ALAN P. WILEY	*	**NO. 2000-CA-1544**
VERSUS	*	**COURT OF APPEAL**
CITY OF NEW ORLEANS, JOHN DOE AND CHRISTY LYNN CURL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 94-10309, DIVISION "K-14"
HONORABLE RICHARD J. GANUCHEAU, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Michael E. Kirby, Judge Max N. Tobias Jr.)

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In this case the Plaintiff, Alan P. Wiley, appeals the allocation of fault by the trial court to the unidentified driver. Defendant, the City of New Orleans, appeals the application of the law of evidence at trial and alleges the evidence was insufficient to establish negligence by a preponderance of the evidence.

STATEMENT OF FACTS

On July 5, 1993, Plaintiff Alan P. Wiley was one of two pedestrians on the sidewalk on the river side of Dauphine walking toward Franklin Avenue in an upriver direction. Suddenly, the stolen vehicle of former defendant Christy Curl, which was traveling in a downtown direction on Dauphine, hit a parked car and then left the roadway, jumped the curb, and struck Plaintiff and barely missed the other pedestrian, his friend George Hughes. The vehicle would have struck Mr. Hughes as well, were it not for the fact that he just had enough time to jump out of the way. The driver of the vehicle fled on foot.

The vehicle struck Mr. Wiley and drove him into a fence and gate

between two houses. The vehicle actually struck one of the houses as well. The owner of that house, testified that it "shook like a banging noise" when the vehicle struck it. When the homeowner ran to the front to see what had happened, she saw that the vehicle had struck the other half of her shotgun double home after smashing her parked car. She found Mr. Wiley in the alley between her house and the one next door.

Mr. Wiley suffered a concussion and at least four separate injuries. One was an injury to his right hip. He broke a tooth in the lower back jaw. He broke his right little finger, which is now crooked. Since Mr. Wiley's profession is a pianist, musician and entertainer, the deformed finger is a serious concern. His gravest injury was a severe closed head brain injury that effectively destroyed his ability to remember.

Mr. Wiley is the first appellant in a double appeal. He does not challenge the Trial Court's damage award. Mr. Wiley filed suit on June 30, 1994, suing: the City of New Orleans as owner and maintainer of Dauphine Street and its intersection with Franklin Avenue; John Doe, the unknown motorist who fled the accident scene; and Christy Lynn Curl, owner of the vehicle which was stolen the evening before this accident. On November

21, 1996, without opposition, the Trial Court granted Summary Judgment in favor of Ms. Curl. The Trial Court conducted a bench trial on two separate days. Besides Mr. Wiley, Mr. Hawes and the home owner, the Plaintiff called James R. Clary, Sr., whom the Court accepted as an expert in the field of land surveying and the design, construction, maintenance and safety of public roads and streets. Three witnesses testified for the Plaintiff by deposition: Gary J. Edwards, a music producer; Warren Pendergast, M.D., Mr. Wiley's treating psychiatrist; and Manley W. Kilgore, II, M.D., Mr. Wiley's treating neurologist. The trial court also considered medical records and City records on this intersection.

The trial court entered its Judgment and Reasons for Judgment on December 21, 1999, setting Mr. Wiley's damages at six hundred thousand dollars ($600,000.00) and apportioning fault one-third (1/3) to the City and two-thirds (2/3) to the unknown thief/driver.

ISSUES PRESENTED

There are three issues that lie at the heart of the resolution of this matter. First, whether the trial court was within its discretion in assigning

the percentages of fault. Second, whether the "fifty-percent (50%) rule" of C.C. art. 2324(B) as it existed prior to the amendment in 1996 applies. And finally, whether the cap on pre-judgment interest applies, under LA.R.S. 13:5112(C).

STATEMENT OF THE LAW

The assignment of percentages of fault is a factual question. Factual findings are afforded much weight in appellate courts and cannot be overturned unless there exists manifest error.

> In our three-tiered judicial system, findings of fact are allocated to the trial courts. 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); *Arceneaux v. Domingue,* 365 So.2d 1330 (La.1978). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly wrong. *Rosell,* supra at 845; *Watson v. State Farm Fire & Casualty Ins. Co.,* 469 So.2d 967 (La.1985); *Arceneaux,* supra at 1333. 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*, supra at 844. The reviewing court must always keep in mind that if a trier of fact's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if convinced that if it had been sitting as trier of fact, it would have weighed the evidence differently. *Stobart v. State, Through DOTD*, 617 So.2d 880 (La.1993); *Housley v. Cerise*, 579 So.2d 973 (La.1991); *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106 (La.1990).
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> For the reviewing court, the issue to be resolved is not whether the trier of fact was wrong but whether the factfinder's conclusions were reasonable. *Stobart*, supra at 883; *Theriot v. Lasseigne*, 640 So.2d 1305 (La.1994).

Mistich v.Volkswagen of Germany, Inc. 95-0939, (La. 1/29/96), 666 So.2d 1073, 1077.

The City was sued on the theory of negligent design, construction and maintenance of a dangerous and unfit zigzag intersection. It is a permissible view of the evidence presented at trial that the City had some fault for maintaining a misaligned street that forced the driver to zigzag, coupled with a shifting crown height or slope that had the effect of throwing a speeding driver to the curb.

We have reviewed the record and find no manifest error in the finding of the trial court. The assignment of two-thirds of the fault on the phantom

driver/thief and one-third of the fault to the City was within the trial court's discretion.

The City also argues that Mr. Clary's expert testimony should not have been admissible because it was based upon inadmissible hearsay, i.e. police accident reports. However, the 1988 official comments (d) to the Louisiana Code of Evidence Article 703 states:

> Under this Article the facts or data underlying the expert witness' opinion may properly be: … (3) under designated circumstances, facts or data not admissible in evidence (because, for example, their source is inadmissible hearsay), if they are of a kind reasonably relied upon by experts in the particular field in arriving at their opinions or inferences. … Whether the facts or data may be "reasonably relied upon" in this fashion is a question for the court under Article 104(A). See 3 J. Weinstein & M. Berger, Weinstein's Evidence 703[03](1984).

We find no error in the trial court's ruling that the evidence was inadmissible hearsay *per se*, but could be used as a basis for expert testimony.

The next issue that we must address is whether "the fifty-percent rule" applies. The Judgment ascribes one-third of all fault to the City and two-thirds fault to the unknown driver. This accident occurred on July 5, 1993. The Plaintiff filed his Petition for Damages on June 30, 1994.

Act 3 of the First Extraordinary Session of 1996 amended Civil Code

Article 2324 to repeal solidary liability among tortfeasors, but left open whether the amendment was retroactive. In *Aucoin v. State Department of Transportation and Development*, 97-1967, 10 (La. 4/24/98), 712 So.2d 62, 67, the Louisiana Supreme Court settled that question:

> That shift from solidary liability to joint and several obligation altered the existing rule. Moreover, since the amendment resulted in changing the amount of damages recoverable, the change was clearly substantive. [citation omitted] As such, the amendment can have only prospective application. [citation omitted] Therefore, the applicable article 2324(B) was that which existed at the time of the accident.

Prior to the 1996 amendment, Louisiana Civil Code Procedure Article 2324 (B) stated:

> B. If liability is not solidary pursuant to Paragraph A, or as otherwise provided by law, then liability for damages caused by two or more persons shall be solidary only to the extent necessary for the person suffering injury, death, or loss to recover fifty percent of his recoverable damages; however, when the amount of recovery has been reduced in accordance with the preceding Article, a judgment debtor shall not be liable for more than the degree of his fault to a judgment creditor to whom a greater degree of fault has been attributed. Under the provisions of this Article, all parties shall enjoy their respective rights of indemnity and contribution. Except as described in Paragraph A of this Article, or as otherwise provided by law, and hereinabove, the liability for damages caused by two or more persons shall be a joint, divisible obligation, and a joint tortfeasor shall not be solidarily liable with any other person for damages

> attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, or immunity by statute or otherwise.

Former Article 2324(B) applies to this case in full. The City's fault combined with the phantom driver's fault to cause this accident. That combination of fault makes the City and the phantom driver joint tortfeasors according to this Article. The judgment creditor, Mr. Wiley, was completely free from fault.

In accordance with C.C. art. 2324(B) as it existed prior to its 1996 amendment, so that Mr. Wiley recovers half of his damages, we amend the trial court's Judgment to increase his recovery to $300,000.00 (i.e. 50% of $600,000.00).

Finally, the Judgment awards "judicial interest from the date of demand until paid" but does not state whether the applicable rate is the full fluctuating legal rate (per La.C.C. Art. 2924), or the capped rate for suits against the State and its political subdivisions (per La. R.S. 13:5112(C)).

The Louisiana Supreme Court declared former Louisiana Revised Statute 13:5112(C) unconstitutional in *Ly v. State*, 92-2312 (La. 2/25/94), 633 So.2d 1223, and *Rick v. State*, 93-1776, 93-1784 (La. 1/14/94), 630 So.2d 1271. In both instances the State cap was declared an unconstitutional

exercise of sovereign immunity in violation of Article XII, Section 10, Constitution of Louisiana.

Louisiana Revised Statute 13:5112(C) was amended on November 23, 1995. Our brethren in the First Circuit Court of Appeal of Louisiana ruled that this statute does not apply retroactively.

> …we are again guided by the supreme court's decision in *Long*, and look to the intent of the legislature to determine whether the amendment retroactively validated the six percent prejudgment interest rate contained in La. R.S. 13:5112. Upon reviewing the language of the amendment and Act 828, we find nothing to indicate that the legislature intended to give La. R.S. 13:5112 retroactive effect. Compare *Long*, 595 So.2d 636 (La.1992) (language of the amendment and act demonstrated the legislature's intent that the statute be given retroactive effect). Because the amendment did not expressly ratify former La. R.S. 13:5112 and because there is no evidence tending to show that the legislature intended to give retroactive application to the new statute, we must conclude that the six percent prejudgment interest rate contained in La. R.S. 13:5112 does not apply.
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> [3] [96 1586 La.App. 1 Cir. 7] Accordingly, we hold that the cap on general damages contained in La. R.S. 13:5106 and the cap on legal interest contained in La. R.S. 13:5112 do not apply to cases, such as this, which were still pending between the time that these statutes were declared unconstitutional by *Chamberlain* and *Rick* and the effective date of the amendment to La. Const. Art. XII,§ 10(C) and Acts 1995, No. 828.

Lewis v. State, 96-1586, 6-7 (La.App. 1 Cir. 12/20/96), 685 So.2d 640,

For the reasons assigned by the Lewis court, we hold that the 1995 reenactment of La.R.S. 13:5112(C) does not apply retroactively to this 1994 lawsuit arising out of a 1993 accident. As such, Mr. Wiley is entitled to full judicial interest from date of judicial demand until paid.

SUMMARY

In conclusion we find the trial court did not err in its assignment of percentages of fault and that it was correct in allowing plaintiff's expert to testify as to opinions based upon police reports that were inadmissible as hearsay. Plaintiff is entitled to recover from the defendant City of New Orleans 50% of his damages, as found by the trial court, despite the fact that the City was found to be only one-third at fault for the accident. Finally, plaintiff is entitled to judicial interest from date of judicial demand until paid irrespective of La. R.S. 13:5112(C).

AFFIRMED AS AMENDED