NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 0796

RONALD G. KYLE

VERSUS

NEW HAMPSHIRE INSURANCE COMPANY,
AND ALLAN BOUDREAUX

Judgment Rendered: FEB 09 2007

* * * * * * *

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 496,766

Honorable R. Michael Caldwell, Judge

* * * * * * *

James L. Hilburn
Baton Rouge, LA

Attorney for
Plaintiff – Appellee
Ronald G. Kyle

John Dale Powers
Douglas M. Chapoton
Baton Rouge, LA

Attorneys for
Defendant – Appellant
New Hampshire Ins. Co.

* * * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant/appellant, New Hampshire Insurance Company (hereinafter referred to as "defendant"), appeals a judgment in favor of the plaintiff, Ronald G. Kyle (hereinafter referred to as Mr. Kyle), finding Mr. Kyle 25% at fault, and the other driver, defendant's insured, Mr. Boudreaux, 75% at fault in causing the automobile accident underlying this litigation, and awarding Mr. Kyle $18,000.00 for diminution of value of his vehicle, $20,099.68 for the repairs to his vehicle, and $6,487.00 for the loss of use of the vehicle. Defendant has also filed in this court a peremptory exception raising the objection of no right of action. For the following reasons, we deny the exception and affirm in part and reverse in part the judgment of the trial court.

FACTUAL BACKGROUND

This matter involves an automobile accident that occurred on June 28, 2001, at approximately 5:30 p.m., on Siegen Lane in Baton Rouge. At the site of the accident, Siegen Lane has three lanes southbound and three lanes northbound, divided by a yellow-striped center turning lane. The record reveals that the traffic on Siegen Lane at that time was extremely congested and in some instances, bumper-to-bumper. Mr. Kyle was driving a 1998 BMW 750, traveling in the left northbound lane (toward Airline Highway). All three lanes of traffic were backed up and Mr. Kyle decided he wanted to turn around and go back to a business facility he had passed on his left. He got into the center turning lane and traveled northbound in the lane with the intent of reaching a driveway on the left side of the road where he could pull in, turn around, and proceed southbound on Siegen Lane. At approximately the same time, Mr. Boudreaux was exiting the Enterprise Rental Car facility on the right side of Siegen Lane, intending to cross over all three northbound lanes in order to make a left turn and proceed southbound on Siegen Lane. The northbound traffic, which was bumper-to-bumper, had stopped and

created a sufficient gap to allow him to traverse those lanes. After being waved on by several of the stopped drivers, Mr. Boudreaux proceeded across this gap in the northbound traffic. As he entered the center turning lane, his vehicle collided with Mr. Kyle's vehicle, which was traveling northbound in the center turning lane. According to Mr. Kyle, he never saw Mr. Boudreaux's vehicle, which pulled out in front of him so unexpectedly that he was unable to stop or avoid the collision. Mr. Boudreaux, on the other hand, testified that he pulled into the turning lane, and stopped to see if he could make his left turn onto southbound Siegen Lane. He testified that he watched as Mr. Kyle "jumped" from the end of the left northbound lane, into the turning lane, and he "came flying down there and ran into" his vehicle. The physical evidence reveals that the right front (passenger side) corner of Mr. Kyle's BMW struck the front driver's side corner of Mr. Boudreaux's vehicle. The investigating officer testified as to his findings upon arriving at the scene of the accident. His findings were fairly consistent with the testimony of both drivers, and while he did not issue any citations, it was his opinion that both drivers had violated traffic laws: Mr. Kyle was engaged in improper lane usage and Mr. Boudreaux had failed to yield.

PROCEDURAL BACKGROUND

Mr. Kyle instituted this suit against Mr. Boudreaux and his automobile insurer, New Hampshire Insurance Company seeking damages arising out of the aforementioned accident. Although his original petition alleged personal injury, that claim was abandoned as Mr. Kyle testified that he was not injured as a result of the accident. In addition to the facts surrounding the accident relevant to negligence and liability, the remaining evidence introduced at trial concerned the damages to the BMW driven by Mr. Kyle, including the diminution of value of the BMW caused by the accident.

After a bench trial, judgment was rendered finding Mr. Kyle 25% and Mr.

Boudreaux 75% at fault in causing the accident. In allocating fault, the trial court specifically found that Mr. Boudreaux's version (that Mr. Kyle just "flew" right into his vehicle) is less plausible than Mr. Kyle's, stating in oral reasons:

> I think we have all been presented with this situation given the sad state of traffic in Baton Rouge and the more popular use now of the fifth turning lane on major thoroughfares such as Siegen Lane. And as I said, I find Mr. Kyle's version of the accident more plausible than Mr. Boudreaux's, but I don't think Mr. Kyle is totally free from fault.

The trial court's judgment awarded Mr. Kyle $18,000 (less 25% comparative fault) for the diminution of value to the BMW as a result of the accident, together with the sum of $2,484.16 (less 25% comparative fault), costs, and legal interest.

Mr. Kyle then filed a Motion for New Trial contending it was warranted by the trial court's failure to award the value of the property damage (repairs) to his vehicle and for its failure to award the proper amount for loss of use of the vehicle. The trial court granted the motion and rendered judgment awarding Mr. Kyle the same amounts previously awarded and adding to this recovery an award in the amount of $20,099.68 for the repairs to the vehicle and adjusting the award for loss of use of the vehicle from $2,484.16 to $6,487.00. The defendant perfected this appeal.

NO RIGHT OF ACTION

The defendant has filed, with this court, a peremptory exception raising the objection of no right of action. The basis of defendant's exception is its assertion that the plaintiff's wife, Sharon Kyle, is the *sole registered* owner of the vehicle her husband was operating at the time of this incident; therefore, pursuant to La. C.C.P. art. 686[1] and La. C.C. art. 2351,[2] she is the sole proper party plaintiff to sue

---

[1] Louisiana Code of Civil Procedure Art. 686 provides in pertinent part that *either* spouse, during the existence of the marital community, is the proper party plaintiff to sue to enforce a community right *except* when one spouse is the managing spouse with respect to the community right sought to be enforced, then only that spouse is the proper party plaintiff.

to enforce any rights related to the vehicle.

While defendant's argument *may* have merit, no evidence was presented in support of the exception, or otherwise in the record to support defendant's contention that the vehicle was registered in the name of Sharon Kyle only. Moreover, both Mr. and Mrs. Kyle testified at trial that they were the owners of the vehicle. Thus, the record supports the presumption that the vehicle is community property and that either spouse is the proper party plaintiff to sue to enforce any rights related thereto. Given the lack of evidence in the record to support defendant's claim that Sharon Kyle is the sole registered owner and proper party plaintiff, we overrule the exception.

ALLOCATION OF FAULT

The defendant first assigns error to the trial court's allocation of fault. Our review of the record reveals that this was purely a factual determination based on the slightly conflicting testimonies of the two drivers involved. Neither driver's testimony was in conflict with the physical evidence or the findings of the investigating officer. The trial court *expressly* found Mr. Kyle's version of the accident more credible than Mr. Boudreaux's, rendering this a factual finding that we are legally prohibited from reassessing or disturbing.

Our review of the record convinces us that the trial court correctly considered the relevant factors set forth in **Watson v. State Farm Fire and Casualty Ins. Co.**, 469 So.2d 967 (La. 1985) and its ultimate findings are neither inconsistent with the application of the **Watson** factors, nor manifestly erroneous.

Moreover, defendant is simply incorrect in asserting, without supporting citation, that his situation is "one not usually contemplated when courts prescribe a heightened duty to a motorist [Mr. Boudreaux] making a left hand turn." In **Miller**

---

[2] Louisiana Civil Code Art. 2351 provides that when a community movable is registered in the name of only one spouse, that spouse has the *exclusive right* to *manage*, alienate, encumber, or lease that movable.

v. Keal, 29,564 (La. App. 2nd Cir. 5/7/97), 694 So.2d 569, writ denied, 97-1751 (La. 10/13/97), 703 So.2d 620, a case very similar to the case at hand, the second circuit confirmed that even in this situation, where a driver is improperly using the center turning lane to travel, the "*law imposes a higher standard of care on motorists who are exiting a private drive or parking lot to enter a highway.*" **Miller**, 694 So.2d at 573 (emphasis added). The court affirmed a 70/30 allocation of fault similar to the 75/25 allocation in this case, finding no manifest error.

Finally, we find no merit in defendant's contention that the trial court's findings are inconsistent with **Rabalais v. Nash**, 2005-937 (La. App. 3rd Cir. 3/29/06), 926 So.2d 683. First, the case is entirely inapposite, the most glaring distinction being the application in that case of an emergency vehicle statute specifically addressing such vehicle's use of a center turn lane. We also note that the Supreme Court granted writs in that case, **Rabalais v. Nash**, 2006-0999 (La. 6/30/06); it was heard on October 16, 2006, and a decision was still pending at the date of this opinion.

This assignment has no merit.

Damages for Vehicle Repairs

The defendant asserts the trial court abused its discretion in granting Mr. Kyle's Motion for New Trial and awarding the repair damages to the vehicle because the evidence, including Mr. Kyle's own testimony, established that Mr. Kyle's automobile insurer, Allstate, had already reimbursed the Kyles the property damage to the vehicle. The defendant also asserts that the new trial was improperly granted because the claim for repair damage was not properly pleaded and, therefore, not an element of damages before the court.

As claimed by the defendant, the record establishes that Allstate reimbursed the Kyles for the full amount of the repairs to the BMW following the accident, less the $950 deductible, a total of $18,327.49. However, there is *no* evidence in

the record to support the defendant's claim on appeal that "New Hampshire settled Allstate's claim from the policy issued to Boudreaux and paid to Allstate, in settlement of its $20,099.68, subrogation claim, the amount of $6,018.18." This settlement is not in the record. Additionally, neither the settlement agreement between Mr. Kyle and Allstate, or evidence thereof, nor the Allstate insurance policies at issue were made a part of the record before us.

The issue before us was presented to the third circuit in **Kidder v. Boudreaux**, 93-859 (La. App. 3rd Cir. 4/6/94), 636 So.2d 282, writs denied, 94-1150, 94-1640 (La. 10/7/94), 644 So.2d 629, 630, under very similar facts and circumstances:

> [W]hether the tortfeasor's insurer, Farm Bureau [New Hampshire, in this case] is entitled to credit for medical payments [property damage] made to the injured party, Mrs. Kidder [Mr. Kyle], by her own insurer where the insurer making payments [Allstate] did not assert a subrogation right, and where there is no evidence in the record that [Mr. Kyle and Allstate] entered into a subrogation agreement, or that under its policy, [Allstate] was contractually subrogated to the rights of [Mr. Kyle] ....

Kidder, 636 So.2d at 284. The third circuit found Farm Bureau was not entitled to a credit for the amount paid to the plaintiff by her own insurer. *Id.* The court specifically recognized that the right of subrogation is an exception to the collateral source rule even if the party subrogated does not appear to assert its subrogation rights and the defendants do not timely object to nonjoinder of the necessary party. *Id.* However, the court also confirmed that conventional subrogation *must be proven*. As in the case before us, the **Kidder** court found that conventional subrogation had not been established because the insurance policy between the plaintiff and her insurer was not introduced into evidence and was not a part of the record on appeal. **Kidder**, 636 So.2d at 284; *cf.,* **Sutton v. Lambert**, 94-2301 (La. App. 1st Cir. 6/23/95), 657 So.2d 697, writ denied, 95-1859 (La. 11/3/95), 661 So.2d 1384, (where conventional subrogation applied – collateral source rule was

inapplicable – based on a provision in the plaintiff's insurance contract with its insurer, *which was introduced into evidence*, conventionally subrogating Allstate to the rights against the defendants). As noted earlier, in this matter, neither the settlement between Mr. Kyle and Allstate, the alleged settlement between defendant and Allstate, nor the Allstate policy was made a part of the record before us.

Therefore, as in **Kidder**, conventional subrogation has not been proven here; the collateral source rule applies, and the trial court did not abuse its discretion in granting a new trial and awarding the Kyles this element of property damage. This result is wholly consistent with the jurisprudence applying the collateral source rule where no subrogation has been proved.[3]

Alternatively, defendant argues the trial court erred in granting the new trial and awarding damages for the repairs to the BMW because that element of damages was not sufficiently pleaded by Mr. Kyle. At the end of the first trial, during the trial court's oral reasons for judgment, Mr. Kyle's counsel specifically objected to the trial court's failure to award the repairs for the property damage. In

---

[3] The rule is most commonly applied to insurance proceeds and the tortfeasor's liability to an injured plaintiff is held to be the same, regardless of whether or not that plaintiff had the foresight to obtain insurance. **Louisiana Department of Transportation and Development v. Kansas City Southern Railway Co.**, 2002-2349 (La. 5/20/03), 846 So.2d 734, 740. Thus, the tortfeasor is not allowed to benefit from the victim's foresight in procuring insurance and other benefits. **Bozeman v. State**, 2003-1016 (La. 7/2/04), 879 So.2d 692, 698. In response to defendant's contention that this award amounts to a unlawful "double recovery" by the plaintiff, the jurisprudence of this state has already addressed and rejected that notion:

> For years, the Louisiana courts have struggled with the so-called "windfall" or "double-dip" aspect of the collateral source rule only to discover that no "windfall" or "double-dip" in fact occurred ... [b]ecause the injured party's patrimony was diminished to the extent that he was forced to recover against outside sources and the diminution of patrimony was *additional* damage suffered by him.
>
> ....
>
> In the case of insurance purchased by the plaintiff ..., the plaintiff has paid premiums, which are a diminution of his patrimony as that cash would have otherwise been available to him. By going against his own insurance company, he is diminishing the benefits of that policy which would otherwise be available, he has suffered a diminution in patrimony by premium payments and his rates will rise providing a third area of loss.

Bozeman, 879 So.2d at 699.

response, the trial court stated,

> Frankly, ... it wasn't in your original pleadings, a specific claim for damage to the vehicle. And as [defendant counsel] points out and I pointed out, I didn't think it was an issue of damage at trial; I frankly didn't. I thought that the evidence was offered merely to show the extent of the damage to the vehicle and that was used in the valuations done by [the experts]. ... And I don't think that was an issue that any of us – at least I didn't pick up on it at trial; ... And you may be correct, and you may prevail on appeal. But I'm going to stand with the judgment of the eighteen thousand dollars [diminution in value], plus the rental.

Subsequently, in granting the plaintiff's motion for a new trial, the trial judge admitted that he was "mistaken in my ruling that this issue had not been properly brought before the court." He noted that the concentration at trial was on the loss of the value to the vehicle, and "that's where [he] focused." Upon further consideration, the trial court concluded that there *was* evidence that it was before the court:

> [I]t is clear that the petition talks about the omnibus clause asking for damages. ... [T]he pretrial order and the interrogatories did address the issue. Likewise, according to my notes, in the deposition of Joannie Kittrell from Cavin's Auto, the invoice for the original repairs to the B.M.W. from September 27th 2001, invoice number 9606, and the invoice for the supplemental repairs, invoice number 13224, of November 6, 2002, were admitted into evidence.
> ...
> So clearly the cost of repairs was admitted ... which totaled $20,099.68.

Our review of the entire record supports the trial court's findings in granting the new trial and establishes that the property damage for the repairs of the vehicle was indeed pleaded by the plaintiff and sufficient competent evidence was introduced to support the award for this element of damages. The trial court did not abuse its discretion.

For all the foregoing reasons, this assignment has no merit.

DIMINUTION IN VALUE AWARD

The record contains the testimony of experts in diminution of vehicle valuation. The conclusions of these two experts were vastly different: defendant's

expert, Mr. Neil Blitstein, testified that the diminished value of the BMW as a result of the accident was $2,500.00; plaintiff's expert, Ms. Cynthia Wyatt, concluded the diminished value was $18,000.

Defendant assigns error to the $18,000 awarded to Mr. Kyle for the diminution in value of the BMW 750, arguing that the trial court's reliance on Ms. Wyatt's testimony for the valuation of this element of damages was manifestly erroneous, "as she did not possess sufficient expertise and her methodology was unreliable."

A district court is accorded broad discretion in determining whether expert testimony is admissible and who should be permitted to testify as an expert. Moreover, the decision to qualify an expert *will not be overturned absent an abuse of discretion.* **Cheairs v. State, DOTD**, 2003-0680 (La. 12/03/03), 861 So.2d 536, 541.

We have thoroughly reviewed the evidence presented concerning the diminished value of the BMW as a result of this accident, to wit, the testimony of Cynthia Wyatt and Neil Blitstein. While the testimony of each witness varies greatly, neither witness outright contradicted the other; rather, the methodology employed by each in arriving at the diminished valuation differed. We find that the testimony of Ms. Wyatt, upon which the trial court expressly relied, provides a reasonable factual basis for her valuation of the vehicle following the accident and the trial court's award based thereon; in any event, there is clearly no abuse of discretion.

In particular, the trial court noted that it could not accept Mr. Blitstein's *blanket* opinion that the most any car could be diminished in value for being involved in an accident was 10% of its pre-loss value, as such testimony did not take into account the specific value of a BMW compared with any other vehicle. In contrast, the trial court noted the specifics in Ms. Wyatt's testimony: that prior

to the accident, the BMW had a trade-in value between $38,000.00 and $40,000.00, and a retail value of approximately $39,875.00; that after the accident, considering the severity of the accident and the extent of the repairs, the BMW had a trade-in value of $18,000 and an auction value of $20,400.[4] The trial court concluded that it found the testimony of Ms. Wyatt and the figures she came up with more reliable and truer to the diminished value of the luxury automobile at issue.

Our review of the record reveals no abuse of the trial court's great discretion in admitting and relying on Ms. Wyatt's opinion testimony. Ms. Wyatt's testimony was based on her experience and knowledge gained from working for Brain Harris BMW for twelve years. During those years of employment, she sold cars, both new and used, demoed them, did the initial evaluations, appraised them, wrote them up, and following through with the clients concerning the appraisals, trade-in value, etc. She testified that she worked with the used car manager in the performance of these duties. Ms. Wyatt testified that she has performed "thousands" of evaluations of used BMW's. Based on the relevant factors employed by her in her evaluations, Ms. Wyatt concluded that the diminished value of the BMW 750, as a result of the accident and repairs necessitated thereby, was $18,000. Her testimony provides a reasonable factual basis for the trial court's award of $18,000 for the diminished value of the BMW. In any event, there is no abuse of discretion.

This assignment lacks merit.

Loss of Use Award

At the end of the first trial, the trial court awarded Mr. Kyle the amount of $2,484.16 for the loss of use of his vehicle while it was being repaired. This amount is consistent with the evidence presented in the record, including the

[4] The trial court also noted that Mr. Blitstein could not dispute the wholesale auction value of the vehicle.

Enterprise Rent-a-Car invoice in the amount of $2,484.16, and the testimony of Mr. Kyle and his wife that they rented a car for approximately one month, but chose to mitigate their damages after that and shared a vehicle. The record before us does not contain the transcript on the hearing for the new trial, only the trial court's reasons therefor, in which it simply, without explanation, awards an additional amount, $3,922.00, for loss of use of the vehicle. The only support in the record that we can find for this increase in this award is the plaintiff's answers to interrogatories in which he claims the total amount for the loss of use was $6,487.00. In light of the fact that the only evidence presented at trial in support of this element of damage was the invoice for $2,484.16, and the supporting testimony of the Kyles that they rented a vehicle for approximately one month and these were the charges therefore, the trial court abused its discretion in granting the new trial and adjusting this award based on the unsupported assertions made by the plaintiff during discovery.

Accordingly, this portion of the judgment on the new trial is amended; the original award of $2,484.16 for the loss of use of the vehicle is reinstated.

AWARD IN EXCESS OF POLICY LIMITS

In its final assignment of error, defendant contends that if the judgment of the trial court on the granting of the new trial, in the total amount of $44,586.68, is otherwise affirmed, the judgment "clearly exceeds the $25,000.00 policy limit for property damage which the tortfeasor, Boudreaux, had under the terms of his policy." Accordingly, defendant contends the maximum amount of the judgment that may be rendered against it cannot exceed the policy limits; therefore, the trial court's judgment must be amended to no more than the policy limits.

Again, while the defendant's argument *may* be a correct statement of the law applicable to policy coverage limits, there is no evidence in the record to support it. As noted earlier, the New Hampshire policy was not introduced into evidence at

trial or otherwise made a part of the record. While it is true that the pre-trial order stipulates that New Hampshire was the liability insurer of Mr. Boudreaux, and that said policy is subject to the terms, conditions, and limitations contained therein, none of said terms, conditions and limitations, including most notably the policy limits, are not contained in the record.

After the trial court granted Mr. Kyle's Motion for New Trial, and rendered a new judgment, the defendant filed a motion for a new trial, which was denied by the trial court. The defendant attached to its motion for new trial the declarations page of its policy with Boudreaux, which does reflect that the policy limits for property damage is $25,000. However, this attachment to a motion is not evidence in the record and was not before the trial court when it rendered judgment. For this reason, the trial court did not err in awarding the amount that it did, and there is nothing before us warranting an amendment to that judgment on this basis.

CONCLUSION

For all of the foregoing reasons, the judgment of the trial court is amended to vacate the additional amount awarded for loss of use of vehicle and reinstate the original award of $2,484.16 for this element of damage. In all other respects, the judgment of the trial court is affirmed. Defendant is assessed all costs of this appeal.

PEREMPTORY EXCEPTION DENIED; JUDGMENT AMENDED; AFFIRMED AS AMENDED.