Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **8th day of May, 2012**, are as follows:

PER CURIAM:

2011-C -2382 JERYD ZITO v. ADVANCED EMERGENCY MEDICAL SERVICES, INC. AND EMPIRE INDEMNITY INSURANCE COMPANY (Parish of Plaquemines)

For the reasons assigned, the judgment of the court of appeal affirming the district court's judgment is reversed. Judgment is rendered in favor of Advanced Emergency Medical Services, Inc. and Empire Indemnity Insurance Co., dismissing plaintiff's suit with prejudice at his cost.
REVERSED AND RENDERED.

KNOLL, J., dissents and assigns reasons.

05/08/2012

SUPREME COURT OF LOUISIANA

No. 2011-C-2382

JERYD ZITO

VERSUS

ADVANCED EMERGENCY MEDICAL SERVICES, INC.
AND EMPIRE INDEMNITY INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF PLAQUEMINES

PER CURIAM

In this case, we are called upon to determine whether the district court erred in assessing 100% of the fault to defendants for an accident in which plaintiff's vehicle struck a stalled ambulance belonging to defendants. For the reasons that follow, we conclude the district court's factual findings are manifestly erroneous, and therefore reverse the district court's judgment.

FACTS AND PROCEDURAL HISTORY

On June 7, 2006, an ambulance belonging to Advanced Emergency Medical Services, Inc. ("Advanced") was traveling southbound on Louisiana Highway 23, a four-lane highway in Plaquemines Parish. Due to transmission problems, the ambulance became disabled, and was parked on the shoulder of the highway.

At approximately 10:05 p.m. on the night of June 7, 2006, plaintiff, Jeryd Zito, was proceeding southbound in the right-hand lane of Highway 23 in a pickup truck. Plaintiff's truck struck the left rear corner and left side of the ambulance.

Subsequently, plaintiff filed the instant suit against Advanced and its insurer, Empire Indemnity Insurance Co. Plaintiff stipulated his damages from the accident did not exceed $50,000, and the case proceeded to a bench trial.

At trial, the district court received the deposition of the investigating officer, Louisiana State Trooper Henry Thompson, into evidence. Trooper Thompson, a fourteen-year veteran with the State Police, testified he investigated the accident, arriving at 10:10 p.m. From the skid marks left by the ambulance on the shoulder of the road, Trooper Thompson believed the ambulance was parked approximately five feet from the right travel lane. According to Trooper Thompson, the ambulance was covered in reflective tape, and he was able to see its reflection from approximately three to five-tenths of a mile away. Trooper Thompson observed no evidence at the scene to indicate plaintiff tried to brake prior the collision. Based on his investigation, Trooper Thompson issued plaintiff a citation for careless operation of a vehicle. Trooper Thompson also testified that plaintiff admitted to him he had reached over to place his cell phone on the passenger seat of his vehicle, at which time he veered to the right and hit the ambulance.

Gary Jones, the president of Advanced, testified the company was based in North Louisiana, and was operating in Plaquemines Parish pursuant to a state contract to assist in recovery efforts following Hurricanes Katrina and Rita. He stated the ambulance involved in the accident was one of the ambulances providing service under this contract. According to Mr. Jones, the ambulance developed transmission problems, and was moved to the side of the road a few hours before the accident. He also testified the ambulance was covered in Scotchlite, a reflective tape.

Plaintiff testified on his own behalf, stating that on the night of the accident he was headed southbound on Highway 23 to pick up a friend, and was traveling at approximately 60 to 65 miles per hour. He testified he never saw the ambulance until he hit it, and never saw any reflective tape on the ambulance. On direct examination, plaintiff testified that he had picked up his phone to call his friend, and hung up the phone immediately before the accident. However, on redirect, he stated he was not

on his cell phone or reaching for it at the time of the accident. Plaintiff admitted he received a ticket for careless operation of a vehicle, and paid the ticket without contesting it.

Plaintiff also testified that on the date of the accident he was taking various prescription narcotic drugs (Valium, Lortab, and methadone) for a previous back injury, explaining that he last took his prescription medication the morning of the accident. Although amphetamines were found in plaintiff's blood analysis performed at the hospital immediately after the accident, plaintiff denied using amphetamines two to three days before the accident.

Michael Gauthier, a friend of plaintiff's family, testified for plaintiff. He reported that he was traveling southbound on Highway 23 shortly before plaintiff's accident. Mr. Gauthier stated he first saw the ambulance approximately 200 to 300 feet away. According to Mr. Gauthier, the ambulance was clearly visible when it came into view of his headlights, as it was marked with reflective tape and reflectors. Although he moved slightly over in the right lane when he passed the ambulance, he testified he was able to remain fully in the right-hand lane. He testified the ambulance was off the road, but close to or possibly on the white line.

At the conclusion of trial, the district court rendered judgment for plaintiff and against defendants in the amount of $50,000, plus costs and interest from the date of demand. In reasons for judgment, the district court stated:

> This suit arises out of an accident that occurred on or about June 7, 2006, on Louisiana Highway 23 at approximately 10:05 p.m. Plaintiff was traveling south bound in the right lane of traffic when an ambulance, owed and registered to Advanced EMS, was stopped on the right side of the roadway disabled, without hazard lights or signals. The ambulance was not completely out of the travel lane. Just 23 minutes prior to the accident in question, Mr. Michael Gauthier had to swerve to avoid hitting the unmarked ambulance. Mr. Gauthier also testified that the ambulance was blocking the right lane of travel with no flares or

> markers. Plaintiff's vehicle collided with the disabled ambulance, and both personal and property damages resulted.
>
> The court finds that the ambulance owned and operated by Advanced EMS was negligently parked on the roadway and was solely liable for the accident in question. The court also finds no comparative fault on the part of plaintiff. It is uncontested that there were no lights or signals in operation on the ambulance at the time of the accident. Louisiana Revised Statute 32:141 provides that a vehicle left unattended on any highway between sunset and sunrise shall display appropriate signal lights to warn approaching vehicles of its presence. The negligence of Advanced EMS resulted in the impact of the ambulance with plaintiff's truck, resulting in a severe accident in which the plaintiff suffered significant injuries.

Defendants appealed. The court of appeal affirmed in a split opinion. *Zito v. Advanced Emergency Medical Services,* 11-0218 (La. App. 4 Cir. 9/28/11), 72 So. 3d 490 (not designated for publication). The majority concluded the district court's factual findings were not manifestly erroneous. A dissenting judge disagreed with the majority, finding no reasonable review of the record supported the district court's judgment, and concluding plaintiff's negligence alone caused the accident.

Upon defendants' application, we granted certiorari to review the correctness of the judgments below. *Zito v. Advanced Emergency Medical Services, Inc*., 11-2382 (La. 1/13/12), 77 So. 3d 967. The sole issue presented for our consideration is whether the district was manifestly erroneous in finding the sole cause of the accident was defendants' negligence.

DISCUSSION

It is well-settled in our jurisprudence that a reviewing court may not disturb the factual findings of the trier of fact in the absence of manifest error. *Ardoin v. Firestone Polymers, L.L.C.*, 10-0245 at p. 6 (La. 1/19/11), 56 So. 3d 215, 219. The issue to be resolved by the reviewing court is not whether the trier of fact was right

or wrong, but whether the factfinder's conclusion was a reasonable one. *Stobart v. State, Department of Transportation and Development*, 617 So. 2d 880, 882 (La. 1993). If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Id.* at 882-883. However, where documents or objective evidence so contradict the witness' story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness' story, the court of appeal may find manifest error or clear wrongness, even in a finding purportedly based upon a credibility determination. *Id*. at 882; *Rosell v. ESCO,* 549 So. 2d 840 (La. 1989).

In the instant case, the district court found defendants' negligence was predicated upon a violation of La. R.S. 32:141. This statute provides, in pertinent part:

> Upon any highway outside of a business or residence district, no person shall stop, park, or leave standing any vehicle, whether attended or unattended, **upon the paved or main traveled part of the highway** when it is practicable to stop, park or so leave such vehicle off such part of said highway, but in every event an unobstructed width of the highway opposite a standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicles shall be available from a distance of two hundred feet in each direction upon such highway. [emphasis added]

In determining defendants breached their duty under this statute, the district court made a factual finding that "[t]he ambulance was not completely out of the travel lane." Based on our review of the record, we conclude this factual finding is not reasonable in light of the record reviewed in its entirety.

In making its factual finding, the district court relied entirely on the testimony of Mr. Gauthier, explaining Mr. Gauthier "had to swerve to avoid hitting the unmarked ambulance," and he "testified that the ambulance was blocking the right

lane of travel … .” However, a careful review of the record indicates Mr. Gauthier never testified the ambulance was in the travel lane of the highway. Rather, he testified the ambulance was “sitting on the edge of the road,” and “was off the road, but really close on the line, if not on the line.” When asked on direct examination whether he needed to take any evasive action to avoid the ambulance, he testified “I just eased toward the middle, kind of swerved a little out; you know, just to make sure I didn’t hit it.” On cross-examination, he explained “when I saw the ambulance, I eased to the center, just to give myself more room.” In response to additional questioning, he clarified that he never actually left his lane of travel; rather, he simply moved closer to the center line of the two lanes of traffic on the southbound side of the highway. Clearly, nothing in this testimony supports the district court’s conclusion that the ambulance “was blocking the right lane of travel … .”[1]

Considered in its entirety, the evidence in the record indicates the cause of the accident was plaintiff’s inattentiveness, rather than any negligence on the part of defendants. Both Trooper Thompson and Mr. Gauthier testified that the reflective tape on the ambulance was visible from a considerable distance. Plaintiff’s own testimony on direct examination indicated he was using his cell phone immediately before the accident, causing him to become distracted. The conclusion that the accident was caused by plaintiff’s inattentiveness is reinforced by Trooper Thompson’s investigation, which revealed there was no evidence at the scene to indicate plaintiff tried to brake prior the collision. It is also significant that Trooper

[1] The district court also placed emphasis on the failure of the ambulance to display appropriate signal lights under La. R.S. 32:141(C), which provides: “[t]he driver of any vehicle left parked, attended or unattended, **on any highway**, between sunset and sunrise, shall display appropriate signal lights thereon, sufficient to warn approaching traffic of its presence” [emphasis added]. Because the evidence indicates the ambulance was not left on the traveled portion of the highway, this provision is inapplicable. Moreover, even assuming this provision applied, the testimony of Trooper Thompson and Mr. Gauthier establish the reflective tape and other reflective devices on the ambulance were sufficient to warn approaching traffic of its presence.

Thompson cited plaintiff for reckless operation, and plaintiff did not dispute this citation.

In summary, based on the undisputed evidence, we conclude there is no reasonable interpretation of the record which could support the district court's factual finding that defendants' negligence was the cause of the accident. Rather, the evidence in the record clearly establishes the sole cause of the accident was plaintiff's inattentiveness.[2]

DECREE

For the reasons assigned, the judgment of the court of appeal affirming the district court's judgment is reversed. Judgment is rendered in favor of Advanced Emergency Medical Services, Inc. and Empire Indemnity Insurance Co., dismissing plaintiff's suit with prejudice at his cost.

REVERSED AND RENDERED.

[2] Because of this conclusion, we pretermit discussion of defendants' remaining assignments of error.

05/08/2012

SUPREME COURT OF LOUISIANA

No. 2011-C-2382

JERYD ZITO

VERSUS

ADVANCED EMERGENCY MEDICAL SERVICES, INC.
AND EMPIRE INDEMNITY INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF PLAQUEMINES

Knoll, J., dissents.

I respectfully dissent from the majority in this *per curiam* opinion.

As an initial matter, I do not believe this case is worthy of this Court's attention, as it presents no conflict of authority, no unsettled question of law, and no precedent which must be reconsidered or overruled. *See* La. Supreme Court Rule X, § 1. The writ was apparently granted solely for the purpose of conducting a manifest error review of the facts of this particular case. This is directly contrary to this Court's long-settled practice. As Justice Summers stated over forty years ago, "we grant writs only on questions of law." *Dick v. Phillips*, 218 So. 2d 299, 301 (La. 1969); *Porteous v. St. Ann's Café & Deli*, 97-837 (La. 5/29/98), 713 So. 2d 454, 456 n. 2 ("Under this Court's standards for granting writs, the Court does not normally grant simply to review the facts of a case.") Within the Louisiana judicial system's three-tiered hierarchy, the Supreme Court's institutional purpose is to provide guidance to the lower courts by clarifying the law, harmonizing inconsistent jurisprudence, and resolving disputed questions of public policy.[1] This opinion serves none of these purposes.

The Court's decision to grant writs in this case is doubly perplexing because

[1] *See* Daniel Meador, American Courts at 15-16 (1991).

the amount in controversy is relatively small compared to many other potentially worthy applications which we deny every week. Plaintiff's demand was $50,000, a modest figure which does not even meet the amount in controversy requirements necessary to justify a jury trial under La. Code of Civ. Proc. art. 1732. Our decision today sets no meaningful precedent, decides no novel issue of law, and corrects no manifest injustice. The decisions handed down today in this case and *Trascher v. Territo*, 11-2093 (La. 5/8/12), __ So. 3d __, suggest this Court has taken on the role of an error correcting court, even for relatively minor disputes. I fundamentally disagree with this newfound expansion of our discretionary docket, and I would recall the writ as improvidently granted.

Because a writ was granted and we are disposing of this case with a *per curiam*, I do find the trial court manifestly erred in casting the defendant with 100% of fault. Notwithstanding this finding, because writ denials do not make law, I still adhere to my view that we should not have granted a writ in this relatively "simple and routine" case. *Howard v. Union Carbide Co.*, 09-2750 (La. 10/19/10), 50 So. 3d 1251, 1258 (*per curiam*)(Knoll, J., dissenting).

Turning to the merits of the case, the majority goes too far in finding plaintiff's inattentiveness was the sole factor in the accident and assigning him 100% of the fault. Defendant Advanced Emergency Medical Services is an ambulance company based in and operating out of Webster Parish. After Hurricane Katrina devastated Plaquemines Parish and its EMS services, defendant signed a contract with the state to provide ambulance services in the southern part of the parish.[2] The ambulance involved in this accident had ongoing transmission

[2] Defendant asserts an affirmative defense under La. Rev. Stat. § 9:2800.17 and § 29:735, which provide limited immunities for injuries related to emergency preparedness activities. The majority does not reach this issue, so I do not address it in detail other than to note that any claim of statutory immunity must be strictly construed. *Monteville v. Terrebonne Parish*, 567 So.2d 1097, 1101 (La. 1990). Under a narrow interpretation of the statutes, I find the asserted immunities are

problems and had been brought to New Orleans for repairs. On the way back to Plaquemines Parish on June 7, 2006, it broke down again. Although the ambulance was supplied with the appropriate cones and reflective markers, they were not set out, and the hazard lights were left off. Defendant did not call a tow truck or otherwise attempt to remove the vehicle. Instead, the ambulance was left, derelict and unmarked, on the edge of the right shoulder of Highway 23.

On the night of June 7, 2006, plaintiff was driving south on Highway 23 to pick up a friend. No street lights were operational because of the storm, and the night was pitch black. Plaintiff never clearly saw the ambulance before he hit it; he saw a "flash," lost consciousness, and woke up some time later with blood pouring down his face. Plaintiff's injuries were extensive, and he incurred significant medical bills in addition to his general damages.

The *per curiam* presents the central question in this case as whether the ambulance was completely pulled off to the side of the road or whether it encroached over the white line. The evidence on this issue is uncertain and open to interpretation. The only photographs of the accident scene were taken well after the wreck. The tire skid marks show the ambulance's tires were parked on the shoulder but, according to the testimony of defendant's president, the "box" of the ambulance continues for three to three and one-half feet past the edge of the tires. Unfortunately, the investigating state trooper did not take measurements of the accident scene, so it is impossible to tell whether the skid marks were more or less than three and one-half feet from the white line.

The only other evidence regarding the ambulance's position at the time of the accident was the testimony of Mark Gauthier. About 45 minutes to an hour before plaintiff's accident, Gauthier was driving south in the right hand lane of

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inapplicable under the facts at hand because plaintiff's injury did not arise from an "emergency preparedness activity" on the part of the defendant.

Highway 23 when he came upon the ambulance parked "on the shoulder, right hand shoulder of the road but it was close, very close, if not on the white line." Because there were no reflectors or flares, Gauthier did not see the ambulance until the last second, when it "caught me by surprise." In order to avoid an accident, Gauthier "had to swerve to miss it" and "hit my brakes and moved out to the center lane to give em room."

The trial court, relying on the (admittedly unclear) photographs and Gauthier's testimony, found the ambulance was "not completely out of the travel lane." The majority reverses, finding this is "not reasonable in light of the record reviewed in its entirety." I disagree.

Gauthier explicitly testified the ambulance was "very close, if not on the white line" marking the travel lane, and he had to swerve partially into the center lane in order to avoid the ambulance. The trial court chose to credit his testimony. A basic principle of appellate review is that the "role of the fact-finder [is] to weigh the respective credibilities of the witnesses, and this court will not second-guess the credibility determinations of the trier of fact." *State ex rel. Graffagnino v. King*, 436 So.2d 559, 563 (La. 1983). A trial court's credibility determination may only be overturned where the testimony is "internally inconsistent or implausible on its face," or there is objective evidence which conclusively discredits the testimony. *Rosell v. ESCO*, 549 So.2d 840, 844-5 (La. 1989). Neither is true here. This Court is bound to accept the credibility determinations made by the finder of fact. There is sufficient evidence for a reasonable determination finding the ambulance encroached upon the travel lane of the highway and created a potential danger for drivers.[3]

[3] Indeed, the ambulance caused one near-accident and one actual accident within a few hours of breaking down; this is almost *per se* evidence of the serious danger it posed.

There is significant record evidence supporting a finding of negligence on the part of the defendant. A reasonable driver would have made every attempt to get the ambulance as far away from the traveled portion of the road as possible, and would not leave it "very close to, if not on the white line." As all the streetlights were out, a reasonable driver would have set out the cones and reflectors which were provided inside the vehicle.[4] Defendant neglected to contact a tow company to try to move the vehicle off the road before nighttime. These actions and failures to act fell below a reasonable standard of care, and it was well within the trial court's discretion to find the defendant's negligence was a proximate cause of plaintiff's accident.

The record also reflects plaintiff's negligence, but the *per curiam* greatly overstates the extent of plaintiff's fault. For instance, there is the issue of plaintiff's prescription drug use. Plaintiff was lawfully prescribed painkillers as a result of an earlier car accident. However, it is a careless misstatement of the record to claim, as the *per curiam* does, that "on the date of the accident [plaintiff] was taking various prescription narcotic drugs." A review of the record reflects that, on the morning of the accident, plaintiff took one Lortab, in accordance with his prescription. He had also taken a Valium the night before the accident. There is no evidence that taking a single Lortab several hours earlier, and a single Valium the night before, would affect plaintiff's ability to drive a vehicle. The trial court was well within its wide discretion to find plaintiff's medication was irrelevant to this case.[5]

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[4] The body of the ambulance was marked with reflective tape known as Scotchlite. The testimony was that Scotchlite reflects light from anywhere from 200 to 500 feet away, depending on conditions. At 65 miles per hour, 200 feet of visibility provides two seconds of warning. This reflective tape is no substitute for flashing markers or road flares.

[5] Although plaintiff did test positive for amphetamines, he testified that he had not taken any amphetamines for two to three days before the accident and was not

The *per curiam* also claims plaintiff was using his cell phone "immediately before the accident," which caused him to be distracted. Plaintiff admitted to making a phone call approximately 3 to 4 miles away from the scene of the accident. Plaintiff was driving at 65 miles per hour, the posted speed limit, meaning he had been off the phone for 3 to 4 minutes by the time of the accident. Plaintiff explicitly denied being on his cell phone during or just before the accident:

> Q: You were asked, other than driving, were you doing anything before the accident. This is my question: You weren't on the cell phone or reaching for your cell phone. Is – is that what you're saying?
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> A: That's correct. I was not.

That being said, there is evidence of plaintiff's inattentiveness or carelessness. Given the poor condition of the roads after Katrina and the lack of streetlights, a reasonable driver should not have been driving at 65 miles per hour in such poor visibility. It is also unclear whether plaintiff had his headlights set to "bright," which may have allowed him to see the ambulance from slightly farther away.

Plaintiff bears some responsibility for not seeing the ambulance in time and avoiding it, as Gauthier was able to do. However, plaintiff's contributing negligence does not give the defendant a free pass for its own inexplicably negligent behavior in leaving the ambulance in a place where it posed a serious threat to drivers. A driver who was "momentarily inattentive or careless" before an accident is not necessarily barred from all recovery.[6] Instead, where "several

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affected by them on the night of June 7, 2006. Plaintiff's testimony regarding his drug intake was consistent with the toxicology tests taken after the accident at West Jefferson Medical Center.

[6] *Monceaux v. Jennings Rice Drier, Inc.*, 590 So.2d 672, 675 (La. App. 3 Cir. 1991), *writ denied*, 592 So. 2d 1289 (La. 1992); *Trahan v. State, Dept. of Transportation and Development*, 536 So. 2d 1269, 1274-75 (La. App. 3 Cir.

dangerous hazards combine to produce an accident, comparative fault is applicable." *Brown v. Beauregard Elec. Co-op., Inc.*, 94-512 (La. App. 3 Cir. 12/14/94), 647 So.2d 668, 671, *writ denied*, 95-122 (La. 3/10/95), 650 So. 2d 1186.

This case is reminiscent of *Monceaux v. Jennings Rice Drier, Inc.*, 590 So. 2d 672 (La. App. 3 Cir. 1991), *writ denied*, 592 So. 2d 1289 (La. 1992).[7] Plaintiff Johanna Monceaux was killed when her car crossed the white line and hit a disabled rice truck left on the shoulder of I-10 without any markers or road flares. *Id.* at 673. There, as here, the negligence of both plaintiff and defendant were substantial factors in causing the accident. While Monceaux bore some of the blame, as witnesses saw her vehicle veer slightly onto the shoulder before the accident, the defendant was also found at fault. As the court of appeal held:

> There is no doubt that the unmarked, unlighted truck parked on the side of I-10 at night posed a dangerous traffic situation and subjected motorists to an unreasonable risk of harm.

Id. at 675. After a careful review of the record, the court of appeal allocated 50% of the fault to defendant, 25% to plaintiff, and 25% to the State.[8]

As in the *Monceaux* case, I would apportion fault between plaintiff and defendant. When modifying a trial court's allocation of fault between negligent parties, this Court does not perform a *de novo* review. Instead, we decrease (or increase) the erroneous allocation of fault to the lowest percentage which could be found by a reasonable finder of fact. *Clement v. Frey*, 95-1119, 95-1163 (La. 1/16/96), 666 So.2d 607, 609-10.

In conclusion, I believe this case does not present any issues worthy of this Court's consideration and would recall the writ as improvidently granted. Failing

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1988), *writ denied*, 541 So. 2d 854 (La. 1989).

[7] I was a member of the Third Circuit panel which reviewed this case on appeal.

[8] The State's liability was based on the failure of the State Police to inspect and secure the broken-down rice truck after being contacted and promising to do so.

that, I would find the trial court committed manifest error in its allocation of 100% fault to the defendant and would apportion fault between the plaintiff and the defendant.