

**TROY THOMAS,
INDIVIDUALLY AND AS
NATURAL TUTOR OF/AND
ON BEHALF OF HIS MINOR
CHILDREN, TERRELL
THOMAS AND TROILYNN
THOMAS, AND FERGUSON
THOMAS**

*

NO. 2001-CA-0329

*

COURT OF APPEAL

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

VERSUS

*

**ALLSTATE INSURANCE
COMPANY AND BRIAN
COMBOY**

**APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 98-54547, SECTION "C"
HONORABLE SONJA M. SPEARS, JUDGE**

**JAMES F. MCKAY, III
JUDGE**

(Court composed of Judge Joan Bernard Armstrong, Judge James F. McKay, III, Judge David S. Gorbaty)

GEORGE H. JONES
New Orleans, Louisiana
Attorney for Plaintiff/Appellant

STEVEN B. WITMAN
LAW OFFICES OF STEVEN B. WITMAN
Metairie, Louisiana
Attorney for Defendant/Appellee

AFFIRMED

The plaintiffs, Troy Thomas and Ferguson Thomas, appeal the trial court's judgment granting the defendants', Allstate Insurance Company and Brian Comboy, motion to dismiss.

On March 30, 1998, around 3:30 p.m., the defendant was traveling westbound in the left lane of traffic on Earhart Boulevard at Fern Street and approaching Carrollton Avenue. Mr. Comboy, the defendant, attempted to switch into the right lane in order to avoid the traffic buildup in the left lane. After looking in his rearview mirror, the defendant ascertained that the right lane was free of oncoming traffic and proceeded to enter the right lane. The plaintiff, Troy Thomas was allegedly traveling in the right lane of traffic, approaching the Fern Street intersection when he struck the front right panel of the defendant's vehicle which was protruding approximately one and a half feet in the right lane. The plaintiffs claim that they sustained injuries as a result of this accident. The defendant's insurer, Allstate Insurance Company, paid Troy Thomas \$626.53 in property damage to his vehicle. Furthermore, the police report indicates that a traffic citation was issued to

Mr. Comboy for illegal lane usage, which was apparently dismissed by New Orleans Traffic Court. After a trial on the merits was held, the district court concluded that the plaintiffs failed to provide credible evidence of injuries or damages and found the defendant to be free of liability. The trial court dismissed all claims with prejudice.

The plaintiffs argue that the trial court was clearly wrong and manifestly erroneous in dismissing the claims and refusing to award damages for the plaintiffs' alleged injuries and damages.

A reviewing court may not set aside 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 order to reverse a fact finder's determinations, the appellate court must find from the record that: 1) a reasonable factual basis does not exist for the finding of the trial court, and 2) the record establishes that the finding is clearly wrong (manifestly erroneous). *Mart v. Hill*, 505 So.2d 1120, 1127 (La.1987).

This test dictates that a reviewing court must do more than simply review the record for some evidence which supports or controverts the jury's findings. The reviewing court must review the record in its entirety to

determine whether the jury's finding was clearly wrong or manifestly erroneous. *Stobart v. State, through Dep't of Transp. & Dev.*, 617 So.2d 880, 882 (La.1993). Thus, even though an appellate court may feel its own evaluations and inferences are more reasonable than the fact finder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Rosell*, 549 So.2d at 844; *Stobart*, 617 So.2d at 882. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Stobart*, 617 So.2d at 883.

In the instant matter the plaintiffs argue that the trial court erred when it dismissed their suit with prejudice. The plaintiffs base this argument on the premise that the trial court was mistaken in its factual determinations. First, they argue that the trial court failed to take into consideration documents and other objective evidence as to how the accident occurred by failing to find that Mr. Comboy breached a legal duty prior to changing lanes. They cite La. R.S. 32:79, which states in pertinent part that:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic, the following rules, in addition to all others consistent herewith, shall apply.

(1) A vehicle shall be driven as nearly as

practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Mr. Comboy testified that as he attempted to change lanes in order to avoid a traffic backup, he looked into his rearview mirror and saw that there was no oncoming traffic. He then proceeded to enter the right lane causing his vehicle to protrude about one and half feet into the right lane when he noticed the plaintiff's approaching in the right lane. He mentions that there appeared to be a curve in the road. He remained stopped in this position when plaintiff's vehicle collided with the front right quarter panel at the wheel of his vehicle.

The plaintiffs' version is somewhat dissimilar, they aver that the defendant suddenly and without warning entered the right lane of traffic and collided with their vehicle. There seems to be no dispute that the defendant's vehicle was protruding into the right lane. The dispute is which car hit the other car and who bears the fault of the collision.

Clearly, the trial court heard all of the evidence and found the defendant's version of the events to be more credible. The trial court obviously concluded that the defendant had ascertained that his movement was safe before he entered the right lane in compliance with the above statute. This factual determination will not be disturbed on appeal.

The plaintiffs additionally argue that the trial court erred in failing to award damages for their injuries. As stated above, the trial court heard all of the testimony and reviewed the medical documents presented as evidence and concluded that the plaintiffs failed to prove their damages.

The plaintiffs conveyed no complaints of injury to either the defendants or the police who came to the scene of the accident. In fact they sought medical assistance more than a week after the accident occurred and only after contacting an attorney. They both received medical help from the American Medical Group on or about April 6, 1998, and received some form of therapy from that date until August 31, 1998. Troy Thomas was diagnosed with lumbar strain, upper thoracic strain, and left shoulder strain. His medical bill was \$2,255.00. Ferguson Thomas was diagnosed with left shoulder and left knee sprains and was discharged on October 8, 1998. His medical bill was \$ 2,310.00. The trial court saw the objective evidence presented at trial and heard all of the live testimony and concluded that the plaintiffs failed to prove their claims of injury and consequently awarded no damages to either plaintiff. This determination of fact will not be disturbed on appeal.

For the foregoing reasons the judgment of the trial court is affirmed.

AFFIRMED

