal passing maneuver when Mr. Harris turned into his path while attempting to make a left turn into a private driveway. Clearly, Mr. Harris failed to ascertain that he could safely execute a left turn without danger to overtaking or passing traffic, thereby breaching his legal duty. Accordingly, we reverse the judgment of the trial court allocating 50 percent fault to Mr. Leonard. We further amend the judgment to assess 100 percent fault for the accident to Mr. Harris.

II. SPECIAL DAMAGES

Mr. Leonard also contests various components of the special damages awarded by the jury. "Special damages" encompass those damages which must be specially pled or have a ready market value, i.e., the amount of the damages supposedly can be determined with relative certainty. **Wainwright v. Fontenot**, 2000-0492, p. 5 (La. 10/17/00), 774 So.2d 70, 74. Included under the heading of special damages are the plaintiff's medical expenses incurred as a result of the tort, as well as past lost wages. **Kaiser v. Hardin**, 2006-2092, p. 11 (La. 4/11/07), 953 So.2d 802, 810. In reviewing a jury's factual conclusions with regard to special damages, an appellate court must satisfy a two-step process based on the record as a whole: There must be no reasonable factual basis for the trial court's conclusions, and the finding must be clearly wrong. **Kaiser**, 2006-2092 at pp. 11-12, 953 So.2d at 810. Therefore, we now turn to a discussion of whether the jury's award of special damages was based on manifestly erroneous factual findings. Specifically, Mr. Leonard challenges the amount of damages awarded for past and future medical expenses and for past lost wages.

A. Past Medical Expenses

Mr. Leonard requested $82,688.98 in past medical expenses; however, the jury awarded him only $30,000.00. Where a defendant's negligent action aggravates a plaintiff's pre-existing injury or condition, he must compensate the victim for the full extent of his aggravation. **Touchard v. Slemco Elec. Foundation**, 99-3577, pp. 5-6 (La. 10/17/00), 769 So.2d 1200, 1204. The jury's award herein suggests it found that some, though not all, of Mr. Leonard's injuries resulted from the third accident or that the third accident aggravated pre-existing conditions caused by either or both of his prior accidents. This finding is not manifestly erroneous given that the medical records submitted into evidence clearly demonstrate that Mr. Leonard sustained similar injuries to his lower back in each of the three accidents. On December 9, 2003, Mr. Leonard reported to Dr. Kennard that he had been experiencing back pain since the initial August 31 accident. See **Kaiser**, 2006-2092 at p. 12,953 So.2d at 810. The defendants' medical expert, Dr. Donner, testified that Mr. Leonard's disk problem, which accounted for a large part of the medical expenses Mr. Leonard incurred, had not been caused by any of the wrecks. Dr. Donner opined that Mr. Leonard's disk pathology was degenerative in nature, rather than post-traumatic. Dr. Donner's testimony regarding age-related degeneration was corroborated by the MRI performed on Mr. Leonard on December 30, 2003 that revealed only "nonspecific degenerative change L5-S1 without disc herniation or other focal defect." Based on this evidence, we cannot say that the jury erred in awarding less than the full amount requested for past medical expenses.

B. Past Lost Wages.

Mr. Leonard also challenges the amount awarded by the jury for lost wages. To recover for actual wage loss, a plaintiff must prove that he would have been earning wages, but for the accident in question. In other words, it is the plaintiff's burden to prove past lost earnings and the length of time missed from work due to

the accident. **Rhodes v. State Through Dep't. of Transp. and Dev.**, 94-1758, p. 19 (La. App. 1 Cir. 12/20/96), 684 So.2d 1134, 1147. Past lost earnings are susceptible of mathematical calculation from proof offered at trial and require such proof as reasonably establishes the claim. However, the matter is much more problematic when, as here, a plaintiff has sustained injuries from three automobile accidents in the space of three months.

Mr. Leonard testified that, following the third accident, which is the subject of the instant suit, he tried to continue operating his sheetrock finishing business but he was only able to work in a supervisory capacity. He maintained that performing supervisory work was not profitable, and thus, he eventually was unable to work. However, despite Mr. Leonard's testimony to the contrary, the medical records admitted into evidence at trial established that Mr. Leonard had reported to more than one doctor that he had been able to work in a supervisory capacity only since the initial August 31 accident.[3] Based on this evidence, the jury could reasonably find that Mr. Leonard's loss of wages was not caused solely by the November 28 accident. The jury ultimately fixed Mr. Leonard's damages for past lost wages in the amount of $25,000.00 and, given the complex facts herein, and the reasonable inferences that can be drawn therefrom, we cannot say that the jury was clearly wrong in its award.

C. Future Medical Expenses

Mr. Leonard further contends that the jury erred in disregarding his expert's testimony regarding his need for surgery, thus resulting in the grant of an inadequate award for future medical expenses. At the outset, we note that credibility determinations are for the trier of fact, even as to the evaluation of expert witness testimony. **Sportsman Store v. Sonitrol Sec. Systems**, 99-0201, p.

[3] On October 6, 2003, Mr. Leonard informed Dr. Bell-Larrison that he was unable to work due to his back pain. Later, on November 26, 2003, he reported to Dr. Bell-Larrison: "no work since August except supervisory." Clearly these reports predate the third accident at issue herein. Moreover, subsequent to the third accident, during his December 9, 2003 appointment with Dr. Kennard, Mr. Leonard indicated that he had been unable to work since "8-31-03."

6 (La. 10/19/99), 748 So.2d 417, 421; **Lirette v. State Farm Ins. Co.**, 563 So.2d 850, 853 (La. 1990). A fact finder may accept or reject the opinion expressed by an expert, in whole or in part. **Lirette**, 563 So.2d at 855. Based on the jury's award, it is apparent that it credited the testimony of the defendant's medical expert, Dr. Donner, who opined that Mr. Leonard was not a candidate for surgery. According to Dr. Donner, it was unlikely that Mr. Leonard would benefit from surgery and that surgery could actually worsen his condition.

While future medical expenses need not be established with mathematical certainty, they must be established with some degree of certainty, and the plaintiff must show that expenses more probably than not will be incurred. **Sandbom v. BASF Wyandotte, Corp.**, 95-0335, p. 20 (La. App. 1 Cir. 4/30/96), 674 So.2d 349, 361. When the need for future medical care has been established by medical testimony, but the cost is not susceptible of an exact value, a reasonable award may be made. **Richard v. St. Paul Fire and Marine Ins. Co.**, 94-2112, p. 11 (La. App. 1 6/23/95), 657 So.2d 1087, 1093; **Ganucheau v. Winn Dixie LA., Inc.**, 99-432 (La. App. 5 Cir. 11/10/99), 746 So.2d 812, 816, writ denied, 99-3641 (La. 2/18/00), 754 So.2d 972. The evidence presented at trial indicated that Mr. Leonard would need some future medical treatment, including prescription medications to manage his pain. Considering the forgoing facts, we cannot say that the jury's award of $20,000.00 for future medical expenses was unreasonable. Thus we find no merit in this assignment of error.

III. MOTION IN LIMINE

In his third assignment of error, Mr. Leonard claims the trial court erred in "allowing defendant to tell the jury the plaintiff recovered from other lawsuits after a motion in limine was granted prior to trial prohibiting any discussions about other awards." We disagree.

A motion in limine is a procedural device that provides both plaintiffs and defendants with a vehicle to have evidentiary issues decided prior to trial. Such motions are not governed by any particular rules on timing or substance. **Furlough v. Union Pacific R.R. Co.**, 33,658, p. 7 (La.App. 2 Cir. 8/31/00), 766 So.2d 751, 757. However, as a court of record, our scope of review is limited to evidence that appears in the record of the proceedings.[4] **Gutierrez v. Moezzi**, 2006-1395, p.16 (La.App. 4 Cir. 4/11/07), 957 So.2d 842, 852. Although Mr. Leonard claims that he "filed" a motion in limine and that the resultant "ruling was ironclad," the record before us contains no such motion, either oral or written. Nor does the record contain any judgment or a minute entry reflecting a ruling on such a motion.

Moreover, we note that Mr. Leonard failed to make a contemporaneous objection to this purported "violation," nor did he request that the jury be admonished to disregard the offending comment. Hence, we are unable to find any merit in this assignment of error.

IV. MOTION FOR NEW TRIAL

Finally, Mr. Leonard contends that the trial court should have granted him a new trial based on alleged juror misconduct. He asserts that the jury behaved improperly and deprived him of collecting the "full value for his case." We find his argument to be unpersuasive.

Louisiana Code of Civil Procedure art. 1973 provides that "[a] new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law." Louisiana Code of Civil Procedure art. 1972(3) further provides that "[a] new trial shall be granted, upon contradictory motion of any party [w]hen the jury ... has behaved improperly so that impartial justice has not been done."

[4] Discussions held in chambers and not made part of the record cannot be considered by a reviewing court. **Laurent v. Jolly-Wright**, 2005-1495, p. 2 (La.App. 4 Cir. 1/10/07); 950 So.2d 47, 48, writ denied, 2007-0283 (La. 3/23/07), 951 So.2d 1108.

Improper behavior by a jury is not defined, but must be determined by the facts and circumstances of the particular case. **Brown v. Hudson**, 96-2087, p. 5 (La.App. 1 Cir. 9/19/97), 700 So.2d 932, 936, writ denied, 97-2623 (La. 1/9/98), 705 So.2d 1103, cert. denied, 524 U.S. 916, 118 S.Ct. 2297, 141 L.Ed.2d 157 (1998).

A new trial is mandated only upon a showing of jury misconduct that is of such a grievous nature as to preclude the impartial administration of justice. **Bossier v. DeSoto General Hospital**, 442 So.2d 485 (La.App. 2 Cir. 1983), writ denied, 443 So.2d 1122 (La. 1984). Otherwise, the granting of a new trial is left to the sound discretion of the trial court. **Id**. A decision to deny a motion for new trial based upon jury misconduct is reviewed pursuant to an abuse of discretion standard. **Wright v. Hirsch**, 560 So.2d 835 (La. 1990). When reviewing the denial of a motion for new trial, unless an abuse of discretion can be exhibited, the trial court's decision will not be reversed.

Not every instance of jury misconduct necessitates the granting of a new trial. The burden falls upon the mover to prove that the level of the behavior was of such a grievous nature as to preclude the impartial administration of justice. **Brown**, 96-2087 at p. 4, 700 So.2d at 935. This is a heavy burden on the mover. The courts of this state have been reluctant to set aside jury verdicts based upon allegations of improper behavior. **Brown**, 96-2087 at p. 5, 700 So.2d at 936.

In an effort to meet this burden, Mr. Leonard relies on the affidavits of two of the jurors, which he attached to his memorandum in support of his motion for a new trial. However, there is no indication in the pertinent minute entry, nor is there any transcript of the hearing, to show that the affidavits were offered into evidence at the hearing on that motion. A court cannot consider exhibits filed into the record as attachments to a memorandum, because such attachments are not evidence. **Satterthwaite v. Byais**, 2005-0010, p. 6 (La.App. 1 Cir. 7/26/06), 943

So.2d 390, 395. Since such attachments are not evidence, they are not properly part of the record on appeal. **Id.**

Moreover, it is well settled that affidavits and other testimony by jurors cannot be used as evidence to impeach their verdict. Louisiana Code of Evidence art. 606(B) provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether any outside influence was improperly brought to bear upon any juror, and, in criminal cases only, whether extraneous prejudicial information was improperly brought to the jury's attention. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

The allegations made in the affidavits merely involve matters or statements made during the course of the jury's deliberations and do not imply that any outside influence, as contemplated by La. Code of Evid. art. 606(B), was brought to bear upon any juror. Accordingly, we find no abuse of discretion in the trial court's denial of Mr. Leonard's motion for a new trial.

CONCLUSION

For the above and foregoing reasons, the judgment of the trial court allocating 50 percent fault to Mr. Leonard is reversed. The judgment is amended to assess Mr. Harris with 100 percent fault and to increase the award of damages accordingly. The judgment, as thus amended, is affirmed. Defendants are cast with all costs of this appeal.

REVERSED IN PART, AMENDED, AND AS AMENDED, AFFIRMED.