NOT DESIGNATED FOR PUBLICATION

VANA ANDREWS	*	**NO. 2001-CA-1563**
VERSUS	*	**COURT OF APPEAL**
EDWARD D. HOLMES, JR., CREDIT GENERAL INSURANCE COMPANY, EARL JACKSON AND TRANSIT MANAGEMENT OF SOUTHEAST LOUISIANA, INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
MERLIN BLANKS, ET AL.	**NO. 2001-CA-1564**
VERSUS	
EDWARD HOLMES, ET AL.	

CONSOLIDATED WITH:	**CONSOLIDATED WITH:**
HARRY COX	**NO. 2001-CA-1565**
VERSUS	
REGIONAL TRANSIT AUTHORITY AND EDWARD THOMPSON	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NOS. 98-3127 C/W 98-5905 C/W 98-6524, DIVISION "G"

Honorable Robin M. Giarrusso, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Steven R. Plotkin, Judge Patricia Rivet Murray, Judge Terri F. Love)

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AFFIRMED

This case arises out of a bus-dump truck collision. The accident occurred when a dump truck driven by Edward Holmes struck the right, rear side of a Regional Transit Authority ("RTA") bus. From a judgment in favor of defendants, plaintiff, Harry Cox, appeals. We affirm.

FACTS

On the morning of April 11, 1997, Mr. Cox alleges he was a passenger on the RTA bus that was involved in an accident with the dump truck driven by Mr. Holmes. Mr. Cox testified that a RTA bus, Elysian Fields line, was his mode of transportation to and from his job as a painter with Joe Wallis Painting Company and that the accident occurred shortly after 6:15 a.m. while he was en route to work. Although at one point in his testimony Mr. Cox alleges he was seated in the front of the bus only two seats behind the driver, at another point he testifies that he was seated in the rear of the bus near the point of impact.

The bus driver, Edward Holmes, Jr., testified that none of the passengers were knocked about the bus as a result of the collision and that none of them stated that they were injured. The bus driver further testified that although the collision made a lot of noise, "it wasn't no large amount of damage to the [bus]." The bus driver still further testified that following the accident his bus was not taken out of service; indeed, after completing all the paperwork for the accident, he resumed his route.

Mr. Cox, on the other hand, testified that the impact "threw [him] to the floor, from [his] seat." He also described the accident to his doctor as resulting in "the bus [being] lifted-up off the ground a few seconds, and

then, the bus was dropped to the ground." As a result, he told his doctor that "his neck snapped backward-and-forward." Mr. Cox testified that he immediately experienced neck and back pain and that, contrary to the bus driver's testimony, he told the bus driver he was hurt.

According to Mr. Cox, a paralegal, who worked for his prior attorney, happened to be on the scene and "carried him" to a doctor on Canal Street. Although Mr. Cox testified that he saw this Canal Street doctor about five times over a period of two to four months, he could not name this doctor, who was not produced to testify at trial.

After his original attorney experienced legal difficulties, Mr. Cox retained a new attorney, who referred him to new doctors. The first doctor he was referred to was Dr. McKenna, who Mr. Cox saw for about a month before requesting a new doctor. His new attorney then referred him to Dr. Henry Evans who was qualified simply as an expert in the field of medicine, testified that he first saw Mr. Cox on June 9, 1997. At that time, Mr. Cox presented with complaints of neck and back pains. Dr. Evans testified that he last saw Mr. Cox for this accident on September 18, 1999. At that time, Mr. Cox was still complaining of back and neck pain. Dr. Evans opined that Mr. Cox "definitely has disc pathology" and that his injury was "consistent with the history" that Mr. Cox provided.

On cross-examination, Dr. Evans testified that Mr. Cox told him of two instances of prior injuries. One was a 1993 accident on a street car in which he sustained neck and back sprain and "subsequently, has chronic intermittent pains." For that accident, he was treated for about a year with Dr. Charles Simmons. Dr. Evans, however, testified that Mr. Cox did not tell him about a 1998 accident and that he would consider it significant if he did suffer similar injuries. Also on cross-examination, Dr. Evans testified that on June 25, 1997, two weeks after he first saw Mr. Cox for this accident, he released him to work with the restriction that he wear a cervical support.

Based on the results of an MRI performed on September 16, 1998 that established a possibility of "some encroachment of the lumbar disc" at the L4, L5 levels, Dr. Evans recommended that Mr. Cox see an orthopedist, Dr. Charles Billings. Dr. Billings, who was qualified as an expert in orthopedic surgery, testified that he only saw Mr. Cox once, on August 2, 1999. Dr. Billings testified that at that visit Mr. Cox outlined the "important, historical events" as follows:

> Mr. Cox, who was then fifty-six years old, stated "occupation, painter." Usual state of health, until a bus mishap, 4/11/97. He was a passenger in the vehicle, struck by a dump truck. Jolted forward-and-backward in his seat. And, he described pain in his low back, thereafter.
>
> Apparently, he had been treated by Dr. Evans following his injury. He had obtained some x-rays. And, therapy was prescribed. His pain had continued.

> And, according to the patient, there had been "no past history of similar pain or injury." *He had been unable to continue with his work as a painter, due to his complaints.* (Emphasis supplied).

Dr. Billings noted subjective findings were present including decrease in range of motion and low back pain, but noted "no objective muscle spasm, and no objective neurological deficit" and "[n]o signs of any acute injury." Dr. Billings' orthopedic impression was "chronic lumbar strain, with probable underlying lumbar disc disease, most notable at L4-5." Based on his assessment, Dr. Billings did not recommend surgery to Mr. Cox.

Contrary to the history provided to Dr. Billings, Mr. Cox's former employer, Joesph Wallis, owner of Joe Wallis Painting Company, testified by deposition that Mr. Cox continued to work for him as a painter following the bus accident. Although Mr. Wallis testified that Mr. Cox subsequently quit, Mr. Wallis stated that he had no reason to believe that Mr. Cox quit because he was found to be disabled by a physician. Additionally, when confronted on cross-examination with tax records reflecting he earned $2,126.79 in 1998 working for BAZAN Painting, Mr. Cox admitted working for that company.

During Mr. Cox's cross-examination, the defense played a surveillance video depicting Mr. Cox engaging in manual labor for yet

another employer. The video, which was taken during the month before trial, depicts Mr. Cox crawling underneath a house, which had a small crawl space, and remaining under the house for quite some time. When confronted with the video, Mr. Cox admitted that he was working as a carpenter's helper and that the job they were doing entailed repairing the foundation structure of the house that had been damaged by termites. Mr. Cox further admitted that the job also entailed carrying cement cylinder blocks.

Mr. Cox's medical records, which were introduced into evidence, also reflect that he was involved in two additional accidents subsequent to the one in question. On December 9, 1998, Mr. Cox was allegedly injured as a result of an accident while a passenger on a RTA bus that was hit by an automobile. As a result of that accident, he was treated by Dr. McKenna for about two months for right knee pain. As noted, Mr. Cox failed to tell Dr. Evans about this accident, despite the fact that he was still treating him for the accident in question.

On February 17, 1999, Mr. Cox was in a motor vehicle accident. In that accident he was the driver of the car that was hit by another vehicle. As a result of that accident, he was treated by Dr. Simmons for the following: "immediate headaches and pain one hour after in his left side, left elbow, neck and lower back." In his report, Dr. Simmons expressly notes that Mr.

Cox told him he had "injured his neck and lower back in a motor vehicle accident in 1997 and had not recovered." The report further states that "[t] his accident aggravated the pain in his neck and back." Still further, the report refers to the earlier July 1993 street car accident for which Dr. Simmons had treated him.

On April 13, 1998, Mr. Cox filed this suit against RTA, Edward Thompson, and H & H Trucking Company. On March 25, 1999, Mr. Cox filed an amended petition adding as a defendant Credit General Insurance Company as the liability insurer of H & H Trucking Company and substituting Edward Holmes for Edward Thompson as the truck driver. Following a bench trial, the trial court found that Credit General's insured, Mr. Holmes, was negligent in causing the accident. However, the trial court found that Mr. Holmes' negligence was not the cause of any injury to Mr. Cox and thus awarded no damages. In so finding, the trial court gave the following written reasons for judgment:

> Mr. Cox is completely unworthy of belief. For example, he lied about Dr. Billings' recommendation for surgery. He lied about working. He failed to tell Dr. Evans about his February 1998 accident and he lied about the details of this accident claiming to have fallen on the floor of the bus.
>
> It is clear that Credit General Insured was at fault in causing this minor accident. But, there is no way that Mr. Cox could be injured as he claims. Because his [sic] is unbelievable, the Court cannot determine which injuries were caused by this accident, which were exaggerations or lies and which were

caused by other accidents.

Mr. Cox appeals from that judgment. On appeal, Mr. Cox does not dispute the trial court's finding that Mr. Holmes was solely at fault in causing the collision with the bus on which he was a passenger. Instead, the crux of his appeal is whether the trial court was manifestly erroneous in finding that Mr. Holmes' negligence was not a cause of Mr. Cox's injuries.

ANALYSIS

The appellate standard of review is well-settled. Although the verbiage may vary, the Supreme Court has consistently required appellate courts to adhere to the manifest error standard. 1 Frank L. Maraist and Harry T. Lemmon, *Louisiana Civil Law Treatise: Civil Procedure*, §14.14 (1999). In *Stobart v. State of La., Through Dep't of Transp. and Dev.*, the Supreme Court articulated that standard as follows:

> The reviewing court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.
>
> Nevertheless, the issue to be resolved by a reviewing court is not whether the fact finder's conclusion was a reasonable one. . . . Even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. . . . [T]his Court has emphasized that "the reviewing court must always keep in mind that "if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it

would have weighed the evidence differently.'"

617 So. 2d 880, 882 (La. 1993)(quoting *Housley v. Cerise*, 579 So. 2d 973 (La. 1991)). Hence, when there are two permissible views of the evidence, the trial court's choice between them cannot be manifestly erroneous. *Id.* An appellate court nonetheless has a constitutional duty to review the entire record and to further determine "`that the record established that the finding is not clearly wrong.'" *Ambrose v. New Orleans Police Dep't Ambulance Serv.*, 93-3099, 93-3110, 93-3112, pp. 7-9 (La. 7/5/94), 639 So. 2d 216, 220-21 (quoting *Arceneaux v. Domingue*, 365 So. 2d 1330, 1333 (La. 1978)).

As noted, Mr. Cox does not dispute the trial court's assessment of all the fault in causing the accident to Credit General's insured, Mr. Holmes; rather, he concedes that the sole issues before this court are causation and damages. As to causation, Mr. Cox assigns as error the trial court's failure to find he was injured as a result of this accident. In support of this claim, Mr. Cox cites the uncontested medical testimony of his two treating physicians, Drs. Evans and Billings. Summarizing these doctors' opinions, Mr. Cox notes that both doctors opined that he had a disc injury.

LIGA counters that to the extent Drs. Evans and Billings testimony supports Mr. Cox's argument that the bus-dump truck accident caused his injury, the doctors' acknowledged their testimony on the crucial

causation issue was based on the history Mr. Cox provided to them. Moreover, LIGA argues that the medical testimony on which Mr. Cox relies was contested for two reasons. First, Mr. Cox failed to inform his doctors of other accidents in which he was involved. As the trial court noted, "[h]e failed to tell Dr. Evans about his February 1998 accident." Likewise, he told Dr. Billings he had "`no past history of similar pain or injury.'" Second, Mr. Cox failed to call as a witness his initial treating physician--the phantom Canal Street physician.

As noted, Mr. Cox neither identified, nor called as a witness at trial the Canal Street physician who the paralegal brought him to immediately following the accident and who treated him for a few months thereafter. The absence of this treating physician at trial, LIGA contends, gives rise to an adverse presumption that his testimony would be adverse. We agree. "The law is clear that if the plaintiff fails to call a treating doctor, then the jury may presume that the testimony of such doctor would have been adverse to the contentions of the plaintiff, unless it is overcome by credible evidence offered by plaintiff." *Guillot v. Miller*, 580 So. 2d 1104, 1107 (La. App. 4th Cir. 1991)(collecting cases).

Given this presumption resulting from his initial physician's failure to testify coupled with Mr. Cox's failing to be forthright with his physicians

who did testify, Mr. Cox's reliance on the medical testimony alone to support his claim of causation is misplaced.

Mr. Cox next argues that the trial court erred in relying on the severity of the crash—classifying it as a "minor" accident—in denying his claim. Mr. Cox argues that the trial court apparently based its conclusion on a photograph that the defendants introduced depicting the RTA bus and dump truck as still stuck together, as well as on the RTA bus driver's testimony. Mr. Cox argues that the trial court erred in failing to give any weight to the investigating police officer's notation on the police report that the damage to the bus was "heavy." Still further, citing *Simpson v. Caddo Parish School Bd.*, 540 So. 2d 997 (La. App. 2d Cir. 1989), Mr. Cox argues that even assuming the collision was a minor one, defendants neither offered another explanation for his injuries nor contradicted his medical evidence.

LIGA counters that, as noted above, the medical evidence is contested and that *Simpson, supra*, is distinguishable. *Simpson* involved a minor school bus accident that resulted from a car making scraping contact with a bus. In affirming a finding of causation of personal injuries suffered by the students, the court of appeal reasoned:

> There is no dispute that an accident occurred while the three children were aboard the bus, and the unrebutted medical testimony presented by plaintiffs is that on the next day the three children showed objective signs of injury caused by trauma. Nor is there evidence that any of the three children

suffered from any problems prior to the accident.

540 So. 2d at 1000. The *Simpson* court further noted that "[t]his court has avoided the precedent of attempting to measure an injury in direct proportion to the force of a collision when medical expert and lay witnesses establish that a plaintiff sustained injuries." *Id.* (citing *Seegers v. State Farm Mutual Insurance Co.*, 188 So. 2d 166 (La. App. 2d Cir. 1966)); *Starnes v. Caddo Parish School Bd.*, 598 So. 2d 472, 477 (La. App. 2d Cir. 1992)(citing *Simpson, supra*)).

Simpson, as LIGA contends, is factually distinguishable. Unlike the children who admittedly were passengers on the school bus, defendants disputed whether Mr. Cox was even a passenger on the RTA bus. Unlike the children whose treating physician testified to finding objective signs on the day following the accident, Mr. Cox failed to present any evidence establishing his condition immediately after the accident. He failed to call his initial treating physician, giving rise to an adverse presumption. And, unlike the children who had no prior problems, Mr. Cox was in prior and subsequent accidents. Contrary to Mr. Cox's contention, we conclude that the trial court's mentioning of the fact this was a "minor" accident, as only one of multiple factors supporting a finding of no causation, was not error.

Mr. Cox next argues that the trial court erred in finding it could not

determine "which [injuries] were caused by other accidents." In support of this argument, Mr. Cox attempts to pigeonhole his injuries. Particularly, he argues that although he was in subsequent accidents in December 1998 and February 1999, he was not in any accident during the interim between this accident on April 11, 1997 and his MRI on September 16, 1998 and that during that interim he treated for the neck and back injury at issue. Mr. Cox thus contends there was a clear demarcation between the accident at issue and the injury he claims. This argument, however, overlooks the fact that Mr. Cox's medical evidence in this case was contested by the adverse presumption resulting from his failure to call his initial treating physician coupled with his failure to fully inform his physicians who testified at trial regarding all of his accidents.

Mr. Cox's final argument is that the trial court erred in failing to simply reduce, as opposed to totally reject, his claim. In support of this argument, Mr. Cox attempts to address the trial court's finding that he "lie [d] about working." In this regard, he argues that whether he worked or not is not determinative of the nature of his injury. Regardless, Mr. Cox's apparent lie about working was yet another factor the trial court considered in determining that he was not credible.

After reviewing the entire record, we find that Mr. Cox's credibility

was a serious concern of the trial court in this case. The trial court was required to determine whether the collision caused any injuries to Mr. Cox. The trial court concluded that it could not "determine which injuries were caused by this accident," as opposed to the other three accidents that Mr. Cox admittedly was involved in during the five year span from 1994 to 1999. The trial court further concluded that it could not determine "which [injuries] were exaggerations or lies." As noted, Mr. Cox's claim that he fell to the floor as a result of the impact was contradicted by the RTA bus driver's testimony and apparently viewed as an "exaggeration" by the trial court. And, as noted above, Mr. Cox's lies about working were also a factor considered by the trial court in determining Mr. Cox's credibility. Ultimately, the trial court concluded that Mr. Cox was not credible and thus dismissed his claim. We cannot find that credibility call manifestly erroneous. *Maldonado v. Louisiana Superdome Comm'n*, 687 So. 2d 1087, 1093 (La. App. 4th Cir. 1997)(noting "[t]he trial court is vested with much discretion in assessing the credibility of the witnesses and making factual inferences from the evidence presented"); *Maraist & Lemmon, supra* § 14:14 (noting that credibility issues "are clearly within the province of the trier of fact and should be insulated from appellate reversal").

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed. Costs are assessed against the appellant.

AFFIRMED