

NOT DESIGNATED FOR PUBLICATION

MARK LEWIS * **NO. 2000-CA-1064**
VERSUS * **COURT OF APPEAL**
CLEMENT STANLEY, NEW * **FOURTH CIRCUIT**
ORLEANS PRIVATE PATROL * **STATE OF LOUISIANA**
SERVICE, INC. AND DEEP *
SOUTH SURPLUS, INC. *
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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 98-50601, SECTION "B"
Honorable Angelique Reed, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin, Judge David S. Gorbaty)

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AFFIRMED

In this appeal, Stanley Clement, New Orleans Private Patrol Service, Inc. and Clarendon National Insurance Company contend that the trial court erred in disregarding the testimony of the eyewitness and finding that the plaintiff proved his case by a preponderance of the evidence. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

This lawsuit arises out of an intersectional collision that occurred on August 14, 1997. Plaintiff Mark Lewis was exiting Interstate 610 and preparing to turn left to travel north on Franklin Avenue. Defendant Stanley Clement, an employee of New Orleans Private Patrol Service, Inc., was traveling south on Franklin Avenue in the left lane. At trial, plaintiff testified that he stopped at a red light behind two other vehicles at the intersection of the interstate and Franklin Avenue. The light turned green, and plaintiff proceeded through the intersection behind the two other cars. As Lewis was crossing southbound Franklin Avenue, his car was struck by

the defendant's vehicle.

Defendant testified at trial that as he approached the intersection of Franklin Avenue and the interstate, the stoplight facing him turned from red to green. He accelerated to proceed through the intersection, and collided with the plaintiff's car.

Officer Lloyd Clark of the New Orleans Police Department conducted the post-accident investigation and took statements from the plaintiff and defendant. At trial, Officer Clark testified that plaintiff told him that he had the green light at the time of the accident, and that defendant told him "he did not know if he had the green light or not." Accordingly, Officer Clark issued a citation to Mr. Clement for disregarding the traffic light. At trial, defendant disputed the information contained in the police report, and averred that he told Officer Clark that he had the green light.

Defendants introduced into evidence the deposition testimony of Stephen Troyer, an eyewitness to the accident. Mr. Troyer was traveling behind plaintiff as he exited the interstate. In his deposition, Mr. Troyer stated that the signal light facing Lewis changed to yellow as Lewis was proceeding down the exit ramp, and changed to red when Lewis entered the intersection. Mr. Troyer did not remain at the scene of the accident, but called the telephone number that was printed on the side of defendant's truck

and reported the collision. Mr. Troyer was subpoenaed to appear at trial but failed to do so, despite the fact that the trial judge communicated with him by telephone and ordered his appearance. As a result, the trial judge issued a writ of arrest for Mr. Troyer.

After a trial on March 15, 2000, the trial judge rendered judgment in favor of the plaintiff and awarded damages, finding that Mr. Lewis had the green light at the time of the collision. The trial court specifically noted that “[a]lthough Mr. Clement testified that he was sure that he had a green signal light, the court does not find him (sic) to be credible.” Defendants subsequently filed this appeal.

DISCUSSION

Defendants argue that the trial court erred by ignoring the testimony of Mr. Troyer, a disinterested eyewitness, and finding for the plaintiff.

A court of appeal may not set aside a trial court’s or a jury’s finding of fact in the absence of “manifest error” or unless it is “clearly wrong.” *Rosell v. ESCO*, 549 So.2d 840 (La. 1989). In *Mart v. Hill*, 505 So.2d 1120 (La. 1987), the Louisiana Supreme Court posited a two-part test for the reversal of a factfinder’s determinations:

- 1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and
- 2) The appellate court must further determine that the record

establishes that the finding is clearly wrong (manifestly erroneous). *Id.* at 1127 (quoting *Arceneaux v. Domingue*, 365 So.2d at 1333 (La. 1978)).

This test dictates that the appellate court must do more than simply review the record for some evidence that supports or controverts the trial court's finding. *Id.* The appellate court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.

Nevertheless, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. See generally, *Cosse v. Allen-Bradley Co.*, 601 So.2d 1349, 1351 (La.1992); *Housley v. Cerise*, 579 So.2d 973, 976 (La.1991); *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990). Even though an appellate court may feel its own evaluations and inferences are more reasonable than those of the factfinder, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978). However, where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness's story, the court of appeal may find manifest

error or clear wrongness even in a finding purportedly based upon a credibility determination. *Rosell*, 549 So.2d at 844-45. Nonetheless, this court has emphasized that "the reviewing court must always keep in mind that 'if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Housley v. Cerise*, 579 So.2d 973, 976 (La. 1991), (quoting *Sistler v. Liberty Mutual Ins. Co.*, 558 So.2d 1106, 1112 (La.1990)).

Courts have recognized that "[t]he reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts." *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La.1973). Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

Citing *Winfield v. Porter*, 618 So.2d 890 (La. App. 4 Cir.1993), *writ denied*, 629 So.2d 349 (La. 1993), defendants aver that since the testimony of Mr. Clement and Mr. Lewis was conflicting, the statement of Mr. Troyer,

an independent eyewitness, should have tipped the scales in favor of the defendants and precluded a ruling for the plaintiff. After considering the specific facts underlying this case, we disagree.

In *Winfield*, the plaintiffs were rear-ended by a pickup truck that fled from the scene after the collision. After the impact, an independent eyewitness, Damien Peters, followed the at-fault driver from the scene of the accident, conversed briefly with him, and copied down the vehicle's license plate number. The tag number was traced after the accident to the defendant's truck, which matched the specific description provided by the eyewitness, as well as the less exact description given by the plaintiffs. After a trial, the trial court accepted the defendant's excuses and alibi as to why he could not have been in an accident at that time, and dismissed the lawsuit. Opining that the "material facts as found by the trial judge are not reasonably supported by credible evidence," *Id.* at 892, this court reversed, and held that "the testimony of the disinterested witnesses, if credible, should be given greater weight by the trial court than that of an interested witness." *Id.*

The instant case is distinguishable from *Winfield*. Here, credible evidence, namely the testimony of Mr. Lewis and Officer Clark, supports the trial judge's finding of liability. Furthermore, the disinterested witness in

this case, Mr. Troyer, did not remain at the accident scene as did Mr. Peters, but rather called in and reported what he saw. Mr. Troyer refused to testify at trial, even when telephoned by the trial judge and ordered to appear. Because of these factors, Mr. Troyer's credibility was adversely affected, and his testimony was not believable. Therefore, it was not necessary for the trial court to attribute greater weight to Mr. Troyer's statements merely because he was a disinterested witness.

Although the testimony of the independent witness is not specifically addressed in the judgment, it is clear from the transcript of the proceedings that the trial judge intended to read Mr. Troyer's deposition before deciding the case. At the conclusion of the trial, the judge and the attorneys discussed the possibility of Mr. Troyer coming in at a later date to testify. Judge Reed stated, "I have the deposition [of Mr. Troyer]. I need to read it." Defense counsel asked, "Is his presence necessary to decide the case?" The judge replied, "Well, I haven't read the deposition yet." She went on to say, "I guess if I read [his] deposition, I won't need his testimony any longer." Defense counsel responded, "Judge, I am prepared to submit the deposition. I don't need to ask him anything else." Mr. Troyer did not return to court to testify, and Judge Reed rendered a judgment two days later. In light of the comments made by the trial judge, we conclude that she intended to, and did,

read the deposition of Mr. Troyer, and based her conclusions on it.

Employing the foregoing appellate standards, we cannot say that, in light of the entire record, the ruling of the trial court was manifestly erroneous. The testimony of Mr. Lewis and Officer Clark provided a reasonable factual basis for the trial court to conclude that Mr. Lewis had the green light.

Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED