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| **ALEXANDRE GUMBS** | * | **NO. 2007-CA-0009** |
| **VERSUS** | * | **COURT OF APPEAL** |
| **EDWARD GRAY, CEMBELL INDUSTRIES, INC., GRAY INSURANCE COMPANY AND ALLSTATE INSURANCE COMPANY** | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-15636, DIVISION "J-13"
Honorable Nadine M. Ramsey, Judge
* * * * * *
**Judge Patricia Rivet Murray**
* * * * * *

(Court composed of Chief Judge Joan Bernard Armstrong, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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**AFFIRMED**

This is a personal injury suit arising out of a rear-end collision. Following a bench trial, the trial court rendered judgment in favor of the plaintiff, Alexandre Gumbs, and against the defendants, Edward Gray; Mr. Gray's employer, Cembell Industries, Inc.; and Cembell's insurer, Gray Insurance Company (collectively the "Defendants"),[1] for $11,416 plus legal interest. From this judgment, the Defendants appeal.

## FACTS

On Wednesday, October 13, 1999, at about 4:30 p.m., both Mr. Gumbs and Mr. Gray were traveling eastbound on Interstate 10 just before the I-610 split in Metairie, Louisiana. Mr. Gumbs was driving his car home from work, and Mr. Gray was returning to the shop in a company truck.[2] The traffic on the interstate was congested; the parties described it as "stop-and-go" traffic.

[1] Although Allstate Insurance Company, which was Mr. Gumbs' uninsured motorist carrier, was also named as a defendant, Mr. Gumbs' claim against Allstate is not at issue on this appeal. Allstate filed a third party demand against the Defendants for the $1,000 in MedPay coverage payments that it made on Mr. Gumbs' behalf. The trial court's original judgment failed to address the cross-claim. The trial court granted Allstate's partial motion for new trial and amended the judgment to award this amount plus cost and interest to Allstate.

[2] The parties stipulated that Mr. Gray was in the course and scope of his employment with Cembell and driving a Cembell vehicle.

The parties dispute whether an accident occurred. Mr. Gumbs testified that Mr. Gray rear-ended him; Mr. Gray testified that he stopped the truck he was driving just short of hitting Mr. Gumbs's car.

Mr. Gray testified that he was traveling at all times in the far left lane. He estimated that he was going between five to ten miles per hour. Mr. Gray testified that he was following the car in front of him at a safe distance when Mr. Gumbs squeezed into the space between his vehicle and the vehicle he had been following. Just at that moment, the stop-and-go traffic stopped again, and Mr. Gumbs slammed on his brakes, forcing Mr. Gray to slam on his brakes. As noted, Mr. Gray testified that he was able to stop his vehicle just short of a collision with Mr. Gumbs' vehicle. Mr. Gumbs exited his vehicle, and, to Mr. Gray's surprise, exclaimed: "You hit me." Mr. Gray testified that he then exited the truck, examined both vehicles, and found no damage to either vehicle. He was able to walk between his truck and Mr. Gumbs' vehicle. According to Mr. Gray, a bridge police officer passed by and instructed him and Mr. Gumbs to move their vehicles to the median, and they complied.

Mr. Gumbs testified that he was traveling at all times in the far left lane and that Mr. Gray was following directly behind him for a long time before the accident. Mr. Gumbs testified he was traveling 35 miles per hour and that "sometimes you go 35; sometimes you don't." Mr. Gumbs testified that the traffic came to a stop, he stopped his car, and about three to four seconds later the truck Mr. Gray was driving rear-ended his car. Mr. Gumbs testified that when he exited his car he saw "the impression of the truck on [his] bumper." Mr. Gumbs also testified that the damage to his car was "under the car, the structure."

After the parties moved their vehicles to the median, State Trooper Chavez Cammon arrived on the scene. Trooper Cammon stated that both drivers estimated that they were traveling about five miles per hour in stop-and-go traffic. He further stated that neither driver indicated that he was injured. He still further stated that Mr. Gray admitted that he was following close to Mr. Gumb's vehicle. Given the parties gave conflicting stories as to whether an accident occurred coupled with the lack of any apparent physical damage to either vehicle, Trooper Cammon stated that he did not issue any citations. Trooper Cammon also explained why he could not say for sure if there was an accident in this type of situation, stating: "[t]here was no severe type of damage to each vehicle, and then I have two drivers telling me—one driver saying he hit him, the other driver saying he didn't. I was not at the crash at the time it occurred; therefore, I cannot make an estimate as to who would be at fault or who would be cited because there was no damage."

Mr. Gumbs acknowledges that he told Trooper Cammon that he was not injured and that he did not seek medical treatment until the day after the accident when he began experiencing neck pain. He testified he was treated on October 14, 1999, at Ochsner Foundation for neck pain and prescribed pain medication. He further testified that he was treated for on-going neck pain symptoms by Dr. Norman Ott's office from November 1999 until April 2000, when he was discharged.[3]

On October 12, 2000, this suit was filed.

On August 18, 2005, a bench trial was held in this matter, and the trial court took the matter under advisement. On August 29, 2005, Hurricane Katrina struck

[3] Although a few months later Mr. Gumbs returned to Dr. Ott's office complaining of neck pain, Dr. Ott found his subsequent complaint was not related to the accident.

the New Orleans area. (As discussed below, Defendants claim this is relevant to the instant appeal.) On November 22, 2005, the trial court rendered judgment and issued reasons for judgment. The trial court found in favor of Mr. Gumbs and against Defendants. The court awarded $9,000 in general damages, $2,416 in special damages, and legal interest from the date of judicial demand. On November 3, 2006, the trial court denied Defendants' motion for new trial.[4] This appeal followed.

## DISCUSSION

On appeal, Defendants assert only one assignment of error, which essentially is that the trial court erred in finding an accident occurred.[5] In this regard, Defendants contend that this court should apply a *de novo*, as opposed to a manifest error, standard of review for four reasons:

- The corroborative evidence so contradicts the plaintiff's story that a reasonable fact finder could not credit it.
- The trial court failed to make findings or explain the basis for its ruling, and the basis for its ruling cannot be ascertained from the record.
- The trial court's ruling fails to explain its refusal to accept uncontradicted or independently corroborated testimony or evidence, or the fact finding itself was reached by overlooking applicable legal principles.
- The trial court's decision making was influenced by the effect of Hurricane Katrina.

[4] On November 9, 2006, the trial court granted Allstate's partial motion for new trial and recognized its right to recover from Defendants the $1,000 in MedPay that it paid on Mr. Gumbs' behalf. As noted, Allstate filed a cross-claim against Defendants for this amount.

[5] Defendants' assignment of error is that:

> In this situation involving conflicting statements of plaintiff and defendant as to whether any collision occurred, the trial court erred in failing to consider the preponderance of evidence, and in ruling in favor of plaintiff where plaintiff's proof consisted solely of his own unsupported testimony, where plaintiff's testimony was contradictory, and where the entirety of the independent testimony and physical evidence was corroborative of defendant's testimony that no collision occurred.

Defendants' argument regarding the effect of Hurricane Katrina is that the usual rationale for applying the manifest error standard—that the trial court is better able to evaluate the live witnesses as compared with the appellate court's access to only a cold record—is not applicable here due to the delay in rendering a decision caused by the hurricane. We disagree. First, the delay in rendering a decision in this case—from August 2005 to November 2005—is not atypical under normal circumstances. Second, there is no indication that the trial court was in any way impaired in deciding this case by the effects of the hurricane.

Another basis Defendants cite in support of their argument that the manifest error standard of review should not be applied is the holding in *Bloxom v. Bloxom*, 512 So. 2d 839 (La. 1987), that a *de novo* review is warranted when the basis for the trial court's ruling cannot be determined from its reasons for judgment. Defendants contend that such is the case here. Defendants' reliance on *Bloxom* for that holding, however, is misplaced. The Louisiana Supreme Court in *Leal v. Dubois*, 00-1285 (La. 10/13/00), 769 So. 2d 1182, clarified its holding in *Bloxom* to mean that "deference should be accorded to the trial court's decision, even if that decision is of less than ideal clarity, if the trial court's path may be reasonably discerned, such as when its findings, reasons and exercise of discretion are necessarily and clearly implied by the record." *Leal*, 00-1285 at p. 4, 769 So. 2d at 1185. Such is the case here.

The trial court's reasons for judgment state in pertinent part that:

> In the case of a rear-end collision, the rear car is presumably at fault. *Francis v. Esteen,* 771 So. 2d 184 (La. App. 4 Cir. 2000). The Court finds that Mr. Gray did not overcome this presumption of fault. Even assuming *arguendo* Mr. Gumbs moved from the center lane into the left lane in front of Mr. Gray's vehicle, Mr. Gray still had a duty of reasonable care. Generally, motorists have [a] duty to act reasonably and prudently under circumstances and are charged with keeping

> proper lookout, seeing what they should see, maintaining proper control of their vehicle, and observing traffic signs. *Sharpley v. City of Baton Rouge*, 665 So. 2d 21 (La. App. 1 Cir. 1995).
>
> Mr. Gray did not dispute that the traffic was heavy, referring to it as "bumper-to-bumper." Under those circumstances, Mr. Gray had the duty to keep a proper look out for the car in front of him. Accordingly, the Court finds that Mr. Gray was at fault.

Defendants contend that the trial court erred in relying on the presumption that a rear-ending motorist is presumed to be a fault to resolve the factual issue of whether an accident occurred. Contrary to Defendants' contention, the trial court's reasons indicate, albeit implicitly, that it first resolved the factual question of whether an accident occurred in favor of Mr. Gumbs and then correctly invoked the presumption to resolve the question of whether Mr. Gray was at fault.

Defendants also contend that the corroborative evidence contradicts Mr. Gumbs' testimony, pointing to Trooper Cammon's deposition testimony that he observed no physical damage to either of the vehicles. They argue that the photographs of both vehicles that were introduced at trial corroborate Trooper Cammon's and Mr. Gray's testimony that there was no damage to either vehicle. These photographs show that a strand of lights and a dealer's license plate holder on the front of Mr. Gray's truck were undamaged, and they show no visible damage on the rear of Mr. Gumbs' car.

Mr. Gumbs counters that Trooper Cammon acknowledged in his deposition testimony that "it's very possible" for there to be an accident without any damage.

The record reflects that the only witnesses to this accident were Mr. Gumbs, who testified it occurred, and Mr. Gray, who testified that it did not. Trooper Cammon did not arrive on the scene until after the vehicles were moved to the median. Trooper Cammon acknowledged that he could not say for sure if an

accident occurred. Moreover, as Mr. Gumbs points out, Trooper Cammon also acknowledged that an accident can occur without any visible damage to the vehicles.

This case presents a classic credibility call on the question of whether an accident occurred. The trial court was presented with conflicting testimony on this factual issue and resolved it in favor of Mr. Gumbs. It is well settled that such a factual finding is governed by the manifest error standard of review. *See Evans v. State Farm Mutual Automobile Ins. Co.*, 03-1003 (La. App. 5 Cir. 12/30/03), 865 So. 2d 195 (affirming as not manifestly erroneous trial court's finding that no accident occurred); 2 Russ M. Herman, *Louisiana Personal Injury* § 15:48 (2006)(noting that "in personal injury cases in which the parties present two separate versions of how an accident occurred and the trial court makes findings of fact based on the credibility of witnesses, a reviewing court must use the manifest error/clearly wrong standard of review, which gives great deference to the trier of fact.") Based on our review of the record, we cannot say that the trial court's finding that an accident occurred was manifestly erroneous.

**DECREE**

For the forgoing reasons, the judgment of the trial court is affirmed.

**AFFIRMED**