SAMUEL V. ALBERT	*	**NO. 2000-CA-2016**
VERSUS	*	**COURT OF APPEAL**
JOHN D. BERZAS AND ALLSTATE INSURANCE CO.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 99-54528, SECTION "B"
Honorable Angelique Reed, Judge

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Judge Patricia Rivet Murray

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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer, Judge Patricia Rivet Murray)

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REVERSED AND RENDERED

This civil action arises from an accident in which a van driven by John D. Berzas struck Samuel V. Albert as he was walking across a street. The trial court held that Mr. Berzas and his liability insurer, Allstate Insurance Company, were sixty-percent liable for Mr. Albert's resultant injuries and fixed total damages at $763.00 for medical expenses and $9,000.00 in general damages. The defendants now appeal, contesting both liability and quantum. We reverse for the reasons that follow.

At trial, the court heard three conflicting versions of the accident, which occurred in the late afternoon or early evening on June 18, 1998. Mr. Albert testified that after parking his Coca Cola delivery truck in the company parking lot, he was walking across South Rendon Street when Mr. Berzas' van came from the left and struck him. According to Mr. Albert, there were no vehicles parked nearby to block his view and the van was not speeding; the accident occurred, he said, because "I thought [the van] was gonna' slow down." Mr. Albert's co-worker, Michael Gardener, testified that

he had stopped his truck to allow Mr. Albert to cross South Rendon Street in front of him before turning into the lot. A van came from behind his truck at about 10 or 15 miles per hour, then slowed slightly before it struck Mr. Albert. In contrast, Mr. Berzas testified that Mr. Albert had been standing for several minutes on the running board of a Coke truck that was blocking South Rendon Street. As Mr. Berzas pulled around the left side of the truck to pass, Mr. Albert "jumped down off the truck and was right in front of me and I stopped immediately as soon as I hit him." According to Mr. Berzas, he was only going about five miles per hour, but he was unable to stop in time to avoid contact with Mr. Albert.

In written reasons for judgment, the trial court explicitly accepted Mr. Berzas' version of events, stating as follows:

> The Court ... finds the facts to be that plaintiff, Samuel V. Albert was standing on the side of his co-worker's truck talking to his co-worker which was parked in the street when the defendant who was stopped behind the co-worker pulled from behind him and attempted to go around him at the same time that the plaintiff stepped off his co-worker's truck and was struck by the defendant as he stepped off the truck and into the street.

The court then concluded that on these facts, both parties shared the blame for the accident: Mr. Berzas had "failed to see the plaintiff" as he passed the truck, while Mr. Albert "was negligent in stopping to talk in the middle of the street ... and in jumping off the truck into the street without first

ascertaining if it was safe to do so." Based upon these findings, the court apportioned sixty percent of the fault to the defendant, Mr. Berzas, and forty percent to the plaintiff, Mr. Albert.

The defendants assert that because none of the testimony presented at trial suggests that Mr. Berzas either did not see Mr. Albert or lost sight of him at any point, there is no evidentiary support for an assessment of fault against Mr. Berzas. The plaintiff argues, however, that "the fact that Mr. Berzas admitted to striking Mr. Albert more than sustains" the court's finding of liability and apportionment of fault, and therefore, the judgment cannot be found manifestly erroneous.

Absolute liability is not imposed on a driver whenever there is a car-pedestrian collision. *Aetna Cas. & Surety Co. v. Nero*, 425 So.2d 730, 733 (La. 1983); *Mutart v. Allstate Ins. Co.*, 622 So.2d 803, 806 (La. App. 4th Cir. 1993). Instead, both a driver and a pedestrian have the duty to maintain a proper lookout and to see what should be seen. *Mutart* at 807. Moreover, "[t]he pedestrian has a duty not to leave a place of safety until it is safe to do so. If a motorist sees a person in a position of safety, the motorist can assume that the person will not leave that position of safety until it is safe to do so." *Id.*; see also *Powell v. Regional Transit Authority*, 95-1426 (La. App. 4th Cir. 11/5/97), 701 So.2d 1370 (holding that a bus driver has no

duty to anticipate someone suddenly opening a car door).

Our review of the record in this case reveals no basis for a factual finding that Mr. Berzas failed to see Mr. Albert; to the contrary, in all three versions of the incident provided by the witnesses, the defendant driver was noted to have had a clear view of Mr. Albert's position. More importantly, the version of events recounted in the trial court's reasons establishes that this accident would have happened whether or not Mr. Berzas saw Mr. Albert: The defendant driver "attempted to go around [the truck] **at the same time** that the plaintiff stepped off his co-worker's truck and was struck by the defendant **as he stepped off**" the truck. Thus, based upon the factual findings of the court below, Mr. Berzas' alleged substandard conduct, failing to see Mr. Albert, was not the cause-in-fact of this accident.

Accordingly, the trial court's judgment in favor of Samuel V. Albert is reversed, and judgment is entered in favor of John D. Berzas and Allstate Insurance Company, dismissing plaintiff's claims with prejudice.

REVERSED AND RENDERED