

**COURT OF APPEAL,
FIFTH CIRCUIT**

FILED MAR 24 2009

SONIA MCGOWAN



NO. 08-CA-810

VERSUS

FIFTH CIRCUIT

JUSTIN J. LOUPE, ST. CHARLES PARISH
SHERIFF'S OFFICE, ST. PAUL FIRE &
MARINE INSURANCE COMPANY, TONYA
N. BARNES, AND USAGENCIES
CASUALTY INSURANCE COMPANY

COURT OF APPEAL
STATE OF LOUISIANA

ON APPEAL FROM THE SECOND PARISH COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 98-637, DIVISION "A"
HONORABLE ROY M. CASCIO, JUDGE PRESIDING

MARCH 24, 2009

**JEROME M. WINSBERG,
JUDGE PRO TEMPORE**

Panel composed of Judges Clarence E. McManus,
Walter J. Rothschild and Jerome M. Winsberg

RON A. AUSTIN
MARGARET E. MADERE
Attorneys at Law
400 Manhattan Boulevard
Harvey, LA 70058
COUNSEL FOR PLAINTIFF/APPELLEE

DON A. ALMERICCO
RON L. SCHROEDER
Attorneys at Law
11 James Boulevard
Suite 200
St. Rose, LA 70087
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

gms
CEW
NJK

The Defendant, Justin J. Loupe, a deputy with the St. Charles Parish Sheriff's Office (Sheriff's Office), the Sheriff's Office, and St. Paul Fire and Marine Insurance Company (St. Paul), appeal a judgment in favor of the Plaintiff, Sonia McGowan for personal injuries in an automobile accident. We affirm.

In March of 2006, the Plaintiff was traveling in the left lane of westbound U.S. 90 two cars behind a marked Jefferson Parish Sheriff's Office (JPSO) vehicle when the driver abruptly halted and made a sudden u-turn. The Plaintiff and the driver of the car in front of the Plaintiff stopped their cars safely. A St. Charles Sheriff's Police van driven by Loupe was following the Plaintiff. Loupe's van skidded into the back of the Plaintiff's car with force. It then tapped the Plaintiff's bumper a second time. At some point, Loupe's car was also rear-ended by the car following him, driven by Tonya Barnes. The Plaintiff suffered a left clavicle fracture and cervical strain in the accident.

In February of 2007, the Plaintiff filed suit against Loupe, the Sheriff's Office, and St. Paul, and Barnes and her insurer.¹ The petition was subsequently

¹ The Plaintiff settled with Barnes and her insurer prior to trial and they were dismissed from the suit.

amended to substitute Sheriff Greg Champagne as a Defendant in place of the Sheriff's Office.

A bench trial was held in June of 2008, and a judgment was rendered for the Plaintiff in the amount of \$19, 296.59 against Loupe, the Sheriff's Office, and St. Paul.²

On appeal, the Defendants assert that the trial judge erred in finding Loupe at fault in the accident and assessing damages against them. The Defendants cite Loupe's testimony which contradicted the Plaintiff's version of the events.

La.R.S. 32:81 imposes a duty on a motorist not to follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of the preceding vehicle, the traffic conditions, and the condition of the roadway. Phipps v. Allstate Ins. Co., 05-651, p. 4 (La.App. 5 Cir. 2/27/06), 924 So.2d 1081, 1084. In a rear-end collision, the following motorist is presumed to have breached this duty and he bears the burden of proving that he was not negligent. Phipps, 05-651 at 4-5, 924 So.2d at 1084.

A following motorist may assume that the preceding vehicle is being driven with care and caution; however, he must drive at an appropriate speed and must maintain an interval between the two vehicles as would enable him to avoid a collision with the preceding vehicle under circumstances which should be reasonably anticipated. Id. The following driver may rebut the presumption of fault by establishing that he had his vehicle under control, closely observed the lead vehicle, and followed at a safe distance under the circumstances. Phipps, 05-651 at 4-5, 924 So.2d at 1084.

² He awarded \$10,000 for pain and suffering, \$7,448 for medical expenses, and \$1,848.59 for property damage.

At trial, only the Plaintiff and Loupe testified. The Plaintiff asserted that Loupe's van hit her car very hard after she stopped. She immediately looked up and saw the van get hit and then she felt a second bump which was minimal. The Plaintiff believed that the second hit was caused by Barnes running into the Loupe's van after Loupe hit her car. She testified that her injuries were clearly from the first hard impact.

Defendant, Colonel Justin Loupe, an employee of the St. Charles Sheriff's Office, testified that he was driving a van used for transporting inmates at the time of the accident. He stated he saw the JPSO vehicle abruptly stop and make the u-turn. He did not recall a car in front of the Plaintiff. When the Plaintiff braked in response to the actions of the JPSO unit, he braked to stop the van from striking the Plaintiff, but he was struck from behind by Barnes, causing him to skid into the Plaintiff. He believed he would not have hit the Plaintiff had Barnes not run into his van first. He contended that his vehicle only struck the Plaintiff one time.

Neither the van nor the third car sustained any damage, according to photographs introduced at trial.

The court of appeal may not set aside the trial court's findings of fact in the absence of manifest error or unless the findings are clearly wrong. Rosell v. ESCO, 549 So.2d 840, 844 (La.1989); Cannet v. Franklynn Pest Control Co., Inc., 08-56 at p. 5 (La.App. 5 Cir. 4/29/08), 985 So.2d 270, 274. A proper review of the record cannot be completed, however, by reading so much of the record as will reveal a reasonable factual basis for the finding in the trial court. Ambrose v. New Orleans Police Department Ambulance Service, 93-3099, 93-3110, 93-3112, p. 7 (La.7/5/94), 639 So.2d 216, 220; Cannet, 08-56 at 5, 985 So.2d at 274. There must

be a further determination that the factfinder's conclusion is not clearly wrong.

Ambrose, 93-3099, 93-3110, 93-3112 at 7, 639 So.2d at 220; Cannet, 08-56 at 5, 985 So.2d at 274.

In Rosell, the Court explained that when a review of the entire record shows that the trier of fact has made reasonable determinations as to the credibility of conflicting witnesses, such determinations “can virtually never be manifestly erroneous or clearly wrong.” Rosell, 549 So.2d at 845; Triche v. Ross 03-327, p. 4 (La.App. 5 Cir. 7/29/03), 852 So.2d 539, 540. Furthermore, where there are two permissible views of the evidence the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Stobart v. State, 617 So.2d 880, 882-883 (La.1993), Cannet, 08-56 at 5, 985 So.2d at 274.

In this case, only the Plaintiff and Loupe testified, each giving a different version of when and how the first impact occurred, as well as the number of times the van struck the Plaintiff's car. The physical evidence showed damage only to the Plaintiff's car.

Our review of the record shows that there are two permissible views of the evidence in this case. Although the trial judge did not provide reasons for judgment, he apparently accepted the Plaintiff's version, which was a reasonable determination. Since the Defendants failed to bear their burden of proving Loupe did not breach his duty as a following driver under La.R.S. 32:81, we find that the trial judge was not clearly wrong in finding Loupe 100% at fault in the accident and in awarding damages against the Defendants.³

Accordingly, the judgment of the trial court is hereby affirmed.

AFFIRMED

³ We note that the judgment names the St. Charles Sheriff's Office as a liable Defendant, even though the Plaintiff substituted the Sheriff, Greg Champagne, to replace the St. Charles Sheriff's Office as the party defendant in an amended petition. Since no one filed a motion for new trial, or raised this in the appeal, we cannot address this error.

EDWARD A. DUFRESNE, JR.
CHIEF JUDGE

MARION F. EDWARDS
SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD
FREDERICKA H. WICKER

JUDGES



FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

MARY E. LEGNON
FIRST DEPUTY CLERK

TROY A. BROUSSARD
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY MARCH 24, 2009 TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

A handwritten signature in black ink, appearing to read "Fitzgerald", written over a horizontal line.

PETER J. FITZGERALD, JR.
CLERK OF COURT

08-CA-810

RON A. AUSTIN
MARGARET E. MADERE
ATTORNEYS AT LAW
400 MANHATTAN BOULEVARD
HARVEY, LA 70058

DON A. ALMERICO
ROY L. SCHROEDER
ATTORNEYS AT LAW
11 JAMES BOULEVARD
SUITE 200
ST. ROSE, LA 70087