NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 CA 0385

DOUGLAS POURCIAU

VERSUS

DENNIS MELVILLE AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Judgment rendered September 21, 2018.

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, State of Louisiana
Trial Court No. C645056
Honorable R. Michael Caldwell, Judge

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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Welch Jr. concurs without reasons.

PETTIGREW, J.

In this case involving an intersectional collision, both the plaintiff and defendant appeal the trial court judgment. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Douglas Pourciau and Dennis Melville were involved in an automobile accident on December 15, 2015, at the intersection of Millerville Road and the entrance ramp of I-12 in Baton Rouge. At this intersection, Millerville Road consists of two northbound lanes, two southbound lanes, and a southbound left-turn lane. The intersection is controlled by a traffic signal. Prior to the accident, Pourciau was traveling in the outside northbound lane of Millerville Road closest to the shoulder, and Melville was stopped at the traffic signal in the southbound left-turn lane behind two or three other left-turning motorists. After the green left-turn arrow was illuminated, Melville followed the vehicles in front of him in turning left to enter the I-12 entrance ramp. Melville had almost completely cleared the intersection when the front end of Pourciau's vehicle struck the passenger side rear fender of Melville's vehicle, as Pourciau entered the intersection. Both parties gave written statements to the police officer investigating the accident, in which Pourciau claimed that he had a green light at the time of the accident, and Melville claimed that he had a green left-turn arrow at the time of the accident.

Pourciau filed a petition for damages against Melville and his insurer, State Farm Mutual Automobile Insurance Company ("State Farm"), for personal injuries and property damage arising from the accident. Prior to trial, the parties stipulated to the amount of Pourciau's past medical expenses and the damages associated with the total loss claimed by Pourciau.

After a bench trial held on June 13, 2017, the trial court rendered judgment in favor of Pourciau in the amount of $27,293.76, consisting of $8,278.76 in property damage, $10,015.00 in past medical expenses, and $9,000.00 in general damages. The trial court allocated eighty percent of the fault for the accident to Pourciau and twenty percent of the fault to Melville, and ordered the award of damages to Pourciau

reduced by his percentage of fault. The court also assessed court costs, deposition costs, and court reporter fees to Melville and State Farm.

Pourciau appealed, assigning the following trial court errors:

1. Because there exists a legal presumption of the defendant's negligence when a plaintiff proves the defendant executed a left hand turn, the trial court erred in finding Dennis Melville only 20% at fault for the accident. The trial court verdict was an abuse of its discretion, manifestly erroneous, and clearly wrong.

2. The trial court erred in its calculation of the award of general damages to Douglas Pourciau.

3. The trial court erred in failing to award future medical expenses to Douglas Pourciau.

4. The trial court erred in failing to award "loss of use" damages to Douglas Pourciau as a result of the total loss of his vehicle.

Dennis Melville and State Farm also appealed the trial court judgment, assigning the following trial court error:

1. The trial court erred in assessing 20% or any amount of fault to the defendants-appellants, Dennis Melville and State Farm Mutual Automobile Insurance Company.

DISCUSSION

Allocation of Fault

Both parties argue on appeal that the trial court erred in its allocation of fault between the parties.

Louisiana Revised Statutes 32:232, which governs traffic-control signals, provides that vehicular traffic facing a circular green signal may proceed straight through or turn right or left, but shall stop and yield the right-of-way to other vehicles lawfully within the intersection at the time such signal is exhibited. La. R.S. 32:232(1)(a). Further, vehicular traffic facing a green arrow signal may cautiously enter the intersection to make the movement indicated by such arrow, but shall stop and yield the right-of-way to other traffic lawfully using the intersection. La. R.S. 32:232(1)(b).

A motorist approaching an intersection who is favored with a green light cannot depend exclusively on a favorable light, but has a duty to watch for vehicles already in the intersection when the light changed; however, this duty does not extend to looking

for approaching traffic that has not yet entered the intersection. **Hampton v. Marino**, 97-1345, pp. 8-9 (La. App. 1 Cir. 11/6/98), 725 So.2d 503, 509.

A left turn is a dangerous maneuver, and a driver has a duty not to attempt the turn until he ascertains it can be completed safely. Thus, once it has been established that a motorist was attempting to make a left turn when an accident occurred, the burden of proof shifts to the left-turning motorist to absolve himself of liability. This burden remains despite the existence of a left-turn signal at the intersection in question, but the burden may be discharged by proof that the green arrow signal was illuminated. **Hampton**, 97-1345, p. 9, 725 So.2d at 509, citing **Christaw v. O'Bryant**, 535 So.2d 1020, 1022 (La. App. 2 Cir. 1988); **writ denied**, 536 So.2d 1223 (La. 1989). Nevertheless, a left-turning motorist is required to exercise a very high degree of care, even where the motorist executes his turn on the authority of an illuminated left-turn signal. **Tipton v. Menard**, 467 So.2d 126, 128 (La. App. 3 Cir. 1985).

Melville testified at trial that prior to beginning his left turn onto the I-12 entrance ramp, he was stopped at a red light in the southbound left-turn lane on Millerville Road, behind two or three other cars that were waiting to turn left. He denied seeing Pourciau's vehicle approaching the intersection while waiting in the left-turn lane or at any time prior to the collision. Once the green left-turn arrow signal was illuminated, Melville testified that the cars in front of him proceeded through the intersection, and he had almost completed his left turn and cleared the intersection when he saw a flash in his peripheral vision and felt an impact. Melville's testimony that he had almost completely cleared the intersection was corroborated by the fact that the collision occurred in the intersection, in the far right northbound lane of travel, closest to the shoulder, and the damage to his vehicle was located on the rear quarter panel, from behind the wheel to the bumper.

Pourciau testified that just south of the intersection where the collision occurred, there is an overpass where Millerville Road crosses over the interstate. As he was traveling north on Millerville Road that morning, he stopped at a red light at the

intersection just before the overpass. After the light turned green, he continued north, traveling over the overpass. When he reached the top of the overpass, he testified that he could see that he had a green light at the intersection below, so he "just kept on going." As he approached the intersection, he saw a white car make a left turn in front of him, but he did not slow down when he saw the white car because he did not feel he was in any danger of hitting it. However, after the white car cleared the intersection, Pourciau suddenly noticed Melville's truck, which was right behind the white car, in front of him. He testified that he took his foot off the accelerator to apply the brake, but was unable to avoid hitting the rear passenger fender of the truck.

Ingolf Partenheimer, a traffic engineer, testified at the trial about the traffic signal at the intersection where this accident occurred. Partenheimer testified that at the time of the accident, the lights were working correctly. According to Partenheimer, the green left-turn arrow signal for Melville's southbound left-turn lane would have remained illuminated for 33.5 seconds, which was enough time for 14 to 15 cars to pass through the intersection before the light changed. Regarding Pourciau's traffic signal, Partenheimer explained that both the traffic signal at the intersection where the accident occurred and the traffic signal at the prior intersection were operated by a single traffic signal controller. Thus, he explained that if Pourciau's vehicle was the first vehicle stopped at the red light at the prior intersection, and he proceeded north once that light turned green, then there would be enough time for Pourciau to travel over the overpass and through the next intersection before the light turned red at the second intersection.

There is no dispute that Melville was making a left turn at the intersection. However, Melville testified that the green left-turn arrow for his lane was illuminated at the time he turned, and Pourciau testified that he had a green light when he approached the intersection. In ruling, the trial court noted the conflicting testimony of the parties as to who had a green light or green left-turn arrow, but stated that it found Melville to be the more believable witness. The trial court did not believe Pourciau's testimony that he had a green light at the time he entered the intersection, but stated

that even if he had, since Melville had obviously preempted the intersection, Pourciau had a duty to yield the right-of-way to him. Despite the trial court's conclusion that Pourciau did not have a green light at the time he entered the intersection and failed to yield the right-of-way to a motorist who had preempted the intersection, the trial court also found that Melville breached the "duty to see what he should have seen," because he testified that he did not see Pourciau's vehicle approaching until right before it hit him. Based on these findings, the court allocated eighty percent of the fault to Pourciau and twenty percent of the fault to Melville.

It is well settled that the allocation of fault is a factual matter within the sound discretion of the trier of fact and will not be disturbed on appeal in the absence of manifest error. If an appellate court finds that the apportionment of fault is clearly wrong, 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 trial court's discretion. **Toussaint v. Baton Rouge Gen. Med. Ctr.**, 18-0029, p. 9 (La. App. 1 Cir. 6/4/18), ___ So.3d ___, ___. However, when there is evidence before the trial court that, upon the trial court's reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, the appellate court should not disturb this finding absent manifest error. The manifest error standard demands great deference to the trier of fact's findings, since 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). Thus, where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. **Id.**

In assessing the nature of the conduct, various factors may influence the degree of fault assigned, including: (1) whether the conduct results from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. The relationship

between fault/negligent conduct and the harm to the other party are considerations in determining the relative fault of the parties. **Gohres v. Dryer**, 09-0473, p. 8 (La. App. 1 Cir. 11/18/09), 29 So.3d 640, 646.

Since the trial court determined that Melville's green left-turn arrow was illuminated at the time he turned, his burden of proof as a left-turning motorist to absolve himself of liability was discharged. **Hampton**, 97-1345, p. 9, 725 So.2d at 509. However, Melville was still required to exercise a very high degree of care, even though he executed his turn on the authority of an illuminated green left-turn arrow signal. **See**, **Tipton**, 467 So.2d at 128. Despite the trial court's finding that Melville had lawfully entered and preempted the intersection, obligating Pourciau to yield the right-of-way to him, the trial court also concluded that Melville should have seen Pourciau's oncoming vehicle if he was exercising the appropriate degree of care while executing his turn, and that a failure to do so was negligence on his part. [R186] After a careful review of the evidence, we cannot say that the trial court's allocation of fault in this case was manifestly erroneous.

General Damages Award

In his next assignment of error, Pourciau argues that the trial court abused its discretion in only awarding $9,000.00 in general damages, considering he suffered "internal derangement, internal disruption, and posterior subligamentous herniation of the C5-6 intervertebral disc, exacerbation of middle and lower back pain, and head pain" as a result of the accident.

Pourciau testified that he was healthy and in good shape prior to this accident. Although he had undergone two prior surgeries on his lower back involving fusion and placement of rods and screws, he alleged that he was not receiving any treatment for his lower back at the time of this accident, and he denied having any neck injuries prior to this accident.

No ambulance was called to the scene of the accident, but Pourciau began to realize that he was injured late that evening and the next day. He first sought medical

attention for his injuries two days after the accident with a chiropractor, Dr. Peter Dickinson.

At his first appointment with Dr. Dickinson on December 17, 2015, Pourciau completed a number of patient intake forms. Throughout these forms, he consistently described mid-back pain, lower back pain, and headaches, but never mentioned neck pain. Pourciau was unable to explain why he did not list neck pain on any of the intake forms, but testified that he was certain that he mentioned neck pain to Dr. Dickinson.

Dr. Dickinson's report from the December 17, 2015 office visit states that Pourciau's main complaint on that date was low back pain, but he testified that Pourciau also complained of mid back pain, right leg radicular pain, and headaches. On examination, he found that Pourciau also had some neck pain with decreased range of motion. X-rays of his cervical and lumbo-pelvic region were taken, and were consistent with a sprain or strain type of injury to his neck and lower back, more than likely due to the accident. Dr. Dickinson recommended conservative therapy via chiropractic care, and Pourciau continued to treat with him several times a week for the next three months. Over the course of these visits, Pourciau's reported pain level went from an 8/10 on December 19, 2015, to a 3/10 on March 16, 2016. Pourciau did not return after his March 16 visit.

An MRI of Pourciau's neck and lower back was obtained on February 2, 2016, which Dr. Dickinson testified revealed two bulging discs and facet arthrosis in the lumbar spine, as well as a herniated disc in the cervical spine. Dr. Dickinson believed that one of the bulging discs in the lumbar spine, as well as the facet arthrosis, most likely pre-dated the accident at issue herein. He believed that there was about a fifty percent chance that the other bulging disc in the lumbar region also pre-dated the accident. However, based on the history given to him by Pourciau regarding his neck injury, he believed that the cervical disc herniation was more likely than not caused by the December 15, 2015 accident. Based on the results of the MRI, Dr. Dickinson referred Pourciau to an orthopedic specialist for further evaluation and treatment, but

testified that at that time he felt Pourciau could benefit from continued conservative chiropractic treatment as well.

Despite Dr. Dickinson's orthopedic referral in late February 2016, and despite Pourciau's testimony that he was still in pain from the accident at the time of the trial, he did not see an orthopedist and did not seek any further treatment for his symptoms following his March 16, 2016 appointment with Dr. Dickinson. Pourciau explained that he was self-treating by "taking four to six Tylenol a day to relieve the pain . . . so I can tolerate it, so I can function." He testified that his injuries have prevented him from doing certain things around the house, like cutting the grass or climbing a ladder, and from playing with his grandchildren like he used to, but that he is still able to enjoy his gardening hobby.

In awarding general damages to Pourciau for his injuries, the trial court noted that Pourciau treated for three months with a chiropractor for his low back and neck pain and had an MRI, which indicated the possibility of a herniated disc. However, the trial court questioned the "extent of [Pourciau's] symptomology for the neck," since he did not list neck pain on the chiropractor's intake form and only took four to six Tylenol a day for his pain. Considering these factors, the trial court awarded $9,000.00 in general damages for Pourciau's injuries arising from the accident.

In awarding damages, 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 to the highest or lowest point of an award within that discretion. **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).

Based on the evidence presented to the trial court regarding his injuries, especially the fact that he discontinued treatment after three months and was only self-

treating with Tylenol, we cannot say that the trial court abused its great discretion in awarding Pourciau $9,000.00 in general damages for his injuries.

Future Medical Expenses

Pourciau's next assignment of error is that the trial court erred in failing to award future medical expenses, considering Dr. Dickinson's testimony that he recommended further treatment for Pourciau's herniated cervical disc.

Under Louisiana law, a tort victim may recover past (from injury to trial) and future (posttrial) medical expenses caused by tortious conduct; however, in order to recover future medical expenses, he must prove by a preponderance of the evidence that he incurred past medical expenses in good faith as a result of his injury and that future medical expenses will more probably than not be incurred. A plaintiff shows the probability of future medical expenses with supporting medical testimony and estimations of their probable cost. Importantly, future medical expenses must be established with some degree of certainty. **Menard v. Lafayette Ins. Co.**, 09-1869, p. 12 (La. 3/16/10), 31 So.3d 996, 1006.

Dr. Dickinson testified that at the time of his last visit with Pourciau on March 16, 2016, he believed that Pourciau could benefit from continuing conservative chiropractic treatment in addition to any treatment recommended by the orthopedic specialist, and estimated that future conservative chiropractic care might cost between $2,500.00 and $3,000.00. He based this opinion on Pourciau's condition the last time he saw him, which was more than a year prior to his deposition, and admitted that he had no knowledge of Pourciau's current medical condition. There was no evidence presented regarding the cost of possible future orthopedic care, and it is undisputed that Pourciau did not see an orthopedist as recommended.

At trial, Pourciau was asked whether he had any intention of getting future medical treatment, since he had been self-treating his symptoms for more than a year, did not go to the orthopedic specialist as recommended, and did not continue treatment with Dr. Dickinson. He responded, "I plan on doing it, if it keeps it up. I'm tired as hell taking four to six Tylenol a day, you know, extra strength Tylenol."

The reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts. **Perkins v. Entergy Corp.**, 00-1372, p. 10 (La. 3/23/01), 782 So.2d 606, 613.

Based on the evidence presented, we cannot say that the trial court erred in concluding that Pourciau did not carry his burden of proving that he would incur future medical expenses. At the time of trial, Pourciau had not sought any medical treatment for his injuries in over a year and was taking Tylenol for his symptoms. The trial court questioned the extent of any neck pain Pourciau experienced. Additionally, although Dr. Dickinson did testify that he felt Pourciau would need treatment in the future, he had not seen Pourciau in over a year at that point and had no knowledge of his current condition or whether he was still experiencing any pain. This assignment of error has no merit.

Loss of Use of Vehicle

In his final assignment of error, Pourciau argues that the trial court erred in failing to award him damages for his loss of use of the vehicle, in addition to the value of the vehicle.

Damages for loss of use of a car which has been totaled are recoverable only for a reasonable time after the plaintiff learns that the car is a total loss. The measure of loss-of-use damages is normally the cost of renting a substitute vehicle until a replacement vehicle is purchased; however, this award need not be restricted to rental. **Neloms v. Empire Fire & Marine Ins. Co.**, 37,786, pp. 12-13 (La. App. 2 Cir. 10/16/03), 859 So.2d 225, 233. The trial court is given a great deal of discretion to determine the damages awarded for loss of use of a vehicle, and where there is no

doubt that a plaintiff suffered considerable inconvenience and mental anguish from the loss of use of his vehicle, the court can award damages for that loss of use. **Alexander v. Qwik Change Car Center, Inc.**, 352 So.2d 188, 190 (La. 1977).

Pourciau's vehicle, a 1999 Toyota Tacoma, was not drivable after the accident. The parties stipulated that the vehicle was declared a total loss and that Pourciau's damages in connection with the total loss were $7,450.00 for the market value of the vehicle and $828.76 for towing and storage fees. At trial, Pourciau testified that he was not currently in possession of the vehicle, that it was not ever repaired, and that he does not currently have transportation. Pourciau had been retired since before the accident, and there was no testimony that he rented a replacement vehicle after his vehicle was damaged, nor was there any testimony about any inconvenience or mental anguish he suffered related to the loss of use of his vehicle. Based on the lack of evidence presented, we cannot say that the trial court erred in failing to award damages for loss of use of his vehicle.

CONCLUSION

For the reasons set forth herein, the judgment of the trial court is affirmed. Costs of this appeal are to be shared equally by the parties.

AFFIRMED.