

**NOT DESIGNATED FOR PUBLICATION**

<b>VINCENT THOMAS, MARY</b>	<b>*</b>	<b>NO. 2000-CA-2150</b>
<b>THOMAS AND VINCENT</b>	<b>*</b>	<b>COURT OF APPEAL</b>
<b>THOMAS, ON BEHALF OF HIS</b>	<b>*</b>	<b>FOURTH CIRCUIT</b>
<b>MINOR CHILD, MEGHAN</b>		
<b>THOMAS</b>		
<b>VERSUS</b>	<b>*</b>	<b>STATE OF LOUISIANA</b>
<b>NEW ORLEANS FISH HOUSE,</b>	<b>*</b>	
<b>INC., ALLSTATE INSURANCE</b>		
<b>COMPANY, CHARLES</b>	<b>*</b>	
<b>BOOZER AND HANOVER</b>	<b>*****</b>	
<b>INSURANCE COMPANY</b>		

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 94-9067, DIVISION "F-10"  
Honorable Yada Magee, Judge  
\*\*\*\*\*  
**Judge David S. Gorbaty**  
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(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

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**AFFIRMED**

Defendants, New Orleans Fish House, Inc., Charles Boozer, and Allstate Insurance Company, appeal a judgment wherein they were cast in judgment for injuries sustained by Vincent Thomas, his wife, Mary, and his daughter, Meghan. For the following reasons, we affirm.

**FACTS AND PROCEDURAL HISTORY:**

On June 26, 1993, Mr. Thomas and his family were driving on Esplanade Avenue in the direction of City Park when their van broke down. Mr. Thomas pulled the van to the side of the road, near the intersection of Esplanade Avenue and Ponce de Leon. He got out of the van, lifted the hood, and attempted to discover the cause of the break down. Mr. Thomas claims that he stood in front of his van to look under the hood, then walked to the driver's side window to tell his wife that they would have to be towed. As he was speaking with his wife, he noticed a truck approaching from his

right. As the truck drew nearer and he realized that the truck was going to hit him, he turned toward the truck and raised his hands up over his head and face in an attempt to protect him from the impact. Mr. Thomas claims that the truck's side view mirror struck him in his hands and lower arms, knocking him backward. He landed on his hip, but did not recall striking his head on the pavement. He was taken by ambulance to the hospital where he was treated for a dislocated finger and released.

Charles Boozer, a truck driver for New Orleans Fish House, Inc., testified that he was heading towards City Park on Esplanade Avenue to make a delivery at Gabrielle's Restaurant. He claims that when he was two to three car lengths away from the Thomas vehicle, he noticed a man's legs sticking out from the side of the hood. He applied his brakes, However, as he drew parallel to the van, the man suddenly stood upright, placing himself in Mr. Boozer's path. Because there was another vehicle in the left lane, Mr. Boozer could not swerve to avoid hitting Mr. Thomas, and struck him with the side view mirror on his truck.

Mr. Thomas alleged in his petition that as a result of the accident he broke his left index finger causing permanent disability, suffered a

concussion with subsequent post concussion syndrome, injured his hip and back, and lost wages. His wife, Mary, witnessed the accident and suffered a loss of support and consortium. His four-year-old daughter, Meghan, also witnessed the accident and feared that her father had been killed. She also suffered a loss of her father's support, as well as emotional distress.

After a bench trial, the trial court rendered judgment in favor of plaintiffs, finding Charles Boozer one hundred percent responsible for the accident, and holding New Orleans Fish House, Inc., Charles Boozer and Allstate Insurance Company liable *in solido* in the following amounts: \$40,500 to Vincent Thomas, reduced by \$10,000 for his failure to mitigate damages; \$7,000 to Mary Thomas for loss of support and consortium; and, \$1,000 to Meghan Thomas for *Lejuene*-type damages. The trial court explained in oral reasons for judgment that it found Mr. Boozer failed to keep a proper lookout and failed to see what he should have seen. The court found that although Mr. Boozer did apply his brakes when he saw Mr. Thomas near the roadway, he did not stop completely to avoid hitting him. Instead, he attempted to maneuver his truck between where Mr. Thomas was standing and a car traveling in the left lane next to the truck, thereby striking

Mr. Thomas with the mirror.

The trial court awarded damages to Mr. Thomas for his dislocated finger, injury to his hip, post-concussion syndrome, and post-traumatic stress disorder. However, because it found that Mr. Thomas failed to take prescribed medication that would lessen the effects of the post-traumatic stress disorder, it reduced the award by \$10,000. The court made an award to Mary Thomas, finding that she suffered a loss of services and consortium as a result of the accident. The court rejected Ms. Thomas' claim for damages pursuant to La. Civ. Code art. 2315.6. However, the trial court did make an award to Meghan Thomas to compensate her for the fright she experienced in seeing her father knocked to the ground by Mr. Boozer's truck.

Defendants appeal the judgment, asserting as their sole assignment of error that the trial court erred in finding one hundred percent liability on the part of Charles Boozer. Plaintiffs answer the appeal asserting that the trial court erred in reducing Mr. Thomas' award for failure to mitigate damages. For the following reasons, we affirm the judgment.

**DISCUSSION:**

### **A. Defendants' Appeal:**

In their sole assignment of error, defendants claim that the trial court committed manifest error in not finding Mr. Thomas at fault for his injuries, considering that he stepped from a position of safety into the path of the truck being driven by Mr. Boozer.

The manifest error standard of review limits an appellate court's ability to upset factual findings of the trial court. *Hill v. Morehouse Parish Police Jury*, 95-1100, p. 4 (La. 1/16/96), 666 So.2d 612, 614. Before an appellate court can reverse a fact finder's verdict, it must find from the record that a reasonable factual basis does not exist for the verdict, and that the record establishes the verdict is manifestly erroneous. *Lewis v. State, through Dept. of Transp. and Dev.*, 94-2370 (La. 4/21/95), 654 So.2d 311; *Stobart v. State, through Dept. of Transp. and Dev.*, 617 So.2d 880 (La. 1993). The appellate court must give deference to the trial court's findings; however, the appellate court also has a constitutional duty to review the record in its entirety, and determine whether the trial court's findings were manifestly erroneous, clearly wrong based on the evidence, or clearly without evidentiary support. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La. 2/20/95), 650 So.2d 742; *Ambrose v. New Orleans Police Dept. Ambulance Serv.*, 93-3099 (La. 7/5/94), 639 So.2d 216. After a thorough

review of the record, we do not find that the trial court was clearly wrong in its findings.

Mr. Thomas testified that he worked under the hood of his van from the front, contrary to Mr. Boozer's testimony that he was situated on the side of his van with his legs sticking out. However, Mr. Thomas does admit that at some point he walked to the driver's side of his van to speak with his wife who was seated behind the steering wheel. In that respect, it is not disputed that Mr. Thomas was on the street side of his vehicle as Mr. Boozer's truck approached. There is a dispute as to where Mr. Thomas was located when the mirror on Mr. Boozer's truck struck him. Mr. Thomas claims that he was not in the lane of travel, but was very close to the side of his van. Mr. Boozer claims that Mr. Thomas stepped back into his lane of travel just before he reached him, making it impossible for Mr. Boozer not to strike him. Both men testified that there was another vehicle in the left lane traveling nearly parallel to the fish truck.

Samuel Reed, Mr. Boozer's helper and a passenger in the truck, testified that he also saw Mr. Thomas' legs sticking out from the side of the van. As they approached in the truck, Mr. Thomas suddenly stood up, saw the truck about to hit him, and for some inexplicable reason, tried to run across the street, thereby putting himself directly in front of the oncoming

truck. The trial court found this testimony to be implausible, and we agree.

Mary Thomas testified that she was speaking with her husband who was standing at the driver's side window, when he suddenly exclaimed that an approaching truck did not see him, and was going to hit him. He put his arms up to protect his face and head, but was struck by the mirror.

The trial court concluded that Mr. Boozer was one hundred percent at fault for the accident. Regardless of whether Mr. Thomas was entirely in the street or partly in the parking zone, Mr. Boozer, instead of stopping his vehicle, tried to maneuver his truck between Mr. Thomas and the vehicle in the left lane. Because the record supports the trial court's conclusions, we cannot say it was manifestly erroneous in finding Mr. Boozer's actions to be the sole cause of the accident.

**B. Plaintiffs' Answer to Appeal:**

Plaintiffs assert that the trial court erred in reducing Mr. Thomas' award for his failure to mitigate his damages. Specifically, the trial court found that Mr. Thomas refused to take medication to control the symptoms of his post-traumatic stress disorder.

Plaintiffs first claim that the trial court erred in reducing the award because the defendants did not assert failure to mitigate damages as an affirmative defense in their answer pursuant to La. Code Civ. Proc. art.



1005.

Generally, affirmative defenses must be raised in the answer of the defendant. However, if a defendant introduces evidence of an affirmative defense, without objection by the plaintiff, the pleadings are considered to be enlarged to include the affirmative defense, and the court can proceed as though the affirmative defense has been raised. *DLJ of Louisiana #1 v. Green Thumb, Inc.*, 376 So.2d 121, 122, fn. 9 (La. 1979); *Sanders v. New Orleans Public Serv., Inc.*, 422 So.2d 232, 234 (La.App. 4 Cir. 1982).

Our review of the record reveals that plaintiffs failed to object to evidence of Mr. Thomas' failure to mitigate introduced by defendants at trial. Thus we find no error in the trial court proceeding to address the evidence as an affirmative defense.

Plaintiffs also claim that the trial court erred in applying the wrong duty to plaintiff with regard to mitigation of damages. They claim that the duty only requires that the injured party take reasonable steps to minimize the consequences of his injury. The standard to be applied is that of a reasonable man under like circumstances.

Defendants have the burden of proving both that plaintiff's actions after the accident were unreasonable, and that this unreasonable conduct aggravated his injury. *Johnson v. Louisiana Power & Light Co.*, 98-2271, p.

728 (La.App. 4 Cir. 6/9/99, 740 So.2d 720, *writ denied* 99-2011 (La. 10/15/99), 748 So.2d 1152. The plaintiff need not make extraordinary or impractical efforts, but must undertake those efforts that a person of ordinary prudence would make under the circumstances. *Jacobs v. New Orleans Public Serv., Inc.*, 432 So.2d 843 (La. 1983).

The trial court stated in its reasons for judgment that the testimony adduced at trial “was overwhelming that Mr. Thomas failed to mitigate his damages, by refusing to take medication to control the symptoms that he was experiencing as a result of the post traumatic stress disorder.” Although our review of the record does not reveal “overwhelming” evidence of Mr. Thomas’ failure to mitigate his damages, there is sufficient evidence to support the trial court’s conclusion.

Dr. Herman Colomb, a psychiatrist who treated Mr. Thomas four years post-accident after Mr. Thomas suffered a recurrence of his post-traumatic stress disorder, testified that he saw Mr. Thomas on four occasions from January to April of 1997. Dr. Colomb recalled from his notes that Mr. Thomas related feelings of anxiousness and depression. It was the doctor’s opinion that prescription medication could substantially relieve Mr. Thomas of these symptoms, and, in fact, opined that an antidepressant could clear up two-thirds of the symptoms of depression. However, his notes indicated that

Mr. Thomas refused any type of medication because he feared it would interfere with his work and home life. There was no evidence offered by the plaintiff that this fear was based in fact.

Because Mr. Thomas testified that he continued to suffer from post-traumatic stress disorder at the time of trial, six years post-accident, it is not clearly wrong for the trial judge to find that his refusal to take medication worsened his symptoms of depression and anxiety. Therefore, we will not disturb the trial court's finding that Mr. Thomas failed to mitigate his damages.

Accordingly, for the above reasons, we affirm the judgment of the trial court.

**AFFIRMED**