NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1209

VINCENT GLEBER AND DOUGLAS RAYBURN

VERSUS

PATRICIA MAYFIELD AND AMERICAN ALTERNATIVE INSURANCE COMPANY

Judgment Rendered: February 10, 2012

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2009-10232

The Honorable William J. Knight, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of a finding of one hundred percent fault on the part of the driver of a school bus in causing the automobile accident at issue and of the damage awards rendered. For the reasons that follow, we amend the judgment, affirm as amended, and remand.

FACTS AND PROCEDURAL HISTORY

On October 2, 2008, at approximately 6:50 a.m., Patricia Mayfield was driving a St. Tammany Parish school bus, and had stopped at a stop sign on North Tranquility Road, at its intersection with Highway 190, near Lacombe, Louisiana, waiting to turn left onto Highway 190. At the same time, another motorist, Stephen Benz, was stopped at a stop sign on South Tranquility Road, on the opposite side of Highway 190 from Ms. Mayfield. As Mr. Benz was successfully negotiating a left-hand turn, westbound, onto Highway 190, Ms. Mayfield also made a left-hand turn through the intersection, but in the eastbound direction, onto Highway 190. While Ms. Mayfield was turning, Douglas Rayburn, who was driving a Ford F-150 truck, eastbound, on La. Highway 190, rapidly approached the school bus, which had pulled out in front of his vehicle. In order to avoid hitting the bus, Mr. Rayburn took evasive action, lost control of the vehicle upon hitting gravel, and landed in a ditch, but a collision with the school bus was avoided. Vincent Gleber was a passenger in Mr. Rayburn's vehicle at the time of the accident, and both Mr. Rayburn and Mr. Gleber were injured. No one on the bus was injured.

Mr. Benz reported to the investigating officer on the scene of the accident, Louisiana State Trooper Jason Boyet, that Mr. Rayburn's vehicle was too close to the intersection for the school bus to have made the turn and

that the school bus "turned into the path" of the truck.[1] Ms. Mayfield told Trooper Boyet, immediately after the accident, that she did not see the Rayburn vehicle coming, so she proceeded to make her turn.

Vincent Gleber and Douglas Rayburn filed the instant suit on January 12, 2009, naming as defendants Patricia Mayfield and her insurer, American Alternative Insurance Corporation ("AAIC").[2] The petition was later amended to add as plaintiffs, for their loss of consortium, the plaintiffs' spouses, Robbie Gleber and Melanie Rayburn,[3] and to add as a defendant the St. Tammany Parish School Board. The Louisiana Commerce & Trade Association - Self Insurers' Fund ("LCTA") intervened in the action, seeking reimbursement of workers' compensation benefits paid to Mr. Rayburn, who was in the course and scope of his work with Superior Air Conditioning and Heating, LLC at the time of the accident.

Following a bench trial on August 16, 2010, judgment was rendered in favor of the plaintiffs, and against Ms. Mayfield and the St. Tammany Parish School Board, finding Ms. Mayfield solely at fault in causing the accident. Mr. Gleber was awarded a total of $25,999.65 in damages: $20,000.00 in general damages, $750.00 in lost wages, and $5,249.65 in past

[1] Both accident reconstructionists who testified at the trial of this matter, Wayne Winkler and Jeremy Hoffpauir, agreed that because Mr. Benz first crossed Mr. Rayburn's lane of travel (the eastbound lane of Highway 190) to move into the westbound lane of Highway 190 (as compared to Ms. Mayfield, who first crossed the westbound lane of Highway 190 and then moved into Mr. Rayburn's lane of travel (the eastbound lane of Highway 190)), Mr. Benz would have cleared Mr. Rayburn's lane of travel more quickly than Ms. Mayfield, who was only beginning to enter the eastbound lane upon Mr. Benz leaving it.

[2] Although the plaintiffs named AAIC as "American Alternative Insurance Company" in their petition, AAIC in its answer indicated its correct name was "American Alternative Insurance Corporation."

[3] We note that the loss of consortium claims were dismissed on the day of trial.

medical expenses. Mr. Rayburn was awarded a total of $319,100.82 in damages: $150,000.00 in general damages, $51,326.00 in past lost wages, $56,000.00 in future lost earnings, and $61,774.82 in past medical expenses. Out of the amounts awarded to Mr. Rayburn, the court found LCTA entitled to a total reimbursement of $65,192.82 ($42,588.26 for indemnity benefits paid and $22,604.56 for medical benefits paid),[4] reduced by one-third "for the attorney's fees incurred by [Mr. Rayburn] in pursuing this claim." The net intervention amount awarded to LCTA was $43,457.53. Ms. Mayfield and the St. Tammany Parish School Board were further taxed with $5,760.00 in costs, which included: $1,500.00 for the testimony of Wayne Winkler, $3,000.00 for the testimony of Dr. Thomas Lyons, and $1,260.00 in court costs.

From this judgment, Patricia Mayfield and the St. Tammany Parish School Board have suspensively appealed, asserting the trial court erred: in finding Ms. Mayfield solely at fault and failing to assess fault to Mr. Rayburn; in the amount of general damages, past lost wages, and future lost earnings awarded to Mr. Rayburn; and in the amount of general damages awarded to Mr. Gleber. LCTA has filed an answer to the appeal, asserting it has continued to provide indemnity and medical benefits to Mr. Rayburn, owing to the fact that the defendants suspensively appealed and have not paid the judgment amounts. Therefore, LCTA asks this court to modify the judgment in its favor to award "full" reimbursement of indemnity and medical benefits paid to or on behalf of Mr. Rayburn, less one-third for the attorney fees he has incurred in pursuing his claim, to be paid out of the judgment rendered in Mr. Rayburn's favor. Further, LCTA

[4] The parties stipulated to the correctness of these figures.

suggests that a remand to the trial court would be appropriate for a determination of the exact amount of the reimbursement to which it is entitled.

DISCUSSION

Fault of Patricia Mayfield

In finding that Ms. Mayfield was solely at fault in causing this accident, the trial court stated in his reasons for judgment that Ms. Mayfield failed to properly stop and check "for the clearing of traffic on the favored roadway of Highway 190" before entering the highway, further reasoning as follows:

> The testimony of Mr. Benz is of particular significance to the Court since he has no interest whatsoever in the outcome of this litigation.... Mr. Benz, who was traveling northbound on Tranquility Road, testified very clearly that he knew he had time to enter Highway 190 since all he had to do was clear the oncoming traffic lane. Benz stated that he had plenty of time to go without [impeding] Rayburn's vehicle which was a couple of hundred feet away; in fact, Benz stated that he traveled two to three seconds down Highway 190 before passing Rayburn's vehicle. Benz further testified that he knew an accident was going to happen when he saw the bus turning onto the roadway in front of the truck operated by Mr. Rayburn.
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> While the testimony of the accident reconstructionist for both sides was interesting, that testimony was not necessary in order to decide this case. In fact, the usage by Mr. [Hoffpauir] of the same acceleration factor for both the school bus and Mr. Benz' truck is symptomatic of the lack of utility of that information to the Court. What was very clear was the testimony of Mr. Rayburn and Mr. Gleber that there was no time to do anything except take evasive action. This testimony is corroborated by the testimony of accident reconstructionist Wayne Winkler that the natural reaction of Mr. Rayburn to turn to the right in an avoidance [technique] was totally predictable, and by the testimony of Mr. Benz that as soon as he looked in his rearview mirror he saw a cloud. That cloud was clearly caused by Mr. Rayburn's truck entering the shoulder of the roadway and stirring up the cloud of dust that Mr. Benz described.
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> It is also telling that Ms. Boutwell[5] was not sure what the traffic conditions were on Highway 190 until after they had pulled onto the roadway. While Ms. Mayfield clearly testified

[5] Carolyn Boutwell was a "bus attendant" on the school bus at the time of the accident.

> that she had ample time to pull onto the roadway and proceed in a safe fashion without interference from Mr. Rayburn's truck, the only logical conclusion from the evidence is that she simply did not see the truck as she stated to Trooper Boyet on the date of the accident.
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> For the reasons set forth above, the Court finds plaintiffs have carried their burden of proving that the accident was the sole fault of Patricia Mayfield and she is responsible for the damages which flow therefrom....

A court of appeal may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). The supreme court has announced a two-part test for the reversal of a factfinder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). See also **Mart v. Hill**, 505 So.2d 1120, 1127 (La. 1987). Thus, the issue to be resolved by a reviewing court is not whether the trier-of-fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Stobart v. State, Department of Transportation and Development**, 617 So.2d at 882. Where factual findings are based on determinations regarding the credibility of witnesses, the trier-of-fact's findings demand great deference. **Boudreaux v. Jeff**, 2003-1932, p. 9 (La. App. 1 Cir. 9/17/04), 884 So.2d 665, 671; **Secret Cove, L.L.C. v. Thomas**, 2002-2498, p. 6 (La. App. 1 Cir. 11/7/03), 862 So.2d 1010, 1016, writ denied, 2004-0447 (La. 4/2/04), 869 So.2d 889. The trier-of-fact is empowered to accept or reject, in whole or in part, the testimony of any witness deemed lacking in credibility. **Verges v. Verges**, 2001-0208, p. 10 (La. App. 1 Cir. 3/28/02), 815 So.2d 356, 363, writ denied, 2002-1528 (La. 9/20/02), 825 So.2d 1179. Even though an

appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. **Rosell v. ESCO**, 549 So.2d at 844. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. **Stobart v. State, Department of Transportation and Development**, 617 So.2d at 883; **Wright v. Bennett**, 2004-1944, p. 25 (La. App. 1 Cir. 9/28/05), 924 So.2d 178, 193. The manifest error standard of review is applied to a factfinder's allocation of fault. **Toston v. Pardon**, 2003-1747, p. 17 (La. 4/23/04), 874 So.2d 791, 803.

Preferential right of way at an intersection may be indicated by stop signs. LSA-R.S. 32:123(A). A driver and operator of a vehicle approaching an intersection controlled by a stop sign is required to stop before entering the intersection, and the driver must yield the right of way to all vehicles approaching on the favored highway. See LSA-R.S. 32:123(B); **Toston v. Pardon**, 2003-1747 at p. 16, 874 So.2d at 802. The supreme court has recognized that a motorist has a duty, in such a circumstances, not to proceed until determining that the way is clear. Further, the supreme court has declared that a left turn is one of the most dangerous maneuvers a motorist can execute, and, before attempting same, a motorist must ascertain whether it can be completed safely. See **Toston v. Pardon**, 2003-1747 at p. 15, 874 So.2d at 802.

After reviewing the record presented on appeal, we are unable to say the trial court committed reversible error in finding Ms. Mayfield solely at fault in causing the accident at issue. In so doing, the trial court made credibility determinations as indicated in the quoted trial court reasons for

judgment. Since there was a reasonable basis in the record for the court's finding that Ms. Mayfield failed to ascertain that her way was clear to enter the favored highway, we are unable to disturb the apportionment of fault on appeal.

Damage Awards

In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury. LSA-C.C. art. 2324.1. On appellate review, damage awards will be disturbed only when there has been a clear abuse of that discretion. The initial inquiry must always be directed at whether the trial court's award for the particular injuries and their effects upon this particular injured person is a clear abuse of the trier of fact's much discretion. **Cole v. State, Dept. of Public Safety and Corrections**, 2003-2269, p. 5 (La. App. 1 Cir. 6/25/04), 886 So.2d 463, 465, writ denied, 2004-1836 (La. 10/29/04), 885 So.2d 589.

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. 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 v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Only after making a finding that the record supports that the lower court abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the highest (or lowest) point which

is reasonably within the discretion afforded that court. **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1977).

With respect to Mr. Gleber's damages, the trial court found as follows:

> Vincent Gleber testified that after the accident he experienced neck pain which radiated into his right shoulder, pain in his right jaw and headache. On October 6, 2008, Gleber was examined by Dr. Kennedy who diagnosed Gleber with a cervical and shoulder sprain/strain, along with muscle spasms. Gleber underwent a course of physical therapy until November 25, 2008. Dr. Dyess offered a second opinion on November 12, 2008, and he indicates that Gleber sustained an acute right sternocleidomastoid muscle strain, an acute bilateral cervical paraspinous and trapezius muscle strain; a possible C4-5 plus or minus C5-6 disc injury along with a possible rotator cuff injury of the right shoulder. At trial, Gleber testified that his shoulder and neck still bother him and that his physical therapy treatment was discontinued due to his wife's mental health issues. Gleber stated that his family had to come first at that time and he suspended physical therapy treatment on November 25, 2008 so that he could care for his three children. Gleber received no further treatment after that date.
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> The Court finds that Vincent Gleber offered credible testimony, describing both the injuries he suffered and his present physical state. Taking into consideration the nature of Gleber's injuries, the duration and extent of his treatment and his young age, the Court finds that a general damage award of $20,000.00 is appropriate. This determination is based on the general damage awards given in the following cases which concerned injuries similar to those suffered by Mr. Gleber: *Mayeux v. Selle*, [99-498 (La. App. 5 Cir. 11/10/99), 747 So.2d 1174] - $22,500, a fifteen month shoulder injury with residual problems; *McCraney v. Beckman*, [97-288 (La. App. 5 Cir. 9/30/97), 700 So. 2d 1120] - $6,250 - shoulder impact injury; cervical trapezius strain, five months treatment; *Millican v. Ponds*, [99-1052 (La. App. 1 Cir. 6/23/00), 762 So.2d 1188] - $37,500 - soft tissue injuries of six months; lacerated arm; headaches; *Williams v. State*, [95-2456 (La. App. 1 Cir. 11/20/96), 684 So.2d 1018, writ denied, 96-3069 (La. 3/7/97), 689 So.2d 1372] - $25,000 - soft tissue injuries to neck and low back; right shoulder muscular injuries; snapping scapula syndrome in left shoulder; *Lucas v. Bellsouth Telecommunications, Inc.*, [2009-90 (La. App. 3 Cir. 5/6/09), 10 So.3d 887] - $17,500 - elderly woman treated for neck strain with physical therapy for just over three months.

Based upon the record presented on appeal, we are unable to say the trial court abused his much discretion in the general damage award to Vincent Gleber.

With respect to Vincent Rayburn's damages, the trial court found as follows:

> According to the testimony and evidence introduced at trial, Douglas Rayburn experienced pain in his face, neck and shoulders following the accident. Rayburn was examined by Dr. Texada on October 8, 2008, at which time x-rays of the shoulder and elbow were ordered and injections were given in the shoulder and elbow. Texada ordered physical therapy and a cervical MRI. Later, MRIs were performed on the cervical spine and the right shoulder. The cervical spine MRI revealed a bulging of the C2-3 disc posteriorly in the right paracentral region. The right shoulder MRI revealed a "degenerative inflammatory change of the acromioclavicular joint and fluid in the glenohumeral joint and about the proximal biceps tendon." Texada diagnosed Rayburn as having suffered shoulder impingement; surgery was performed on February 13, 2009 and Rayburn thereafter began physical therapy. On September 17, 2009, Dr. Kevin Jackson examined Rayburn and diagnosed him as having suffered mild right L5 radiculopathy, right ulnar neuropathy, right C7 radiculopathy and bilateral carpal tunnel syndrome.
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> Most recently, Dr. Thomas Lyons examined Douglas Rayburn and diagnosed him as having suffered a right shoulder injury, right shoulder mild adhesive capsulitis, right shoulder subacromial bursitis, right shoulder possible recurrent superior labrum tear, possible recurrent rotator cuff, right shoulder symptomatic acromioclavicular joint and a right upper extremity ulnar neuropathy. On February 26, 2010, Lyons performed a right shoulder [arthroscopy], bursectomy and completed the dissection of the distal clavicle. At trial, Dr. Lyons testified that overall Rayburn has progressed well since the surgery but that Rayburn will have difficulty with repetitive overhead usage of his upper extremities, especially with significant weight. Lyons explained that Rayburn's condition is such that the heavy parts of his job may still be a problem for him. Lyons further assessed Rayburn's anatomical disability impairment as follows: 6-10% impairment of the upper extremity and 5-6% of the whole body.
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> At trial, Douglas Rayburn testified as to his physical injuries and the manner in which those injuries have [affected] all aspects of his life. Most striking to the Court was the sincerity with which Rayburn described the feeling of importance his job at Superior AC gave him. Having worked for Superior AC for two years prior to the accident, Rayburn testified that his job gave him meaning and that he was the

"solutions guy" for both his boss and his co-workers. Rayburn testified that he can no longer do the type of work he did before and that he plans to go back to school in order to learn a new trade. Rayburn also described how his physical limitations prevent him from playing baseball with his daughter, and going fishing and bow-hunting. Because the accident affected his right hand, he has had to learn to compensate with his left hand. Rayburn testified that the surgery Lyons performed did help him and it appears that he has better range of motion than he did before the surgery. Rayburn further testified that he never experienced any serious prior injuries, with the exception of hyper-extending his knee when he slipped in his attic at home. Other than occasional muscle strains associated with the physical aspects of his occupation, Rayburn stated that he had no significant prior injuries.

Rayburn also stated that he did attempt to go back to work with Superior AC a week after the accident but he was not able to perform those tasks he performed previously. His employer did attempt to modify his duties for a period [of] time but ultimately was not able to pay Rayburn his regular salary as compensation for the work Rayburn was able physically to perform. Before the accident, Rayburn testified that he earned $1,000.00 each week plus 25% of the gross profits quarterly. The agreement concerning the percentage of profits had, according to Rayburn, just been made prior to the accident. Rayburn submitted complete tax returns for 2007 and 2008. The 2007 return shows an adjusted gross income of $20,031.00; car and truck expenses in the amount of $6,739.00[.] (Gross income was $39,688.00.) The 2008 return shows an adjusted gross income of $19,598.00; car and truck expenses in the amount of $9,490. (Gross income was $44,817.00.) Based on the reported earnings and the testimony presented at trial, the Court finds that Rayburn's loss of income average is $28,000.00 annually for a period of 22 months and the amount of $51,326.00 is appropriate for plaintiff Rayburn's lost wages through trial, and further awards the amount of $56,000.00 for future lost earnings. The annual income loss is based on Rayburn's adjusted gross income plus his vehicle expenses since this was clearly a [prerequisite] to him while employed that he no longer enjoys. The award for future lost earnings is based on the Court's finding that Rayburn will need approximately two years to complete vocational training in a trade where he is not required to lift, and the Court expects that it will take him approximately one year to find employment thereafter.

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With regard to a general damage award to Douglas Rayburn, the Court finds the following cases instructive: *Ibrahim v. Hawkins*, [2002-0350 (La. App. 1 Cir. 2/14/03), 845 So.2d 471] - $75,000.00, arthroscopic shoulder surgery, fractured rib, soft tissue injuries, physical and psychological therapy; *Quinn v. Wal-Mart Stores, Inc.*, [34,280 (La. App. 2 Cir. 12/6/00), 774 So.2d 1093, writ denied, 2001-0026 (La.

> 3/9/01), 786 So.2d 735] - $150,000, shoulder labral tear - arthroscopic surgery; major rotator cuff tear - probable future surgery; *Maeder v. Williams*, [94-0754 (La. App. 4 Cir. 11/30/94), 652 So.2d 1005, writ denied, 94-3150 (La. 3/10/95), 650 So.2d 1177] - $195,000, shoulder surgeries and another suggested; fractured forearm - surgery; dislocated elbow and thumb; residual shoulder and arm pain; *Burgess v. C. F. Bean Corp.*, [98-3072 (La. App. 4 Cir. 8/18/99), 743 So.2d 251, writ denied, 99-2728 (La. 11/24/99), 750 So.2d 991] - $100,000, arthroscopic shoulder and shoulder decompression surgery; degenerative disc disease; cervical radiculopathy; chronic pain syndrome; depression. Accordingly, the Court finds that a general damage award in the amount of $150,000.00 is appropriate as to Douglas Rayburn

Our review of the record presented on appeal leads us to conclude that the record supports the damage awards made by the trial court; therefore, we are unable to say the trial court abused his much discretion in the general damage award and awards for past and future lost earnings made to Douglas Rayburn.

Intervenor's Answer to the Appeal

LCTA answered this appeal, contending that it has had to continue paying indemnity and medical benefits on behalf of and/or to Mr. Rayburn, because the judgment debtors, Patricia Mayfield and the St. Tammany Parish School Board, suspensively appealed and have not paid the amounts owed to Mr. Rayburn under the judgment. Thus, LCTA asserts additional amounts are owed under its intervention, as the judgment amounts were for specific amounts paid prior to the date of trial. LCTA further argues on appeal that this court should modify the judgment in its favor to award a "full" reimbursement of indemnity and medical benefits that is has paid on behalf of and/or to Mr. Rayburn, less one-third for the attorney fees he has incurred in pursuing his claim, to be paid out of the judgment rendered in Mr. Rayburn's favor. Furthermore, LCTA suggests that a remand to the trial court would be appropriate for a determination of the exact amount of the

reimbursement to which it is entitled. We agree, and do hereby modify the trial court judgment to state, in addition to the specific amounts awarded, that LCTA is entitled to a reimbursement of indemnity and medical benefits that it has paid on behalf of and/or to Mr. Rayburn, since the date of trial, less one-third for attorney fees Mr. Rayburn has incurred subsequent to trial in connection with the appeal of the matter, to be paid out of the judgment rendered in Mr. Rayburn's favor. Furthermore, we remand the matter to the trial court for a determination of the exact amount of this additional reimbursement.

CONCLUSION

For the reasons stated herein, the judgment of the trial court is amended to award additional reimbursement to the Louisiana Commerce & Trade Association - Self Insurers' Fund, as stated herein, and we remand the matter to the trial court for a determination of the amount of this reimbursement; the judgment is affirmed, as amended. All costs of this appeal, in the amount of $1,874.94, are to borne by Patricia Mayfield and the St. Tammany Parish School Board.

JUDGMENT AMENDED; AFFIRMED AS AMENDED; AND REMANDED.