NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0506

JOSHUA VARMALL AND CALLENA VARMALL

VERSUS

TIMOTHY NORWOOD AND IMPERIAL FIRE
AND CASUALTY INSURANCE COMPANY

Judgment Rendered: DEC 2 9 2011

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On Appeal from the
19th Judicial District Court,
Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 584,474
Honorable R. Michael Caldwell, Judge Presiding

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Parro, J., dissents and assigns reasons.

HIGGINBOTHAM, J.

Joshua Varmall and his mother, Callena Varmall, appeal a judgment finding Joshua was fifty percent at fault in an automobile accident with Timothy Norwood.[1] For the following reasons, we affirm the trial court's judgment.

BACKGROUND

On July 31, 2009, Joshua was driving a car belonging to his mother, Callena Varmall, on Wayne Drive in East Baton Rouge Parish. Wayne Drive is a narrow, two-lane residential road with no center line and no paved shoulders. Joshua's cousin, Albert Latham,[2] was following close behind him in another car. They were driving at a slow speed, because Albert was having car problems and they were only traveling a short distance from Joshua's house on Wayne Drive. At some point, Albert honked his horn, causing Joshua to slow and look in his rearview mirror. When Joshua saw that Albert was simply waving at a friend and not for him to stop, he looked back at the road a split second before an oncoming car, driven by Timothy Norwood, hit his car. The front driver's sides of both cars were damaged in the head-on collision. Albert called the police and then walked down the street to get Joshua's mother, who got to the scene before the police officer arrived. A Baton Rouge City Police Officer, Jonathan Migues, responded to the call and took written statements from Joshua and Timothy. He did not interview any other bystanders at the scene, because he determined that there were no eyewitnesses that actually saw the accident happen. By the time Officer Migues arrived at the scene, the cars had been moved from the roadway and he saw no debris on the road. Joshua was cited for driving left of center.

Joshua and his mother, Ms. Varmall, filed suit against Timothy and

[1] The vehicle driven by Timothy was insured by Imperial Fire and Casualty Insurance Company, also a named defendant.

[2] Although the briefs use the name, "Albert Lathan," the trial transcript uses "Albert Latham," so we will follow the designation used in the transcript.

Timothy's insurer for personal injuries and property damage. At the trial, Joshua and Albert both testified that Joshua had been driving slowly in his lane of travel and that Timothy's vehicle was speeding and had crossed the center of the road, causing the accident. Ms. Varmall testified that when she arrived at the accident site, she noticed that Timothy's car was more in her son's lane of travel and that Timothy's car was across the center of the road. Neither Timothy nor Officer Migues appeared at the trial. However, because Officer Migues had been subpoenaed to appear, the trial court left the record open to receive his deposition testimony.

In his deposition, Officer Migues stated that after reviewing the statements of both drivers at the scene and examining the damage on the vehicles, he concluded that Joshua had crossed the center line and caused the accident, which had occurred in Timothy's lane of travel. A diagram of the accident submitted in connection with his testimony showed Joshua's vehicle crossing slightly into the opposite lane and hitting Timothy's vehicle. The diagram showed Timothy's vehicle fully in its lane. The written statements of both drivers were also submitted in connection with Officer Migues' deposition. In those statements, each driver claimed the other had caused the collision. Timothy also claimed Joshua admitted using his cell phone when the accident occurred. Officer Migues could not recall what either driver might have told him orally. After learning during his deposition that Joshua had slowly travelled only a short distance with his cousin driving behind him, Officer Migues admitted that his opinion concerning the cause of the accident might have changed, and that it was possible that Joshua was not actually at fault.

After considering all the evidence, including Officer Migues' deposition, the trial court stated that, given the directly conflicting statements of the two drivers,

"[t]his is an almost impossible case for the court to determine." The trial court then concluded that each driver was fifty percent at fault. Joshua and Ms. Varmall appealed, claiming the trial court erred in allocating fifty percent fault to Joshua.

APPLICABLE LAW

A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882, n. 2 (La. 1993); **Morris v. Safeway Ins. Co. of Louisiana**, 2003-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 2004-2572 (La. 12/17/04), 888 So.2d 872. If the trial court's findings are reasonable in light of the record reviewed in its entirety, an appellate court may not reverse even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The reason for this well-settled principle of review is based upon the trial court's better capacity to evaluate witnesses. **Stobart**, 617 So.2d at 883. Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Rosell**, 549 So.2d at 844.

The trier of fact is owed some deference in allocation of fault, since the finding of percentages of fault is a factual determination. **Duncan v. Kansas City Southern Railway Co.**, 2000-0066 (La. 10/30/00), 773 So.2d 670, 680, cert. dismissed, 532 U.S. 992, 121 S.Ct. 1651, 149 L.Ed.2d 508 (2001). Thus, a trier of fact's allocation of fault is subject to the manifestly erroneous or clearly wrong standard of review. See **Stobart**, 617 So.2d at 882. Allocation of fault is not an exact science or the search for one precise ratio, but rather an acceptable range, and any allocation by the fact finder within that range cannot be clearly wrong. **Foley v. Entergy Louisiana, Inc.**, 2006-0983 (La. 11/29/06), 946 So.2d 144, 166. Only

after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the apportionment, and then only to the extent of lowering it or raising it to the highest or lowest point respectively that is reasonably within the trier of fact's discretion. **Clement v. Frey**, 95-1119 (La. 1/16/96), 666 So.2d 607, 611.

In determining the percentages of fault, the trier of fact should consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed. 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 v. State Farm Fire and Cas. Ins. Co.**, 469 So.2d 967, 974 (La. 1985). These same factors guide the appellate court's evaluation of the respective fault allocations. **Smegal v. Gettys**, 2010-0648 (La. App. 1st Cir. 10/29/10), 48 So.3d 431, 439.

ANALYSIS

After reviewing the entire record in this case, we conclude that the trial court was presented with two permissible views concerning which driver was at fault, and we find no manifest error in the trial court's equal allocation of fault. Obviously, to render the fifty-fifty allocation, the trial court must have found that each party was equally negligent. The record reasonably supports this factual finding. Joshua admitted that he had looked in his rearview mirror to check on his cousin just moments prior to the collision, and "after [he] turned around from checking on [his] cousin," Timothy's car was "right there." Additionally, in his

written statement to the police officer, Timothy said that Joshua admitted that he had been on his cell phone and did not see Timothy before crossing the center line and colliding with Timothy's car. At trial, Joshua denied that he was using his cell phone or that he crossed the center line at the time of the accident, but he did not deny that he took his eyes off the road to check on his cousin when he heard the horn.

All of the witnesses who appeared at trial testified that Joshua's vehicle was in the correct lane of travel and that Timothy's vehicle crossed the center line and hit Joshua's vehicle. Albert testified that he had seen Timothy's vehicle several times that day, "flying up and down the street." Albert stated that he had noticed the car, because it "was speeding." Albert also testified that at no time while he was following Joshua did he see Joshua's car cross the center line. Rather, he saw Joshua slow down and try to swerve to the right immediately before the collision. However, Albert did not give an eyewitness statement to the investigating police officer. Joshua stated he had slowed down considerably right before the accident, due to his cousin's blowing the horn behind him. Joshua said he "came to a slow-down, almost to a halt," as he checked behind him to see if Albert needed some help. He had not seen Timothy's headlights before the horn blew, but when he looked back at the road after checking on his cousin, the oncoming car "was right there." Joshua testified that he had a split second or two to try to turn to the right, but it was not enough time to avoid being hit. Joshua further testified that he was always on his side of the road, even after the collision. Finally, although Officer Migues had cited Joshua for driving left of center, he came to realize during his deposition that a further review of the factual circumstances and the two drivers' statements might warrant a different conclusion.

The trial court reasoned that under these facts, it was "almost impossible" to

determine who was at fault. Because there was evidence that both drivers could have briefly crossed the center line, that Joshua was momentarily inattentive, and that Timothy was speeding, there is a reasonable factual basis in the record for the trial court's finding that both drivers were at fault. Based on our review of the evidence, we find that the trial court's allocation of fifty percent fault to Joshua and fifty percent fault to Timothy is within an acceptable range. Therefore, the trial court's allocation cannot be clearly wrong.

CONCLUSION

For the above reasons, we affirm the trial court's judgment. All costs of this appeal are assessed to Joshua Varmall and Callena Varmall.

AFFIRMED.

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BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

PARRO, J., dissenting.

I must respectfully dissent, because I do not find from the record that there was a reasonable factual basis for the allocation of fifty percent fault to Joshua Varmall.

In order to make its allocation, the trial court must have found that each party was **equally** negligent. Yet, the only evidence of any negligence on Joshua's part was Timothy Norwood's written statement to the police officer. This written statement was not made in court or in a deposition, so there was no opportunity to cross-examine Timothy concerning this clearly self-serving statement. In contrast to this out-of-court statement, all the witnesses to the accident and its immediate aftermath—all of whom testified under oath at the trial and were cross-examined concerning their recollections—clearly stated that Joshua remained in his lane of travel and never crossed over the center line. Even the police officer who took Timothy's statement and based his initial opinion of the circumstances on it, later recanted his opinion during a post-trial deposition and concluded that Timothy, not Joshua, had crossed the center line and caused the collision.

The majority bases its affirmation of the trial court on the fact that while Joshua was checking his rearview mirror, he took his eyes off the roadway ahead of him and was "momentarily inattentive." Rather than recognizing this action as the prudent response of a careful driver to the sound of a horn behind him, the majority categorizes this action as negligence and concludes the trial court was correct in equating this responsible action to Timothy's reckless speeding down the neighborhood street to show off his new car. There simply is no reasonable factual basis in the evidence for finding that Joshua was at fault in causing this accident, much less for finding that Joshua was equally at fault with Timothy.

Accordingly, I respectfully dissent.