NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2017 CA 1131 C/W 2017 CA 1132

MICHAEL DAVID LAWRENCE, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATES OF HIS MINOR CHILDREN: MICHAEL D. LAWRENCE, III, ZEKE LAWRENCE, AND DEGAN LAWRENCE; AND SUMMER LAWRENCE

VERSUS

KALIN GLEN MCKENZIE, TERRI MCKENZIE, GLEN MCKENZIE, PROGRESSIVE GULF INSURANCE COMPANY, GOVERNMENT EMPLOYEES INSURANCE COMPANY, AND TRAVELERS PROPERTY AND CASUALTY COMPANY OF AMERICA

CONSOLIDATED WITH

GINA GEROT GROH AND TYRE WILLIAM GEROT

VERSUS

KALIN MCKENZIE, PROGRESSIVE INSURANCE, MICHAEL LAWRENCE, HEAVY MACHINES, INC., AND TRAVELERS INDEMNITY

Judgment Rendered: FEB 2 1 2018

Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Numbers 2013-0002165 c/w 2013-0002590

Honorable Robert H. Morrison, III, Judge Presiding

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Gretna, LA

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BEFORE: WHIPPLE, C.J., MCDONALD, AND CHUTZ, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by the defendants, Phoenix Insurance Company and Travelers Property Casualty Company of America, from a judgment of the trial court rendered in conformity with a jury's verdict allocating fault. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Shortly before 5:45 a.m. on April 1, 2013, while still dark outside, Kalin McKenzie was traveling in a Nissan Murano westbound on Interstate 12 ("I-12") when he fell asleep at the wheel, lost control of the vehicle, and struck the guardrail of a bridge shortly past the Robert, Louisiana exit.[1] McKenzie's vehicle came to rest at an angle, with the front end in the shoulder near the guardrail and the rear end in the left lane of travel.[2] At the time McKenzie "dozed off," he was en route to a training facility and had not slept in over twenty-four hours, since he had awakened at 5:30 a.m. the previous morning.

Elliot Stevens was traveling to work that morning and following the McKenzie vehicle, when he witnessed McKenzie's vehicle rear-end a semi-truck trailer and eventually come to rest on the interstate. Stevens passed the McKenzie vehicle in the right lane and parked his vehicle in the median past the bridge and off of the roadway. Stevens called 911 for assistance and then walked back onto the bridge to check on the driver of the Nissan. After Stevens got McKenzie out of the vehicle, they attempted to start the vehicle in order to get it off of the bridge, but to no avail. Stevens and McKenzie then began to walk off of the bridge for fear that someone would get hit by a passing vehicle, when several cars came to a stop in the left lane behind the McKenzie vehicle.

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[1]McKenzie testified that the Nissan Murano was his mother's vehicle.

[2]For clarity, this is referred to as the "first collision" throughout the opinion.

One of the vehicles that came to a stop behind the McKenzie vehicle was a white Dodge service truck driven by Michael Lawrence and owned by his employer, Heavy Machines, Inc. As the other vehicles that had stopped ahead of Lawrence were moving into the right hand lane to pass the McKenzie vehicle, Stevens and McKenzie approached Lawrence in his vehicle and asked him if he could push the McKenzie vehicle off of the bridge and roadway with his truck. During this time, the emergency hazard lights, running lights on the roof, and emergency flashers on Lawrence's vehicle were activated. Lawrence reluctantly agreed, and as he began to pull forward, his vehicle was hit from the rear by a maroon Ford extended cab (F150) pickup truck driven by Terry Gerot, causing Lawrence's vehicle to hit the McKenzie vehicle in front of it.[3] As a result of this second collision, Lawrence sustained significant injuries and Gerot sustained fatal injuries.

On July 16, 2013, Lawrence filed a petition for damages in his individual capacity, along with his wife, Summer Lawrence, and as the administrator of the estates of his minor children, Michael D. Lawrence, III, Zeke Lawrence, and Degan Lawrence (hereinafter "the Lawrence plaintiffs"), against Kalin McKenzie, Terri McKenzie, Glen McKenzie, Progressive Gulf Insurance Company (insurer of the McKenzie vehicle), Government Employees Insurance Company ("GEICO") (insurer of the Gerot vehicle), Phoenix Insurance Company[4] (UM insurer of the Lawrence vehicle), Nabors Drilling USA, LP, Nabors Industries, LTD., Nabors-Sun Drilling and Operating Company, Inc., Nabors Offshore Corporation, Nabors Offshore Drilling Company, Nabors Completion & Production Services, Nabors

[3]This is referred to as the "second collision" herein.

[4]In first supplemental and amending petitions, the Lawrence plaintiffs and Gerot plaintiffs amended the named defendants to replace Travelers Property and Casualty Company of America with Phoenix Insurance Company (a Travelers Insurance Company a/k/a Phoenix Insurance Group).

Diamond Holdings, Inc., Nabors Marine, LLC, and Nabors Well Services, Co. (hereinafter collectively referred to as "Nabors").[5, 6]

On August 22, 2013, Gerot's adult children, Gina Gerot Groh and Tyre William Gerot (hereinafter "the Gerot plaintiffs"), filed a wrongful death action in a separate suit against Michael Lawrence, Heavy Machines, Inc., Phoenix Insurance Company (liability insurer of Heavy Machines, Inc.), Kalin McKenzie, Progressive Casualty Insurance Company, and Nabors. Following a motion to transfer and consolidate, the two suits were consolidated by the trial court.[7]

The parties submitted a joint motion to bifurcate the trial of this matter into two parts to be tried on separate settings, first to determine applicable degrees of fault and/or negligence, and second to determine all other issues, including damages and insurance coverages.[8] Accordingly, a trial to determine fault and/or negligence was held before a jury on December 6 through December 9, 2016.

At the conclusion of trial, the jury returned a verdict finding that McKenzie and Gerot were negligent in causing the second collision, and that McKenzie and Gerot's negligence was a cause-in-fact of the second collision. The jury further found that Lawrence was not negligent in causing the second collision, and allocated 60% fault to McKenzie, 40% fault to Gerot, and 0% fault to Lawrence.

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[5]McKenzie was employed by Nabors at the time of the accident.

[6]Heavy Machines, Inc. and Travelers Property and Casualty Company of America, its workers' compensation insurance provider, intervened in this suit seeking to recover all benefits paid to Lawrence and/or his healthcare providers from any amounts recovered or obtained by Lawrence against defendants under the Louisiana Workers' Compensation Act pursuant to the subrogation lien provided in LSA-R.S. 23:1103. Pursuant to the intervenors' motion, the petition of intervention was ultimately dismissed by the trial court.

[7]The Gerot plaintiffs, Lawrence plaintiffs, and intervenors, Heavy Machines, Inc. and Travelers Property and Casualty Company of America, filed motions to fully dismiss their claims against Progressive Gulf Insurance Company and conditionally dismiss their claims against Kalin McKenzie, which were granted by the trial court.

[8]Nabors filed a motion for summary judgment seeking dismissal of all claims against it, which was ultimately granted by the trial court. Additionally, following a settlement agreement, the Lawrence plaintiffs' claims against GEICO were dismissed.

On January 19, 2017 and January 25, 2017, judgments were signed by the trial court in conformity with the jury's verdict.

Phoenix Insurance Company and Travelers Property Casualty Company of America (hereinafter "appellants") filed the instant appeal from the January 25, 2017 judgment of the trial court, assigning the following as error:[9]

(1) The jury erred in finding that Lawrence was not negligent *per se* for the second collision for violating LSA-R.S. 32:141(A);

(2) The trial court erred in instructing the jury on the rescue doctrine where Lawrence was not protecting the personal safety of another who was or who appeared to be in imminent peril at the time of the subject accident;

(3) The jury erred in finding Gerot negligent for the second collision and that her negligence was a cause in fact of the second collision where Gerot was faced with a sudden emergency; and

(4) The jury erred as a matter of law in finding that McKenzie's negligence was a cause in fact of the second collision where the first and second collisions were separate and distinct events and Lawrence's negligence was an intervening and superseding cause in fact of the second collision.

APPELLATE JURISDICTION

At the outset we note that appellate courts have the duty to examine subject matter jurisdiction *sua sponte,* even when the parties do not raise the issue. Malus v. Adair Asset Management, LLC, 2016-0610 (La. App. 1st Cir. 12/22/16), 209 So. 3d 1055, 1059. Thus, we must first determine whether this court has jurisdiction to review the judgment before us on appeal.

On January 19, 2017, the trial court signed a judgment allocating fault in conformity with the jury's verdict and dismissing the Gerot plaintiffs' claims

[9]The Gerot plaintiffs appealed from the January 19, 2017 judgment of the trial court, urging similar assignments of error. Our review of their appeal can be found in a companion opinion to this appeal also handed down this date. See Lawrence v. McKenzie, 2017-1190 c/w 2017-1191 (La. App. 1st Cir. _/_/18).

against defendants Lawrence, Heavy Machines, Inc., and Phoenix Insurance Company.[10] On January 25, 2017, the trial court signed a second judgment substantively similar to the first judgment,[11] but containing a designation as a "final judgment pursuant to Louisiana Code of Civil Procedure article 1915."[12] The second judgment signed on January 25, 2017, which was similar in substance to the earlier judgment, was superfluous and unnecessary, and consequently, invalid. See St. Pierre v. St. Pierre, 2008-2475 (La. App. 1st Cir. 2/12/10), 35 So. 3d 369, 370, n.1, writ not considered, 2010-0587 (La. 3/17/10), 29 So. 3d 1243, citing State v. One (1) 1991 Pontiac Trans Sport Van, VIN # 1GMCU06D3MT208532, 98-64 (La. App. 5th Cir. 7/9/98), 716 So. 2d 446, 448. Nonetheless, given that both judgments were substantively similar, and that the motion for appeal filed on March 17, 2017, by appellants herein was timely as to the valid January 19, 2017 judgment, we will consider this appeal as being taken from the January 19, 2017 judgment. See generally St. Pierre v. St. Pierre, 35 So. 2d at 370, n.1.

DISCUSSION

Jury Charges
(Assignment of Error Number Two)

Because our ruling may affect the standard of review, we will first address the second assignment of error urged by appellants, i.e., that the trial court erred in instructing the jury on the rescue doctrine where they contend that Lawrence was

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[10]The January 19, 2017 judgment was submitted by counsel for defendants Lawrence, Heavy Machines, Inc., and Phoenix Insurance Company.

[11]The January 25, 2017 judgment was submitted by counsel for the Lawrence plaintiffs.

[12]To the extent that the January 25, 2017 judgment contained a designation as a final judgment, we note that a judgment on the issue of liability when that issue has been tried separately before a jury and the issue of damages is to be tried before a different jury is a final judgment pursuant to LSA-C.C.P. art. 1915(A)(5), which does not require a designation as a final judgment after an express determination that there is no just reason for delay as required by judgments rendered under LSA-C.C.P. art. 1915(B). See LSA-C.C.P. art. 1915. (The designation outlined in subsection B is required when a court renders a partial judgment, partial summary judgment, or sustains an exception in part. See LSA-C.C.P. art. 1915(B).)

not protecting the personal safety of another who was or who appeared to be in imminent peril at the time of the subject accident.

The trial court instructs the jury on the law to be applied to the facts of the case. LSA-C.C.P. art. 1792. A charge must correctly state the law and be based on evidence adduced at trial. Gardner v. Griffin, 97-0379 (La. App. 1st Cir. 4/8/98), 712 So. 2d 583, 586. Whether to give an instruction is within the discretion of the court, and will not be disturbed absent an abuse of that discretion. Gardner v. Griffin, 712 So. 2d at 586.

On appeal, the adequacy of jury instruction by a trial court must be determined in the light of the jury instructions as a whole. Lincecum v. Missouri Pacific Railroad Company, 452 So. 2d 1182, 1190 (La. App. 1st Cir.), writ denied, 458 So. 2d 476 (La. 1984). The standard of appellate review is that the mere discovery of an error in the trial court's instructions does not itself justify the appellate court conducting the equivalent of a trial *de novo*, without first measuring the gravity or degree of error and considering the instructions as a whole and the circumstances of the case. Lincecum v. Missouri Pacific Railroad Company, 452 So. 2d at 1190. A verdict should not be set aside unless the error in the instructions misled the jury to such an extent as to prevent the jury from doing justice. Baxter v. Sonat Offshore Drilling, Inc., 98-1054 (La. App. 1st Cir. 5/14/99), 734 So. 2d 901, 906. However, when a trial court abuses its discretion and the instructions are prejudicially misleading, the presumption of regularity afforded a jury verdict is tainted, and the appellate court must undertake a *de novo* review of the record and implement its own judgment based on the evidence. Baxter v. Sonat Offshore Drilling, Inc., 734 So. 2d at 906-907.

Prior to the trial court charging the jury, appellants objected to the inclusion of an instruction on the rescue doctrine or a "rescuer." The trial court overruled the objection; however, at the request of appellants' counsel, the trial court, in an

effort to "balance" the charges, included additional charges with remedial language concerning the test of a reasonable rescuer under the circumstances prevailing and excusing the rescuer. Thereafter, the trial court read the following instructions:

> A "rescuer" is someone who makes some effort or takes some action to protect the person – it should be personal safety of another, who was or appeared to be in imminent peril. A "rescuer" is looked upon with favor in the eyes of the law, and is not chargeable with negligence merely because he failed to make the wisest choice when rendering aid.
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> To be a rescuer, a person must make some sort of effort or take some action to protect the personal safety of another who was or appeared to be in imminent peril. Stated another way, a person cannot rely on the rescuer doctrine if he was not engaged in the actual rescue attempts of someone known to be in imminent peril.
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> The rescuer is only excused from such oversights or imprudences as the situation requiring rescue might have reasonably caused. The test is that of reasonable rescuer under the prevailing circumstances.

On review of the jury instructions as a whole, we find that they are a correct statement of the existing law.[13] Also, considering the testimony adduced at trial, in particular the testimony of McKenzie, Stevens, and Lawrence, we find that issues regarding the rescuer doctrine were proper questions for the jury to decide. Thus, because the charges were correct statements of the existing law based on evidence presented at trial and there is no indication in the record that they were confusing to the jury, we find no abuse of the trial court's discretion in including the charges as set forth above in the jury instructions.[14]

This assignment of error is without merit.

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[13]See Daniels v. USAgencies Casualty Insurance Company, 2011-1357, 2011-1358, 2011-1359 (La. App. 1st Cir. 5/3/12), 92 So. 3d 1049, 1056-1057.

[14]We further note that defendants Lawrence, Heavy Machines, Inc., and Phoenix Insurance Company correctly point out in brief that the basis of the jury's finding that Lawrence was free from fault could be for a variety of reasons other than that Lawrence was acting as a rescuer. In particular, they contend that the jury could have found that there was a failure to rebut the presumption of the negligence of Gerot as a rear-ending driver, that Lawrence displayed appropriate signal lights while stopped on the roadway, or that the totality of the evidence established that Lawrence's actions were reasonable.

Standard of Review of a Jury Verdict Allocating Fault

Appellants' remaining assignments of error challenge the jury's allocation of fault. It is well settled that the allocation of fault is a factual matter within the sound discretion of the fact finder, and appellate courts review a fact finder's apportionment of fault under the manifest error-clearly wrong standard of review. See Clement v. Frey, 95-1119 (La. 1/16/96), 666 So. 2d 607, 610; Great Western Casualty Company v. State ex rel. Department of Transportation and Development, 2006-1776 (La. App. 1st Cir. 3/28/07), 960 So. 2d 973, 977-978, writ denied, 2007-1227 (La. 9/14/07), 963 So. 2d 1005; Schexnayder v. Bridges, 2015-0786 (La. App. 1st Cir. 2/26/16), 190 So. 3d 764, 773. The manifest error standard demands great deference to the fact finder's conclusions; for only the fact finder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). Where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous. Rosell v. ESCO, 549 So. 2d at 844. If an appellate court finds a clearly wrong allocation of fault, it should adjust the award, but then only to the extent of lowering or raising it to the highest or lowest point respectively that is reasonably within the fact finder's discretion. Clement v. Frey, 666 So. 2d at 611.

As the trier of fact, the jury is free to accept or reject, in whole or in part, the testimony of any witness. Pennison v. Carrol, 2014-1098 (La. App. 1st Cir. 4/24/15), 167 So. 3d 1065, 1076, writ denied, 2015-1214 (La. 9/25/15), 178 So. 2d 568. Furthermore, where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, reasonable inferences of fact should not be disturbed on appeal. Scoggins v. Frederick, 98-1814, 98-1816 (La. App. 1st Cir. 9/24/99), 744 So. 2d

676, 687, writ denied, 99-3557 (La. 3/17/00), 756 So. 2d 1141. We will apply these standards in reviewing the remaining assignments of error.

Louisiana Revised Statute 32:141
(Assignment of Error Number One)

In their first assignment of error, appellants contend that Lawrence was "negligent *per se*" for stopping in a travel lane in violation of LSA-R.S. 32:141(A). And, as such, appellants contend that "[a]s a matter of law, the jury could not find that Michael Lawrence was not negligent."

At the outset we note that while statutory violations may serve as guidelines for the courts in determining standards of negligence by which civil liability is determined, the doctrine of negligence *per se* has been rejected in Louisiana. See Galloway v. State, Department of Transportation and Development, 94-2747 (La. 5/22/95), 654 So. 2d 1345, 1347. The violation of a statute or regulation does not automatically, in and of itself, impose civil liability. Faucheaux v. Terrebonne Consilidated Government, 615 So. 2d 289, 292 (La. 1993). Civil responsibility is imposed only if the act in violation of the statute is the legal cause of damage to another. Faucheaux v. Terrebonne Consolidated Government, 615 So. 2d at 292-293.

Accordingly, even if the jury had determined that Lawrence violated LSA-R.S. 32:141(A), the jury would not have been required, as a matter of law, to automatically allocate liability to Lawrence. See Menard v. Cox Communications Louisiana, Inc., 2015-1628, p. 4, n.1 (La. App. 1st Cir. 8/31/16) (unpublished opinion), writ denied, 2016-1902 (La. 12/5/16), 210 So. 3d 813. In any event, we will consider the provisions of LSA-R.S. 32:141 in our review of the jury's determination that Lawrence was not negligent in the second collision.

Louisiana Revised Statute 32:141, entitled, "Stopping, standing, or parking outside business or residence districts," provides as follows:

A. Upon any highway outside of a business or residence district, no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or main traveled part of the highway when it is practicable to stop, park or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of two hundred feet in each direction upon such highway.

B. The provisions of this Section shall not apply to the driver of any vehicle which is disabled while on the main traveled portion of a highway so that it is impossible to avoid stopping and temporarily leaving the vehicle in that position. However, the driver shall remove the vehicle as soon as possible, and until it is removed it is his responsibility to protect traffic.

C. The driver of any vehicle left parked, attended or unattended, on any highway, between sunset and sunrise, shall display appropriate signal lights thereon, sufficient to warn approaching traffic of its presence. If the vehicle is not removed from the highway within twenty-four hours, the provisions of R.S. 32:473.1(B) shall apply.

D. In the event of a motor vehicle accident, if the driver is not prevented by injury and the vehicle is not disabled by the accident, or the accident has not resulted in serious injury or death of any person, the driver shall remove the vehicle from the travel lane of the highway to the nearest safe shoulder. Compliance with the provisions of this Subsection shall in no way be interpreted as a violation of requirements to remain at the scene of an accident as provided for in the Highway Regulatory Act or by R.S. 32:414.

With reference to disabled vehicles, this statute imposes a two-fold duty on drivers of vehicles stopped on a highway: (1) to remove the vehicle as soon as possible; and (2) to protect traffic until the vehicle is removed. Daniels v. USAgencies Casualty Insurance Company, 2011-1357, 2011-1358, 2011-1359 (La. App. 1st Cir. 5/3/12), 92 So. 3d 1049, 1056. Section B of LSA-R.S. 32:141 requires that the driver of a disabled vehicle take reasonable steps, under the circumstances, to protect traffic until the vehicle can be removed. The law will not impose upon a person who stops in aid of a distressed motorist, a burden of care greater than that required of the driver of the disabled vehicle. Daniels v. USAgencies Casualty Insurance Company, 92 So. 3d at 1057.

The term "park" as used in Section A of LSA-R.S. 32:141 does not comprehend or include a mere temporary or momentary stoppage, but rather connotes a stoppage with the intent of permitting the vehicle to remain standing for an appreciable length of time. Lacour v. Continental Southern Lines, Inc., 124 So. 2d 588, 594 (La. App. 1st Cir. 1960); McGehee v. Stevens, 15 So. 2d 897, 899 (La. App. 2nd Cir. 1943). Whether stopping on the travelled portion of the roadway constitutes negligence depends upon the circumstances of each accident. August v. Delta Fire & Casualty Company, 79 So. 2d 114, 116 (La. App. 1st Cir. 1955).

The Lawrence plaintiffs contend that under the facts presented, the jury made a reasonable factual determination that it was not practicable for Lawrence to stop his truck off of the interstate. They further contend that the record supports a finding that Lawrence's vehicle was stuck in traffic on the bridge, that he had no intention to stay there, that he was unable to move around the McKenzie vehicle in the right lane due to oncoming traffic and his truck's lack of acceleration, and that he was not "parked" on the bridge as contemplated by LSA-R.S. 32:141.

Likewise, defendants Lawrence, Heavy Machines, Inc., and Phoenix Insurance Company contend that LSA-R.S. 32:141 does not apply to someone stopped in traffic where there is no intent of the driver to remain at that location. They further contend that no liability or fault on the part of Lawrence exists, because while looking for an opportunity to go around the stopped vehicle, Lawrence was approached and implored to assist McKenzie in removing his disabled vehicle from the roadway. They further note that the evidence establishes that after reluctantly agreeing, Lawrence, who was on the bridge near the McKenzie vehicle for only three minutes, was struck in the rear by the Gerot vehicle before he could push the McKenzie vehicle off of the bridge.

Lawrence testified that right before he approached the Robert exit ramp on I-12, he noticed tail lights ahead swerving from the left lane to the right lane about a

quarter of a mile ahead of him. He testified that because it was chaotic ahead and he recognized potential danger, he immediately let off of the accelerator and activated his hazard lights. Lawrence stated that he was traveling in the left lane at the time to allow the traffic to merge onto the interstate from the Robert exit, and that after he passed the on-ramps, he intended to return to the right lane. Lawrence testified that before that could happen, he continued to decelerate and cars continued to pass him in the right lane. He stated that he was unable to get into the right lane because traffic was passing him at interstate speeds as he continued to decelerate. Lawrence testified that he did not know which lane was open and which lane was closed, so he decided to stay in the lane he was travelling in until he could figure out what was going on. He stated that it took him 20 to 25 seconds to come to a stop behind a few vehicles that were stopped behind a disabled vehicle in front of them. As the vehicles in front of him began to clear out by using the right lane to go around the disabled vehicle, Lawrence saw the McKenzie vehicle stopped with the driver's door open. Lawrence testified that he was unable to pull around the McKenzie vehicle by moving into the right lane because traffic was passing in the right lane at interstate speeds and his truck, which was 8 feet wide and weighed 18,400 pounds with an V6 cylinder diesel engine, did not have the "get up and go" that a normal vehicle had.[15]

Lawrence testified that as he reached for his phone to dial 911, he was approached by Stevens and McKenzie. They advised Lawrence that they had already called 911, that they thought his vehicle was a tow truck due to all of the flashing lights, and asked him if he could help push McKenzie's vehicle off of the roadway. Lawrence stated that as McKenzie and Stevens approached his vehicle, he maintained a 25-foot gap between his vehicle and the McKenzie vehicle and

[15]Lawrence testified that there is a crane on the right side of his service truck for lifting heavy objects and a welding machine with an air compressor on the left side of the truck. He also stated there were several items, including chains, buckets, and parts, in the back of his truck.

that he was watching traffic behind him in his rearview mirror while he was looking for a way out. Although Lawrence had expressed concern, they continued to request his assistance and told him they needed him to push the McKenzie vehicle off of the roadway. Lawrence testified that he ultimately reluctantly agreed to push the McKenzie vehicle off of the bridge and started pulling forward as Stevens was guiding him to the back of the McKenzie vehicle. As he proceeded to move forward, Lawrence noticed a vehicle in his rearview mirror behind him in the left lane that did not appear to be slowing down. When he realized that the vehicle was going to impact him or barely miss him, Lawrence stated that he tried to make his vehicle more visible by using his reverse lights to illuminate the back of his truck even more, to no avail.

Lawrence testified that he had no intention to stop behind a disabled vehicle. He further testified that he was not aware that he was on a bridge until the vehicles came to a stop ahead of him and he followed suit. Lawrence stated that from the time he actually came to a stop until the time of the second collision, only three minutes elapsed.[16]

Stevens testified that he and McKenzie "flagged down" Lawrence in his service truck to ask him to help move the McKenzie vehicle off of the bridge. Stevens stated that Lawrence's service truck had its hazard lights and flashing lights activated and that it was "lit up like a Christmas tree." Stevens testified that he "begged and pleaded" with Lawrence to help them and that as he stepped off of the driver's side of the service truck, he thought Lawrence was going to help them. Stevens stated that he was directing Lawrence toward the McKenzie vehicle and that the front bumper of Lawrence's service truck was approximately a foot away from the rear bumper of the McKenzie vehicle when the second collision occurred.

[16]According to the 911 call log, the call from Stevens reporting the first collision was received at 5:45 a.m., and a call by Erica Bruckhart reporting the second collision was received at 5:55 a.m.

Stevens testified that he felt that Lawrence was acting as a good Samaritan in assisting them.

McKenzie testified that the driver of the white service truck said he would push his vehicle off of the bridge, so McKenzie went back to his vehicle to steer it when the service truck was rear-ended by Gerot's vehicle. McKenzie reiterated that the plan at that point was for Lawrence to push him off of the bridge, and that Lawrence was in the process of doing so when the second collision occurred.

Richard L. Fox, an expert in the field of accident reconstruction, testified on behalf of appellants that, in his opinion, Lawrence voluntarily chose to stop in the left travel lane, which was the wrong thing to do. Fox further testified that the roadway evidence indicated that there was at least ten to thirteen feet of separation between Lawrence's vehicle and the McKenzie vehicle before the second collision. Fox testified that, by his estimation, Lawrence was stopped for seven minutes before the second collision and that a reasonable person would not have continued to block the left lane.

Kelley Adamson, an expert in the fields of accident reconstruction and human factors, testified that he inspected the accident site and the other vehicles involved in the accident on April 2, 2013, the day after the accident. He testified that the damage on the rear of the McKenzie vehicle established that when the Lawrence vehicle and McKenzie vehicle made contact, the vehicles were "much more flush." He further testified that it was his opinion that Lawrence did not have any responsibility for the second collision. Adamson testified that Lawrence was there for a very short time, that he did not intend to stay there, and that clearly, he intended to move the McKenzie vehicle off of the roadway, which he characterized as something a typical person would do under the circumstances.

Michael Gillen, an expert in accident reconstruction and "rules of the road," testified that the Lawrence vehicle was blocking the lane of travel, which had the

same effect as being a disabled vehicle. In his opinion, Lawrence could have moved his vehicle further over onto the six-foot left hand shoulder or completely off of the bridge in order to allow more room in the left lane for vehicles to pass the McKenzie vehicle, but failed to do so.

Brenda Cushing testified at trial that she was traveling to work on I-12 west bound in the left lane that morning when she came upon the McKenzie vehicle. Cushing stated that because it was "a little foggy," she was traveling between 55 and 70 miles per hour, although the speed limit was 70 miles per hour. As she approached the car, she realized it was not moving and that it was stopped in the left lane on the bridge. She testified that "it scared her to death" because, although she was able to quickly swerve around it in the right lane, she almost hit the back end of the vehicle. Notably, Cushing testified that there was absolutely not enough space for her to remain in the left lane and pass the vehicle.

On review, we find that the record contains ample evidence and witness testimony to support the finding that Lawrence was free from fault as determined by the jury herein. As the trier of fact, the jury was free to accept or reject in whole or part the testimony of any witness. Moreover, where the jury was faced with conflicting testimony, the jury was free to disregard those conclusions of accident reconstruction experts, Fox and Gillen, and to accept the conclusions of expert Adamson as credible in reaching its determination. See Pennison v. Carrol, 167 So. 3d at 1076-1077.

Here, the jury was faced with conflicting witness and expert testimony, and a reasonable basis exists to support the jury's determinations. Thus, we are unable to say the jury's determination that Lawrence was free from fault was manifestly erroneous. This assignment lacks merit.

Sudden Emergency
(Assignment of Error Number Three)

In this assignment, appellants contend that the jury erred in finding Gerot negligent for the second collision and in further finding that her negligence was a cause-in-fact of the second collision where Gerot was faced with a sudden emergency.

Pursuant to Louisiana Revised Statute 32:81(A), a following motorist has a duty not to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway. In addition to the duty to follow at a reasonable and prudent distance, a motorist also has a duty to maintain a careful lookout, observe any obstructions present, and exercise care to avoid them. Ly v. State, Department of Public Safety and Corrections, 633 So. 2d 197, 201 (La. App. 1st Cir. 1993), writ denied, 93-3134 (La. 2/25/94), 634 So. 2d 835.

As Louisiana courts have uniformly held, a following motorist in a rear-end collision is presumed to have breached this duty and, hence, is presumed negligent. Mart v. Hill, 505 So. 2d 1120, 1123 (La. 1987). A rear-ending motorist, however, may rebut the presumption of negligence by proving that he had his vehicle under control, closely observed the preceding vehicle, and followed at a safe distance under the circumstances. Harbin v. Ward, 2013-1620 (La. App. 1st Cir. 5/29/14), 147 So. 3d 213, 218.

A following motorist may also avoid liability by proving that the driver of the lead vehicle negligently created a hazard that he could not reasonably avoid, otherwise known as the sudden emergency doctrine. Harbin v. Ward, 147 So. 3d at 218. The sudden emergency doctrine is an exception to the general rule that a following motorist is presumed negligent if he collides with the rear of a leading vehicle. Ly v. State, Department of Public Safety and Corrections, 633 So. 2d at

201. This doctrine provides that a following motorist will be adjudged free from fault if the following motorist is suddenly confronted with an unanticipated hazard created by a leading vehicle, which could not be reasonably avoided, unless the emergency is brought about by his own negligence. Ly v. State, Department of Public Safety and Corrections, 633 So. 2d at 201. The rule of sudden emergency cannot be invoked by one who has not used due care to avoid the emergency. Harbin v. Ward, 147 So. 3d at 218.

Although the sudden emergency doctrine was developed when contributory negligence was a complete bar to recovery, our courts continue to apply the doctrine. Harbin v. Ward, 147 So. 3d at 218. While the sudden emergency doctrine has not been subsumed by comparative fault, some courts have treated the defense of sudden emergency as one of the factual considerations used in assessing the degree of fault to be attributed to a party. Harbin v. Ward, 147 So. 3d at 218.

Appellants contend that Gerot was travelling on the interstate in the right lane behind an 18-wheeler that obstructed her forward view, and as the 18-wheeler was travelling at a slower rate of speed, Gerot moved into the left lane to pass it. Less than five seconds later, Gerot struck the rear of Lawrence's truck. Appellants argue that with Lawrence's vehicle in front of her and the 18-wheeler to the right of her, there was nothing Gerot could have done to avoid the collision.

In support, appellants rely on the testimony of accident reconstruction expert Gillen that Gerot was faced with an unexpected event. Gillen opined that once she got in the left lane, Gerot did not have enough time and distance to perceive, react, and identify what she was seeing and then bring her vehicle to a stop. Gillen also testified that he did not think Gerot was distracted at the time of the accident.

Defendants Lawrence, Heavy Machines, Inc., and Phoenix Insurance Company counter that Gerot could have reasonably avoided Lawrence's truck by being attentive and slowing down like other motorists observed by Stevens and

Lawrence, who moved from the left lane to the right lane as they approached Lawrence's truck. Appellees further contend that the jury was presented with multiple scenarios for Gerot's approach to the accident location, and that the Gerot plaintiffs were not able to rebut the presumption of fault under these scenarios.

The Lawrence plaintiffs further counter, that the jury was faced with conflicting expert opinions based on different views of the evidence, and that making a choice between differing expert opinions does not make the jury's choice unreasonable, manifestly erroneous, or clearly wrong. We agree.

The record reflects that Brian Wiensko was driving an 18-wheeler truck travelling westbound in the right lane of I-12 on the morning of the accident. Wiensko, who entered the interstate from the Robert on-ramp, testified that he could see faint hazard lights flashing on a utility truck about a quarter of a mile away. He stated that as he started to approach the vehicle, the hazard lights started to get brighter and he started to slow down. Wiensko testified that he looked in his rearview mirror and noticed a car "coming up pretty quick" behind him. He stated that as he was about to pass the vehicle with the flashing hazard lights, he noticed that there were two vehicles in the left lane of the roadway. Wiensko testified that at the time he was passing the two vehicles that were stopped in the left lane, he saw the car that was coming up behind him "cut" into the left lane and "smash" into Lawrence's truck. Wiensko testified that from his perspective, he did not observe the vehicle coming up behind him slow down at all. He further testified that the car that hit the service truck was travelling faster than all of the other traffic on the road. Wiensko stated that when he saw the hazard lights flashing, he recognized them as being on a vehicle stopped in the roadway, and that based on that observation, he would not have entered the left lane at any time as he approached the utility truck. Wiensko agreed that if a vehicle were behind his trailer in the right lane, its driver would not have the same line of sight that he had.

Lawrence testified that as Stevens was directing him up to the McKenzie vehicle, he checked his rearview mirror and saw headlights in the left lane behind him pass the Robert overpass. He looked up again and noticed that the vehicle had not gotten out of the left lane and did not appear to be slowing down. Lawrence stated that when he realized that the vehicle was either going to impact him or barely miss him, he tried to make his vehicle more visible by "checking up" on his brake lights to add more visibility. When no response was made by the vehicle that was "barreling down on him," he realized that he was going to take full impact.

The 911 call log and recorded calls concerning the accident were introduced into evidence and played before the jury. An unidentified caller reported that "there was a car and a truck stopped on the left side of the road, in the left lane, and there was a truck on the side of [her]." She continued, stating, "I guess [she] didn't see the truck stopped, and, I mean, [she] ran right into the back of the stopped vehicle." She further stated that she thought the truck was driving at full speed and she did not "think [she] saw that [stopped] truck."

Expert Adamson testified that if Wiensko's 18 wheeler was in the right merge lane coming on to the interstate, and Gerot was in the right lane, she should have been able to see down to the bridge and see the flashing lights just as Wiensko did. He further opined that the same is true if Gerot were travelling in the left lane, and that there was no evidence to suggest that there was a vehicle in front of Gerot in the left lane to block her view of the Lawrence truck. Adamson testified that, if Gerot was travelling at 70 miles per hour, and began the cutting maneuver into the left lane less than five seconds (as testified by Wiensko) before impact and got into the left lane 500 feet behind Lawrence's vehicle, then took 1.8 seconds to recognize the vehicle, then slammed on her brakes, she would have come to a stop 112 feet before she got to the Lawrence truck. Adamson opined

that as Gerot approached Lawrence's truck, she had clues and context available to do more than what she did, based upon the fact that other drivers were able to avoid this accident. After reviewing all of the evidence surrounding the accident, Adamson ultimately concluded that Gerot bore some blame or responsibility for the second collision.

Expert Fox testified that although Gerot would have no expectation that there would be an object stopped in the travel lane of the interstate, he agreed that Gerot got herself into this predicament because she was passing an 18-wheeler and got distracted by it.

The jury expressly found that Gerot was negligent in the second collision between Gerot and Lawrence, that Gerot's negligence was a cause-in-fact of the second collision, and that Gerot was 40% at fault for the second collision. In doing so, the jury obviously accepted the testimony of Adamson that Gerot should have been able to do more to avoid the accident than what she did and that Gerot bore some responsibility for the second collision and rejected Gillen's expert testimony that Gerot did not have enough time to react.

Having thoroughly reviewed the conflicting testimony concerning the accident, and mindful of the great deference we must afford the jury as a fact finder, we cannot say the jury's determination in this regard was manifestly erroneous or clearly wrong. Considering the record in its entirety, we agree that it reasonably supports the jury's conclusion that Gerot was 40% at fault in causing the second collision. Ultimately, we cannot say that the jury erred in its assessment of fault herein.

Thus, we find no merit to this assignment of error.

Cause-in-Fact of Second Collision
(Assignment of Error Number Four)

In their final assignment of error, appellants contend that the jury erred as a matter of law in finding that McKenzie's negligence was a cause-in-fact of the second collision, where they contend that the first and second collisions were separate and distinct events, and that Lawrence's negligence was an intervening and superseding cause-in-fact of the second collision.

> In situations in which there is an intervening force that comes into play to produce the plaintiff's injury (or more than one cause of an accident), it has generally been held that the initial tortfeasor will not be relieved of the consequences of his or her negligence unless the intervening cause superceded the original negligence and alone produced the injury. If the original tortfeasor could or should have reasonably foreseen that the accident might occur, he or she will be liable notwithstanding the intervening cause. In sum, foreseeable intervening forces are within the scope of the original risk, and hence of the original tortfeasor's negligence.

Adams v. Rhodia, Inc., 2007-2110 (La. 5/21/08), 983 So. 2d 798, 808 (citations omitted).

Defendants Lawrence, Heavy Machines, and Phoenix Insurance Company counter that Lawrence's actions of coming to a stop in traffic three minutes before the second collision, and staying to assist Stevens and McKenzie in attempting to remove the disabled vehicle is not an intervening superseding cause that severs the causal connection between the plaintiffs' injuries and McKenzie's negligence. They further contend that the evidence demonstrated the causative effect the disabled vehicle had, considering the behavior of other motorists that encountered it.

The Lawrence plaintiffs counter that the negligence of McKenzie in falling asleep at the wheel, losing control of his vehicle, rear-ending an 18 wheeler, crashing into a guardrail, and then coming to rest in the left lane of the interstate obstructing traffic was the precipitating event that caused the resulting damages in this suit. They further urge that it was foreseeable that approaching traffic would

be put in a dangerous position due to these actions, and that McKenzie's negligence set off the chain of causation in this catastrophe.

The evidence established that after the first collision, McKenzie's vehicle came to rest "mostly" in the left lane taking up four feet, ten inches of the left lane. The evidence further established that within a matter of minutes, multiple vehicles travelling westbound on I-12 that morning had to either swerve into the right lane to avoid McKenzie's vehicle, or, like Lawrence, came to a sudden stop behind McKenzie's vehicle in the left lane and that Lawrence was stopped behind McKenzie's vehicle for a matter of three to seven minutes before the second collision occurred.

In Adamson's expert opinion, the person responsible for this incident that resulted in Gerot running into the back of Lawrence's truck was "the careless operation of the vehicle by Mr. McKenzie." Moreover, in Fox's expert opinion, "if the first crash had not happened, Mr. Lawrence would not have stopped on the bridge; and therefore, the [second] crash wouldn't have happened."

If the original tortfeasor could or should reasonably foresee the accident that might occur, he would be liable notwithstanding the intervening cause. Mendoza v. Mashburn, 99-499, 99-500 (La. App. 5th Cir. 11/10/99), 747 So. 2d 1159, 1168, writ denied, 2000-0037 (La. 2/18/00), 754 So. 2d 976, writs not considered, 2000-0040, 2000-0043 (La. 2/18/00), 754 So. 2d 957. On review, we find it was entirely foreseeable that losing control of a vehicle, crashing into a guardrail and obstructing traffic on an interstate highway would result in accidents by following vehicles. See Mendoza v. Mashburn, 747 So. 2d at 1168 ("Obviously, the defendant cannot be relieved from liability by the fact that the risk, or a substantial and important part of the risk, to which he has subjected the plaintiff has indeed come to pass. Foreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence[.]" citing Miller v. Louisiana Gas

Service Company, 601 So. 2d 700, 705 (La. app. 5th Cir.), writs denied, 604 So. 2d 999 & 1001 (La. 1992), quoting W. Prosser, Law of Torts (4th ed. 1971) at 273-74, 288).

In its assessment of liability, the jury obviously rejected the notion that the first and second collisions were separate and distinct events and determined that the second collision would not have occurred but for the first collision, which was caused by McKenzie. Considering the evidence set forth in the record to support the jury's finding, we find no error in the jury's determination.

Accordingly, we likewise find no merit to this assignment of error.

CONCLUSION

Based on the above and foregoing reasons, the January 19, 2017 judgment of the trial court is hereby affirmed. Costs of this appeal are assessed to the defendants/appellants, Phoenix Insurance Company and Travelers Property Casualty Company of America.

AFFIRMED.