NOT DESIGNATED FOR PUBLICATION



ALICIA BAZILE, INDIVIDUALLY AND ON THE BEHALF OF HER MINOR CHILD, ELDON BAZILE, ETHEL WILLIAMS ON THE BEHALF OF THE MINOR CHILDREN, BRIAN WILLIAMS AND DIMARCO WILLIAMS

VERSUS

HILTON G. BOURGEOIS, JR., MARY B. BOURGEOIS AND ALLSTATE INSURANCE COMPANY

NO. 01-CA-1402

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE FIRST PARISH COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 124,741, DIVISION "B"
THE HONORABLE ROBERT G. CREELY, JUDGE AD HOC

APRIL 30, 2002

# SOL GOTHARD
# JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
Sol Gothard, and Walter J. Rothschild

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(Allstate Insurance Company)

# AFFIRMED

**In this personal injury case, petitioners, Alicia Bazile individually and on behalf of her minor child, Eldon Bazile, and Ethel Williams on behalf of her minor children, Brian and DiMarco Williams, filed suit against Hilton and Mary G. Bourgeois, Jr. and their insurer, Allstate Insurance Company (Allstate) for injuries received in a traffic accident. In due course the matter went to a bench trial on the merits. Judgment was rendered in favor of plaintiffs and against defendants. In the judgment, the Baziles were awarded a cumulative total of $9,932.45 in damages, and the Williams were awarded a cumulative total of $6,275.00 in damages. Defendants, Hilton and Mary Bourgeois and Allstate, appeal the judgment.**

**FACTS**

**At trial the court heard testimony from both drivers, the investigating officer, and an eyewitness regarding the facts of the accident.**

**Officer Larry Lacrouts of the Kenner Police Department, testified that he investigated the accident in question which occurred at the intersection of Maria and Third Streets in Kenner. He observed two vehicles in the right lane heading west on Third Street. The front vehicle, which was an SUV, had moderate damage to the rear. The second vehicle, a smaller car, had heavy damage to both the front and the rear. The front vehicle was driven by Alicia Bazile. Occupants of the vehicle included plaintiffs, Eldon Bazile, Brian Williams, and DiMarco Williams. The second vehicle was driven by Mary Bourgeois and was also occupied by Hilton and Ann Bourgeois. Based on the information obtained by Officer Lacrouts, the accident was classified as a hit and run. In making that determination, the officer considered the statements of both drivers, who stated that the second vehicle was hit in the rear by a red car which left the scene at a high rate of speed. Ms. Bazile told the officer that she had slowed to make a left turn when the accident occurred. Ms. Bourgeois stated that she was behind Ms. Bazile's vehicle traveling at about 30 miles per hour when she was hit in the rear and forced into Ms. Bazile's vehicle by a red car traveling at a high rate of speed. Officer Lacrouts estimated the speed of the third vehicle at about 50 miles per hour at the time of impact. He also stated that there were remnants of both the Bourgeois vehicle and the hit and run car.**

**Cassandra Pittman, an eye witness to the accident, was sitting on her front porch when the accident occurred. She saw the Bazile vehicle stop and attempt to turn left. The Bourgeois vehicle hit the rear of the Bazile vehicle. Then a third vehicle came and hit the second vehicle. That third vehicle pulled out and left the scene. Ms. Pittman called 911 to report the accident. Ms. Pittman testified that she did not know any of the parties involved in the accident. Her testimony makes it certain that the Bourgeois vehicle ran into the rear of the Bazile vehicle before the phantom driver came on the scene. Thus, contradicting her account of the accident to the investigating officer.**

**Alicia Bazile testified that she was driving westbound on Jefferson Highway (Third Street). She put on her left turn indicator and stopped to wait until it was safe to turn. She felt an impact as she was hit in the rear by the Bourgeois vehicle. Then she felt a second impact. With that impact she felt her neck jerk. Ms. Bazile later stated that she felt both impacts and in both, her neck was "jerked."**

**Mary Bourgeois testified that she was driving west on Third Street. She recalls being hit hard in the rear and then being knocked backwards. She recalls seeing the Bazile vehicle, and remembers having her foot on the brake when she was struck in the rear by the hit and run driver.**

**After hearing all of the testimony the trial court found Bourgeois 100% liable for the accident. In making that decision the trial court stated:**

> **From a review of the record, it appears that defendants did not plead "phantom driver" culpability or third party liability in their answer and, therefore, the Court shall assess fault 100% to defendants and 0% to the "phantom driver". Furthermore,**

> **the Court finds that in the event the actions of the "phantom driver" are considered, defendants did not carry their burden of proof regarding which percent of fault the "phantom driver" should be assessed or whether or not the "phantom driver's" actions which resulted in the second impact would have occurred had defendant's vehicle not impacted plaintiff's vehicle first. However, should an appellate review occur and "phantom driver" culpability be assessed, the Court apportions fault 100% to defendants and 0% to the "phantom driver". The reason the Court assesses 100% fault to defendants is that it is unclear from the testimony whether or not defendant's vehicle would have hit the plaintiff's vehicle the second time if it had not hit the plaintiff's vehicle first.**

**On appeal to this Court, defendants maintain that the trial court abused its discretion in assigning 100% fault to defendant and 0% to the phantom driver for defendant's failure to plead phantom driver fault, and for failure to meet their burden of proof. Defendants argue that the pleadings were enlarged to include a claim against the phantom driver when evidence of the driver was admitted at trial without opposition from plaintiffs.**

**LSA-C.C.P. art. 1154 provides in pertinent part:**

> **When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleading. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.....**

**Evidence of issues not contained in the pleadings, that is admitted at trial without objection, serves to enlarge pleadings, and such evidence is treated in all respects as if it had been raised by pleadings. *Hopkins v. American Cyanamid Co.*, 95-1088 (La. 1/16/96), 666 So.2d 615. In the instant matter, evidence to support the liability and fault of the phantom**

**driver was admitted without objection and is, therefore, considered as raised in the pleadings. We find merit in this part of defendants' argument.**

**In the assignment of error, defendants argue that the trial court was manifestly erroneously in its finding that the phantom driver was not at fault. Our review of a factual finding made by the trier of fact is the manifestly erroneous, clearly wrong standard. *Rosell v. ESCO*, 549 So. 2d 840 (La. 1989). In order to reverse, the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court; and, that the record establishes that the finding is clearly wrong. *Id.* We are mindful that this Court must give great weight to the factfinder's findings of credibility and reasonable inferences of fact. *Id.***

**Louisiana law has established a presumption that when a following vehicle rear-ends a vehicle ahead of it, the following vehicle is presumed at fault and must prove a lack of fault to avoid liability. LSA- R.S. 32:81(A), provides:**

> **A. The driver of a motor vehicle shall not 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.**

**A following motorist in a rear-end collision is presumed to have breached this duty, and is presumed negligent. *Hopstetter v. Nicols*, 98-185 (La. App. 5 Cir. 7/28/98), 716 So. 2d 458, *writ denied*, 98-2288 (La. 11/13/98), 731 So. 2d 263; *Ransome v. Bordelon*, 01-1095 (La. App. 5 Cir. 01/15/02) 807 So.2d 1007.**

**In the instant case it is clear that the trial court gave great weight to the unrelated eye witness's testimony. She testified that the Bourgeois vehicle hit the rear of the Bazile vehicle first, then the phantom vehicle struck the rear of the Bourgeois vehicle. Given the facts of this case, we cannot find the trial court was manifestly erroneous in its finding that Bourgeois was 100% at fault in the accident. Accordingly, we affirm the judgment of the trial court.**

# AFFIRMED

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA
101 DERBIGNY STREET (70053)
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# CERTIFICATE

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