NOT DESIGNATED FOR PUBLICATION

ROBERT BOATNER	*	**NO. 2004-CA-2166**
VERSUS	*	**COURT OF APPEAL**
DIANNE JOHNSON AND ALLSTATE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2001-50077, SECTION "C"
Honorable Sonja M. Spears, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Michael E. Kirby, and Judge Leon A. Cannizzaro, Jr.)

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AFFIRMED

This case arises out of an automobile accident. The trial court rendered judgment in favor of the plaintiff, Robert Boatner ("Boatner"), in the amount of $8,475.00, but reduced the award upon finding Boatner 50% at fault. The defendants, Dianne Johnson-Petite ("Johnson") and her insurer, Allstate Insurance Company ("Allstate"), appeal the judgment of the trial court. For the reasons set forth below, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY:

On January 14, 2000, Boatner and Johnson were involved in an automobile accident at the intersection of Downman Road and Babylon Street in New Orleans. Boatner testified that on the day of the accident he had just finished working at an apartment complex on Downman Road. He backed his pickup truck out of the complex onto Downman Road with the assistance of his brother and co-worker checking the traffic and waving him back. Both the brother and co-worker testified that at the time they waved Boatner out of the driveway, the traffic on Downman Road was stopped for a red light one block before. Boatner backed up across the right lane, into the left lane along the median, and attempted to make a U-turn. Boatner

stated that before he could finish the turn Johnson collided with the rear of his truck. Boatner explained that he could not complete the turn because of oncoming traffic on the other side of Downman Road.

Johnson was operating one of the vehicles stopped at the red light when Boatner backed out of the apartment complex. Johnson testified that she was traveling in the left lane of Downman Road and had just stopped at the red light on the corner of Dwyer Road. She stated that after the light turned green she continued forward and; just as she reached the next corner (Babylon Street), Boatner's truck suddenly struck her vehicle. Johnson testified that she did not see Boatner's truck until the impact.

Frank DeSalvo, an independent witness to the accident, testified at trial. DeSalvo stated that he and a friend were operating their motorcycles behind Johnson at the red light. DeSalvo saw Boatner's truck back out onto Downman Road and make, what he described as, an erratic move. DeSalvo stated that he was careful to steer around the truck, but he could see the accident between Boatner and Johnson was going to happen.

At the conclusion of the trial, the trial court rendered judgment from the bench stating:

> The Court is going to find fifty percent liability on the part of the plaintiff and fifty percent liability on the part of the defendant on the following reasons:
>
> During the defendant's testimony, she testified that she - and she was very adamant about the fact - that she did not see

> Mr. Boatner's vehicle before the accident took place. She said she didn't see it at all. The only time she saw it was at impact.
>
> But the testimony of the other witness who testified, and in fact, the testimony of Ms. Johnson-Petite, was also that there was a significant distance from the stop light to the point of the accident, at least a block, with the vary [sic] testimony is at least a block.
>
> And that's significant distance for Ms. Johnson-Petite to have seen the vehicle. She should have seen it at some point before the vehicle backed out in front of her and made whatever the erratic move was in front of her.
>
> The Court also believes that Mr. Boatner did make an erratic move when he was attempting to make his turn. However, one block should have been a sufficient distance for Ms. Johnson-Petite to see the vehicle come out, because even the independent witness, Mr. DeSalvo, had the opportunity to see the vehicles ahead of him.
>
> Ms. Johnson-Petite should have seen his vehicle before. If she did not see him until the exact moment of impact – which is her testimony – then that suggest that perhaps the high rate of speed was involved or perhaps – I don't know.
>
> But the Court won't speculate as to whether or not a high rate of speed was involved, but that should have been seen. She should have seen the vehicle before the impact and try to attempt some other movement at that point.
>
> The Court finds that Mr. Boatner, although he may have made a successful back-out of the driveway and he did that safely, apparently, what he did after he backed out of the driveway – the maneuvers after he backed out of the driveway – contributed to this accident.

On appeal, Johnson asserts two assignments of error. First, the trial court erred in finding her 50% at fault. Second, the trial court erred in determining that Johnson could not avail herself of the "sudden emergency doctrine."

STANDARD OF REVIEW:

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, 8484 (La. 1989). Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly wrong. *Id*. at 845. 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. *Id*. 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, 882 (La. 1993). 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. *Id*. at 883; *Theriot v. Lasseigne*, 93-2661 (La. 7/5/94), 640 So.2d 1305, 1313.

DISCUSSION:

Johnson argues in her appeal brief that she was not at fault in the accident because there was nothing she could do to avoid being hit from the side by Boatner's truck. She specifically denies hitting Boatner from the rear. In support of her argument that she was hit from the side, Johnson relies on photographs of her vehicle that show damage to the passenger side headlight, not to the center of the bumper.

Contrary to her argument on appeal, Johnson testified at trial that Boatner came to a complete stop in front of her. More particularly, she stated: "He came right behind the motorcycles – right directly behind them and jumped in front of me, attempted to turn and could not make the turn because of oncoming traffic and came to a complete stop. I had no choice, he just came to a complete stop."

Boatner, his brother, and co-worker testified that Johnson collided with the rear of Boatner's truck. The independent witness, DeSalvo, saw the accident but could not say what parts of the vehicles collided.

The validity of Johnson's argument, concerning the way in which the vehicles collided, hinges on the trial judge's inferences. In the instant case,

the trial court considered the evidence, listened to the testimony of the witnesses, and evaluated their credibility before rendering her judgment. The trial court concluded that Boatner was partially at fault given the erratic manner in which he attempted to make the U-turn; and that Johnson was equally at fault given the fact that she should have seen Boatner's truck before the impact.

Having reviewed the record in its entirety and examined the evidence submitted by the parties, we conclude that the trial judge's allocation of fault is reasonable. As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. 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, 58, citing *Clement v. Frey*, 95-1119 (La. 1/16/96), 666 So.2d 607, 609.

Finally, we will consider Johnson's argument that the trial court erred in failing to apply the sudden emergency doctrine. The Louisiana Supreme Court has described the sudden emergency doctrine as follows:

> One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

Hickman v. Southern Pac. Transport Co., 262 So.2d 385, 389 (La. 1972).

We have refused to apply the sudden emergency doctrine where the party asserting the doctrine was also negligent. *Ducombs v. Nobel Ins. Co.*, 03-1704 (La. App. 4 Cir. 7/21/04), 884 So. 2d 596, 600, citing *Clement v. Griffin*, 91-1664 (La. App. 4 Cir. 3/3/94), 634 So.2d 412, 439. We reasoned the asserter would still be responsible for its negligence; therefore, we failed to extend the sudden emergency doctrine to him. See, *Wiley v. Safeway Ins. Co*., 99-161 (La. App. 3 Cir. 7/14/99), 745 So.2d 636. (The Third Circuit reasoned to apply this doctrine the defendant must prove the emergency was not caused by his own negligence).

In the facts before us, Johnson has not proven the emergency was not caused by her own negligence, i.e., her failure to see what she should have seen. A motorist is required to maintain a reasonable vigilance or "to see that which she should have seen" and to exercise reasonable care. *Doyle v. McKinney*, 98-1102 (La. App. 4 Cir. 4/7/99), 732 So. 2d 128, 131. The trial court concluded that Boatner was a significant distance ahead of Johnson (at least one block) when he backed into the roadway. Based on the testimony of the witnesses and the evidence presented, we find no error in the trial court's factual determination that Johnson was negligent in not seeing Boatner's vehicle in time to avoid the accident. Accordingly, under the facts

of this case, we find no error in the trial court's failure to apply the sudden emergency doctrine.

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

AFFIRMED