

NOT DESIGNATED FOR PUBLICATION

MERLIN DEGRUY * NO. 2004-CA-0510
VERSUS * COURT OF APPEAL
DEEP SOUTH EQUIPMENT * FOURTH CIRCUIT
COMPANY, ABC INSURANCE * STATE OF LOUISIANA
COMPANY, SPENCER *
STOCKSTILL AND DEF *
INSURANCE COMPANY *

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-19916, DIVISION "G-11"
Honorable Robin M. Giarrusso, Judge

Judge Roland L. Belsome

(Court composed of Judge David S. Gorbaty, Judge Leon A. Cannizzaro Jr.,
Judge Roland L. Belsome)

(CANNIZZARO, J. CONCURS IN THE RESULT WITH REASONS)

Jacqueline Mae Goldberg
10555 Lake Forest Boulevard
Deer Park, Suite 3-E
New Orleans, LA 70127
COUNSEL FOR PLAINTIFF/APPELLANT, MERLIN DEGRUY

Lyon H. Garrison
Philip E. Reso
PRESTON & COWAN, L.L.P.
909 Poydras Street

Suite 2400

New Orleans, LA 70112

*COUNSEL FOR DEFENDANTS/APPELLEES, DEEP SOUTH
EQUIPMENT COMPANY AND SPENCER STOCKSTILL*

**AFFIRME
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This appeal arises out of an August 10, 2001, automobile accident. After a bench trial, judgment was rendered in favor of Merlin Degruy (Degruy) and against defendants, Spencer Stockstill (Stockstill) and Deep South Equipment Company (Deep South). Degruy was found to be 50% at fault in the accident. For the reasons assigned below, we affirm the judgment of the trial court.

FACTS

At the time of the accident, Degruy was driving his pick up truck northbound in the left lane of Michoud Boulevard in New Orleans. Stockstill, who was driving a tractor/trailer rig in the course and scope of his employment with Deep South, was in the right lane going northbound on Michoud Boulevard. Degruy alleged that Stockstill, in an attempt to make a wide right turn into Deep South's driveway, came into the left lane, thereby causing the collision between the two vehicles. Stockstill, on the other hand, admitted to making a wide right turn, but claimed that Degruy attempted to

pass him on the right, thereby causing the collision.

After a trial on the merits, the Honorable Robin M. Giarrusso rendered judgment in favor of Degruy: \$15,000.00 in general damages, \$6,272.98 in medical expenses, \$5,000.00 in future lost wages plus interest. Degruy's recovery was reduced by 50% for his comparative negligence. As stated in the Reasons for Judgment, the trial court concluded that both parties were at fault in causing the accident and, specifically, that "whatever version is believed, the other driver had an opportunity to avoid the accident." This is Degruy's timely appeal from that judgment.

On appeal, Degruy raises the following assignments of error: 1) the trial court erred in finding Degruy 50% at fault in the accident; 2) the general damage award was inadequate; and 3) the trial court erred in not granting past lost wages. Thus, the scope of this appeal focuses solely on the factual findings of the court below.

It is a well-settled principle that an appellate court may not set aside a trial court's finding of fact unless it is clearly wrong. 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. *Rosell v. ESCO*, 549 So.2d 840 (La. 1989). Where two

permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly wrong. *Id.* at 845; *Watson_v. State Farm Fire & Casualty Ins. Co.*, 469 So.2d 967 (La. 1985). Where the factfinder's conclusions are based on determinations regarding credibility of the witnesses, the manifest error standard demands great deference to the trier of fact, because only the trier of fact 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*, 469 So.2d at 844.

Assignment of Error No. 1: Degruy's comparative negligence.

Degruy testified that he was traveling in the left lane the entire time he was on Michoud Boulevard. He further stated that while he was in the left lane Stockstill came into his lane attempting to make a wide right turn. Degruy relies on photographs introduced at trial to support his argument that he was free from fault and that he had no opportunity to avoid the accident. Specifically, Degruy maintains that the photographs clearly show the skid marks from Stockstill's truck making a right turn from the left lane. Degruy, however, presented no evidence to show that those particular skid marks were in fact made by Stockstill's vehicle at the time of this accident. No one at the scene was able to verify such a fact, and Degruy failed to present any expert testimony on that issue.

Stockstill testified that he was traveling in the right lane of Michoud Boulevard. Approximately 100 yards before his planned right-turn into Deep South's driveway, he gave a right-turn signal to notify the two vehicles traveling behind him of what he intended to do. He stated that after he signaled, one of the vehicles passed him on the left and the other, Degruy's, remained behind. He proceeded to move half way into the left lane in order to make a wide right turn. At that time, Stockstill claimed that Degruy attempted to pass him on the right. Stockstill further explained that the cab of his rig was already six feet into the driveway when the collision occurred.

The testimony of Michael Smith, an employee of Deep South, corroborated Stockstill's version of the accident. Smith testified that from his position inside of Deep South's yard, he saw Degruy's truck attempt to pass Stockstill on the right.

The trial court considered the evidence and the conflicting testimony of the witnesses, and found each driver to be 50% at fault.

As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. *Clement v. Frey*, 95-1119 (La. 1/16/96); 666 So.2d 607, 609-610. Therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous. *Estate of Hickerson v. Zimmerman*, 02-1195 (La.

App. 4 Cir. 7/16/03), 853 So. 2d 55.

In the present case, the trial court concluded that both drivers had an opportunity to avoid the accident. After our own review of the record, we find no manifest error on the part of the trial court.

Stockstill admitted to “splitting” the left lane in order to make his right turn. It is also clear that he was aware of the vehicle behind him at the time. The photographs introduced at trial show damage to the driver’s side of Degruy’s truck and the passenger side of Stockstill’s rig. This damage is consistent with Stockstill’s statements that Degruy attempted to pass him on the right. The damage is not consistent with Degruy’s testimony that he was traveling in the left lane when the accident occurred. Considering these facts, we conclude that the trial court’s decision was reasonable.

Assignment of Error No. 2: Inadequate award of general damages.

Degruy submits that the award of \$15,000.00 in general damages was too low considering the medical evidence. Specifically, Degruy points to the testimony of his treating physician, Dr. Daniel L. Seltzer. Dr. Seltzer diagnosed Degruy with an impingement syndrome of his left shoulder. Degruy maintained that because he was still suffering from his injury at the time of the trial, some two years after the accident, the award of \$15,000.00 was inadequate.

Vast discretion is accorded the trier of fact in fixing general damage awards. La. C.C. art. 2324.1; *Hollenbeck v. Oceaneering Int., Inc.*, 96-0377 (La. App. 1 Cir. 11/8/96), 685 So.2d 163, 172. This vast discretion is such that an appellate court should rarely disturb an award of general damages. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La.1993). As explained in *Youn*, 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 decrease the award. *Id.* at 1261.

In the present case, Degruy was seen in the emergency room shortly after the accident. He was referred to physical therapy and then to Dr. Seltzer. Degruy visited with Dr. Seltzer only once on February 18, 2002, and underwent an MRI of his left shoulder and lumbar spine. The MRI results were normal, which Dr. Seltzer found to be compatible with mild impingement syndrome and lumbar strain. As explained by Dr. Seltzer, the condition is a result of an inflammation of the soft tissues of the shoulder. Dr. Seltzer found no neurological problems and did not recommend Degruy for surgery.

Degruy testified that he did not continue treatment with Dr. Seltzer because Dr. Seltzer wanted to “stick a needle” in him. Degruy further

testified that he did not seek medical attention from any other physician. Considering Degruy's limited medical treatment and the findings of Dr. Seltzer, we cannot say that the trial court abused its great discretion by awarding \$15,000.00 in general damages.

Assignment of Error No. 3: Failure to award past lost wages.

Degruy testified that he was unemployed at the time of the accident, and that he had no pending job offers. Degruy's testimony further confirmed that he did not attempt to find a job until August or September of 2003. Based on the evidence presented, we find no error on the part of the trial court in failing to award past lost wages.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED