

NOT DESIGNATED FOR PUBLICATION

JUANDA JONES * **NO. 2000-CA-0250**
VERSUS * **COURT OF APPEAL**
KATHERINE ZIBILICH AND * **FOURTH CIRCUIT**
ALLSTATE INSURANCE *
COMPANY * **STATE OF LOUISIANA**

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-11289, DIVISION "L-15"
Honorable Max N. Tobias, Judge

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Judge Steven R. Plotkin

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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer,
Judge James F. McKay III)

Dennis S. Mann
Michelle D. Robert
HOWARD, LAUDUMIEY, MANN, REED & HARDY
839 St. Charles Avenue
Suite 306
New Orleans, LA 70130

COUNSEL FOR JONES/APPELLANT

Leon A. Crist
LAW OFFICES OF STEVEN B. WITMAN
3850 North Causeway Boulevard
Two Lakeway Center, Suite 1960
Metairie, LA 70002

COUNSEL FOR MS. ZIBILICH/APPELLEE

**REVERSED;
RENDERED.**

This red light/green light dispute presents the question of whether a trial judge can properly dismiss a plaintiff's suit on a finding that the evidence indicates that both parties were equally at fault in causing an accident. On the basis of this court's previous decisions in Allen v. Rawlins, 95-1592, 95-1593 (La. App. 4 Cir. 2/15/96), 669 So. 2d 1282 and Pitts v. Burton, 95-1018 (La. App. 4 Cir. 12/14/95), 665 So. 2d 1314, we find that a trial court commits manifest error by failing to quantify negligence after deciding that both parties are at fault in causing such an accident. Accordingly, we reverse the trial court judgment dismissing plaintiff's case, and render judgment as detailed below.

FACTS

This action arises from an automobile accident that occurred on June 29, 1997, around 6:30 p.m., at the intersection of Earhart Boulevard and Pine Street in the City of New Orleans. Earhart Boulevard is a six-lane divided

highway, with two travel lanes and a parking lane in each direction. Pine Street is a one-way residential street, with parking on both sides. The intersection is controlled by traffic signals.

Plaintiff, Juanda Jones, who was travelling on Earhart Boulevard at the time of the accident, testified at trial that she entered the intersection on a red light and was hit by a vehicle driven by defendant, Katherine Zibilich. In an attempt to corroborate her testimony, Ms. Jones introduced the deposition testimony of Frederick Taylor, who allegedly observed the color of the traffic signal in the direction facing opposite Jones, while he was sitting on the merry-go-round in the park located on the corner diagonal from the accident scene. Mr. Taylor testified that he had been sitting there for one to two hours prior to the time of the accident.

Ms. Zibilich, who was travelling on Pine Street at the time of the accident, testified that she had been stopped at the red light behind another vehicle for some period of time. Then, when the other vehicle started to move, she followed, assuming that the light had turned green. As she entered the intersection, the two automobiles collided. Although Ms. Zibilich admitted that she was not absolutely certain the light was green when she moved her vehicle into the intersection, she also claims that she watched the light controlling her traffic lane turn yellow, then red, immediately after the

accident occurred.

The trial court rendered judgment in favor of Ms. Zibilich, dismissing the case in its entirety. The trial court found specifically that "the evidence preponderates equally to Ms. Zibilich and Ms. Jones having a green light." The trial court also specifically rejected Mr. Taylor's testimony. Ms. Jones appeals, raising the following four issues on appeal: (1) whether the trial judge erred in finding that "the evidence preponderates equally to Ms. Zibilich and Ms. Jones having a green light"; (2) whether the trial judge erred in concluding that the testimony of eyewitness Frederick Taylor was not credible; (3) whether the trial judge erred in failing to assign 100% of fault on Ms. Zibilich, based on the evidence provided; and (4) whether the trial judge erred in failing to award Ms. Jones 50% of her damages, given the evidence presented at trial.

PREPONDERANCE OF EVIDENCE

In her first assignment of error, Ms. Jones argues that the trial court erred in finding that the "evidence preponderates equally to Ms. Zibilich and Ms. Jones having a green light." She claims that the record is void of evidence to support a finding that Ms. Zibilich had a green light.

Generally, an appellate court may not set aside a trial court's or jury's

finding of fact in the absence of “manifest error” or unless it is “clearly wrong.” Cormier v. Comeaux, 98-2398 (La. 7/7/99), 748 So. 2d 1123, 1126; Stobart v. State, Department of Transportation and Development, 617 So.2d 880, 882 (La. 1993); Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Even though the appellate court may feel its own evaluations and inferences are more reasonable than the those of the fact finders, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where a conflict exists in the testimony. King v. Sewerage & Water Board of New Orleans, et al, 99-0382, p. 3 (La. App. 4 Cir. 11/24/99), 747 So.2d 200, 202, writ denied, 99-3588 (La. 2/18/00), 754 So. 2d 967.

The Supreme Court, in Stobart, 617 So.2d at 882, announced a two-part test for the reversal of a fact finder’s determination. Under the test, an appellate court must find from the record (1) that a reasonable factual basis does not exist for the finding of the trial court, and (2) that the record establishes that the finding is clearly and manifestly wrong. Id.; Cormier, 98-2378 at 5, 748 So. 2d at 1127.

In the present case, Ms. Jones argues that no weight should be given to Ms. Zibilich’s testimony that she saw her traffic signal turn yellow, then red, after the accident, because Ms. Zibilich admits that she entered the intersection without seeing a green traffic signal. Furthermore, Ms. Jones

argues that the accident was not a minor impact. Thus, Ms. Jones asserts, it is highly unlikely that Ms. Zibilich was checking the color of her traffic light just seconds after the accident. Moreover, Ms. Jones alleges that Ms. Zibilich's testimony about seeing the light change after the accident is inconsistent with her statement that she simply assumed that since the car in front of her had started to move, the light was green seconds later when she entered the intersection.

When a trial court's findings are based on determinations regarding the credibility of witnesses, the manifest error--clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder 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. Collins v. State ex rel. Louisiana Health Care Authority, 99-2307 (La. App. 4 Cir. 7/12/00), 2000 WL 1009118. Moreover, "when a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong." Id., quoting Rossell v. ESCO, 549 So.2d 840, 844-845 (La.1989).

We find no error in the trial court's finding that the evidence preponderated equally to Ms. Jones and Ms. Zibilich having a green light. The record reveals a reasonable factual basis to support the trial court's

decision to credit both Ms. Zibilich's testimony and Ms. Jones' testimony regarding the color of the traffic light. Thus, this court cannot find that the trial court's judgment on this issue is manifestly erroneous or clearly wrong.

CREDIBILITY OF MR. TAYLOR

By this assignment of error, Ms. Jones contends that the trial court erred in concluding that the testimony of eyewitness Frederick Taylor was not credible. Specifically, Ms. Jones argues that the trial judge's conclusion is unsubstantiated by the evidence and testimony presented.

In his reasons for judgment, the trial judge left no doubt concerning his reason for outright rejection of the testimony of Mr. Taylor, providing five reasons, as follows:

(a) internal conflicts in the testimony; (b) the illogical nature of someone staring at traffic for two hours; (c) failure to inquire at the scene of the accident if his friend was injured; (d) distance from accident; and (e) drug conviction implying that he was in the park to sell drugs to kids.

The trial court's decision to discredit the testimony of Mr. Taylor is a credibility call that can virtually never be manifestly erroneous or clearly wrong. Collins, 99-2307, 2000 WL 1009118; Rossell, 549 So.2d at 844-845. Accordingly, we find no merit in Ms. Jones' arguments concerning the credibility of Mr. Taylor.

APPORTIONMENT OF FAULT

By her third assignment of error, Ms. Jones argues that the trial court erred in failing to assign 100% of the fault to Ms. Zibilich.

In determining the percentage of fault, the trial judge is required to consider both the nature of the conduct of each party at fault, and the extent of the causal relation between the conduct and the damages claimed.

Watson v. State Farm Fire & Casualty Ins. Co., 469 So.2d 967, 974 (La. 1985); Allen, 95-1492, 95-1493 at 5, 669 So.2d at 1285. In Allen, this court held that a trial judge's findings as to percentages of fault must be upheld on appeal, absent clear or manifest error. 95-1592, 95-1593 at 4, 669 So.2d at 1285. Ms. Jones argues that where manifest error does exist, the Court of Appeal is compelled to adjust the percentages of fault. Watson, 469 So.2d 967.

In this case, Ms. Jones alleges that the evidence overwhelmingly proves that Ms. Zibilich had a red light. Ms. Jones claims that Ms. Zibilich was traveling on the smaller of the two streets. Further, she points to Ms. Zibilich's testimony that she never saw a green traffic signal before entering the intersection. Ms. Jones also asserts that Mr. Taylor, an independent eyewitness, affirmed that Ms. Jones had a green traffic signal. Thus, Ms.

Jones contends that the trial judge's finding that fault should be attributed to both drivers equally is manifestly erroneous.

Considering our finding that the trial judge's conclusion that the record evidence "preponderates equally to Ms. Ziblich and Ms. Jones having a green light" is not manifestly erroneous, it would be inappropriate for this court to assign 100 percent of the fault for the accident to Ms. Ziblich. Thus, we find no merit in Ms. Jones' arguments on this issue.

AWARD OF DAMAGES

In her final assignment of error, Ms. Jones argues that the trial judge erred in failing to award Ms. Jones 50% of her damages, after dividing fault equally between the two parties. This court, in Allen, 95-1592 at 5, 669 So.2d at 1285, found as follows: "Having made this finding of equal fault, 50% assessed to each party, the trial court should have awarded damages to each party, diminished according to the percentage of their respective fault." Id. at 5, 669 So. 2d at 1285. Moreover, the court noted that under Louisiana's comparative fault scheme, a plaintiff's negligence will only diminish, not defeat, recovery, as long as the plaintiff's negligence is less than 100%. Id. at 1285; Watson, 469 So.2d at 971-72; La. C.C. art. 2323.

In its reasons for judgment, the trial court concluded as follows:

Although the court finds plaintiff's damages totaling

\$5,500.00 for contusions to knees, headaches, and neck strain together with physician related expenses and the unreimbursed portion of the deductible on her policy, since plaintiff has filed to prove more than 50% fault on the defendant, she cannot recover.

The actual judgment in this case does not mention any percentages of fault, but says simply that “[f]or written reasons assigned, [j]udgment is rendered dismissing all claims in this suit.” Thus, Ms. Zibilich argues that this case is distinguishable from Allen because the trial judge’s statement quoted above was simply his way of saying that Ms. Jones failed to prove her case by a preponderance of the evidence. Ms. Zibilich claims that the trial judge never intended to assign a percentage of fault.

In Pitts, 95-1018, 665 So. 2d 1314, the trial judge stated that “the court was not impressed with the testimony and the evidence presented by the plaintiff and feels accordingly that the plaintiff failed to prove his case by a preponderance of the evidence.” Id. at 2, 665 So. 2d at 1315.

Concluding that “the trial court was clearly wrong,” this court found that both parties were negligent and reversed the trial court’s judgment in favor of the defendant. Id. at 2, 665 So. 2d at 1315-16. Based on facts similar to those presented by the instant case, this court found that “both parties contributed equally to the accident and damages should be reassessed.” Id. at 3, 665 So. 2d at 1316. Thus, the court awarded the plaintiff damages,

“subject to a fifty percent reduction for his comparative negligence.” The same rule applies to the instant case.

CONCLUSION

Accordingly, the trial court judgment is reversed and Ms. Jones is awarded \$5,500 in damages, subject to a 50 percent reduction for her comparative negligence. All costs are to be divided equally between the parties.

**REVERSED;
RENDERED.**