

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0414

MARNIE SOBKOWICH

VERSUS

MICHELLE WILKERSON

Judgment Rendered: NOV 01 2013

Appealed from the
22nd Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Trial Court Number 2010-13272

Honorable Allison H. Penzato, Judge

Scott G. Jones
Lawrence J. Boasso
Matthew J. Guy
Mandeville, LA

Attorneys for Appellant
Defendant – Michelle Wilkerson

Craig P. Hart
Tammy L. Karas
Covington, LA

Attorneys for Appellee
Plaintiff– Marnie Sobkowich

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

Michelle Wilkerson, defendant, appeals a judgment awarding damages in this personal injury lawsuit to plaintiff, Marnie Sobkowich. We affirm.

BACKGROUND

On September 10, 2009, an altercation occurred between Marnie and Michelle, who are sisters, during which Michelle struck Marnie in the face. As a result, Marnie sustained a fractured nose requiring surgery and a laceration to her nose requiring six stitches. On May 18, 2010, she filed this lawsuit against Michelle, seeking to recover damages arising from the incident. Marnie claimed that her sister committed a battery upon her by intentionally striking her in the face with a closed fist. Michelle admitted striking Marnie, but claimed that Marnie was at fault in provoking the incident, that her sister took a swing at her and struck her in the arm, and that she acted in self-defense.

A bench trial was held, during which Marnie and Michelle testified. The record reflects that on the day in question, Marnie and Michelle were at a home owned by Michelle and rented by their mother, Marlene, when an argument over the payment of the mortgage note on the home ensued between Michelle and Marlene. Michelle, who admitted that she was angry at the time and had a heated discussion with her mother, walked out of the home with her 4-year-old son. Marnie exited the home soon thereafter.

The parties gave differing accounts of the events that transpired after they walked out of the home. Marnie claimed that she went outside to retrieve the mortgage note that Michelle and her mother had fought over from Michelle so that she could pay it. According to Marnie, when she exited the home, Michelle had already put her son in her vehicle and was walking back toward her. Marnie testified that she told Michelle to give her the note and she would pay it; she took the note from Michelle, and Michelle punched her in the face.

However, Michelle testified that she was putting her son in his car seat when Marnie, who was yelling, came up behind her. Michelle stated that she was pinned up against a car and a mailbox, had no where to go, and her son was crying. Michelle testified that she was startled and that Marnie hit her (although she admitted she was not sure if Marnie went to grab the mortgage note from her). At that point, Michelle tried to “push” Marnie away. Michelle insisted that she struck Marnie in the nose with an open hand while trying to push her away and that at no time did she punch her sister with a closed fist.

The trial court issued written reasons for judgment in which it made the following findings of fact: (1) Michelle intentionally struck Marnie and the contact was without Marnie’s consent; (2) the evidence did not establish that there was an actual or reasonably apparent threat to Michelle’s safety and therefore the self-defense doctrine did not apply; and (3) Marnie intentionally came into contact with Michelle by, at a minimum, hitting her arm to take the mortgage note from her. In light of these factual findings, the court concluded that the actions of both Marnie and Michelle were intentional and found both equally at fault in causing Marnie’s injuries. The court entered judgment finding that Marnie suffered damages totaling \$33,422.28, which it reduced to \$16,711.14, after applying the percentage of fault attributable to Marnie.

Michelle filed a motion for a new trial, for a judgment notwithstanding the verdict, and for remittitur. She asked the court to issue a new judgment finding that Marnie was guilty of a greater percentage of fault because Marnie was the aggressor. The trial court denied the motion.

In this appeal, Michelle contends that the trial court erred in rendering judgment against her as it was not established by a preponderance of the evidence that she committed an intentional battery on Marnie. She insists that the evidence established that Marnie provoked the confrontation and thereby consented to the

altercation. Although Michelle acknowledges in brief that there is a dispute in the version of the facts offered by the parties, she contends that the record shows that she attempted to extricate herself from the argument to avoid any confrontation and that Marnie's actions in pursuing her and grabbing for the mortgage note were the sole cause of the altercation and resulting damages.

The trial court's factual determinations that Michelle did inflict an intentional battery upon her sister and that Michelle did not act in self-defense are governed by the manifest error standard of review. Under that standard of review, this court may not set aside the trial court's findings unless we determine that there is no reasonable factual basis for the findings and the findings are clearly wrong. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). If the findings are reasonable in light of the record as a whole, this court may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). When, as here, the factual findings are based on the credibility of witnesses, the fact finder's decision to credit a witness's testimony must be given great deference by the appellate court. *Id.*

We have thoroughly reviewed the record and find the trial court's conclusions that Michelle committed an intentional battery upon her sister and that she did not act in self defense are reasonably supported therein. We find no manifest error in the trial court's fault determination; therefore, we may not disturb that ruling.¹

¹ Although Marnie suggests in her appellee brief that the court should have found Michelle to be 100% at fault, she did not file an answer to the appeal. An appellee who seeks to have a judgment modified, revised, or reversed in part on appeal must file an answer in accordance with La. C.C.P. art. 2133. Marnie's failure to answer the appeal precludes this court from consideration of addressing the trial court's allocation of 50% fault to her. See **Matthews v. Consolidated Companies, Inc.**, 95-1925 (La. 12/8/95), 664 So.2d 1191.

CONCLUSION

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to appellant, Michelle Wilkerson.

AFFIRMED.