NOT DESIGNATED FOR PUBLICATION

MICHAEL BENNETT AND LYNN BENNETT	*	**NO. 2000-CA-1589**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
THE CITY OF NEW ORLEANS AND THE STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT	*	**STATE OF LOUISIANA**
	*	

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 84-10733, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge
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Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris, Sr., and Judge David S. Gorbaty)

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AFFIRMED

The defendant, the City of New Orleans ("the City") appeals from the judgment of the trial court which found in favor of the plaintiff, Michael Bennett ("Mr. Bennett"), and against the City for damages allegedly sustained by Mr. Bennett in a car accident that occurred on a road for which the City was allegedly responsible. Upon a careful review of the record evidence, we find no error in the trial court's judgment and affirm.

FACTS AND PROCEDURAL HISTORY

On July 1, 1983, at approximately 9:20 a.m., Mr. Bennett was operating a 1975 Oldsmobile Cutlass owned by his mother, co-plaintiff Lynn Bennett ("Ms. Bennett"), on Old Gentilly Road in a westerly direction near its intersection with Woodland Street in the city of New Orleans. Paul Melancon ("Mr. Melancon") was a guest passenger in the vehicle. Mr. Bennett attempted to pass a slower moving vehicle by changing first into the left, or passing, lane. Upon returning to the right lane, Mr. Bennett suddenly encountered a large body of water and mud covering the right lane and

adjacent shoulder of Old Gentilly Road.

Upon entering this body of water, the wheels of Mr. Bennett's vehicle lost traction on the road surface, causing Mr. Bennett to swerve right to left as he tried to regain control of the vehicle. During this struggle, Mr. Bennett's vehicle entered the opposing lane of Old Gentilly Road, where it struck a cement truck, bounced off the cement truck and then spun back into the other lane, where it was then struck by another vehicle.

As a result of this accident, Mr. Bennett allegedly sustained serious, severe, permanent and painful injuries consisting of the following: multiple facial fractures requiring surgery and wiring of the jaw as well as extraction of teeth; a renal contusion causing hematuria; and brain damage consisting of a contusion to the brain, resulting in Mr. Bennett's permanent total disability. As a further result of this accident, Mr. Bennett has been unable to work.

A bench trial of this matter was held on October 18, 1999 through October 21, 1999. On March 23, 2000, the trial court judge found in favor of Mr. Bennett and against the City and issued her Judgment and Reasons for Judgment. It is from this ruling that the City now appeals.

LAW AND DISCUSSION

Standard of Review

In *Courteaux v. State ex rel. Dept. of Transp. and Development*, 99-0352, 99-0353 pgs. 10-14 (La. App. 4 Cir. 9/22/99), 745 So.2d 91, 95-99 *writ denied*, 2000-3214 (La. 1/28/00) 753 So.2d 834, this Court expounded on the appellate standard of review in cases such as this and stated as follows:

> In reviewing the factual findings of a trial court, an appellate court is limited to a determination of manifest error. *Hill v. Morehouse Parish Police Jury*, 95-1100 (La. 1/16/96), p. 4, 666 So.2d 612, 614; *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La. 2/20/95), 650 So.2d 742, 745; *Stobart v. State through Dept. of Transp. and Development*, 617 So.2d 880 (La. 1993); *Arceneaux v. Domingue*, 365 So.2d 1330 (La. 1978). It is well settled that a court of appeal 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," and where there is a conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review, even though the appellate court may feel that its own evaluations and inferences are as reasonable.
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> Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Watson v. State Farm Fire and Cas. Ins. Co.*, 469 So.2d 967 (La. 1985).
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> We are instructed that before a factfinder's verdict may be reversed, we must find from the record that a reasonable factual basis does not exist for the verdict, and that the record establishes the verdict is manifestly wrong. *Lewis v. State through Dept. of Transp. and Development*, 94-2370 (La. 4/21/95), 654 So.2d 311, 314; *Stobart, supra*. Although we accord deference to the factfinder, we are cognizant of our constitutional duty to review facts, not merely to decide if we, as a reviewing court, would have found the facts differently, but to determine whether the trial court's verdict was manifestly

erroneous, clearly wrong based on the evidence, or clearly without evidentiary support. *Ambrose v. New Orleans Police Department Ambulance Service*, 93-3099 (La. 7/5/94), 639 So.2d 216, 221; *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La. 2/20/95), 650 So.2d 742, 745.

When there is evidence before the trier of fact which, upon its reasonable evaluation of credibility, furnishes a reasonable factual basis for the trial court's finding, on review the appellate court should not disturb this factual finding in the absence of manifest error. Stated another way, the reviewing court must give great weight to factual conclusions of the trier of fact; where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. The 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).

By analogy to the review of awards of damages for personal injuries, the trier of fact is owed great deference in allocating fault, for the finding of percentage of fault pursuant to the comparative fault article, La.Civ.Code art. 2323, is also a factual determination. The Louisiana Supreme Court recognized the analogy between excessive or inadequate quantum determinations and excessive or inadequate fault percentage determinations. In both, the trier of fact, unlike the appellate court, has had the benefit of witnessing the entire trial and of reviewing first hand all the evidence. *Clement v. Frey*, 95-1119, 95-1163 (La. 1/16/96), pp. 7-8, 666 So.2d 607, 610-611.

As to damages and, by analogy, apportionment of fault, the initial inquiry is whether the award for the particular injuries and their effects or apportionment of fault under the particular circumstances of the particular injured person is a clear abuse of

the "much discretion" of the trier of fact. *Lomenick v. Schoeffler*, 250 La. 959, 200 So.2d 127 (1967); *Ballard v. National Indem. Co. of Omaha, Neb.*, 246 La. 963, 169 So.2d 64 (1964); *Gaspard v. LeMaire*, 245 La. 239, 158 So.2d 149 (1963). Only after such a determination of an abuse of discretion is a resort to prior awards appropriate and then for the purpose of *determining the highest or lowest position* which is reasonably within that discretion. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993), *cert. den.* 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994); *Coco v. Winston Industries, Inc.*, 341 So.2d 332 (La. 1976); *Bitoun v. Land*, 302 So.2d 278 (La. 1974); *Spillers v. Montgomery Ward & Co., Inc.*, 294 So.2d 803 (La. 1974).

The standard for appellate review of general damage awards is difficult to express and is necessarily non-specific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award. Nevertheless, the theme that emerges from the jurisprudence is that the *discretion vested in the trier of fact is "great," and even vast*, so that an appellate court should rarely disturb an award of general damages. It is only when the award or apportionment is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award or, by analogy, the apportionment. *Youn v. Maritime Overseas Corp., supra*.

This standard of review for damage awards requires a showing that the trier of fact abused the great discretion accorded in awarding damages and, by analogy, in apportioning fault. In effect, the award or apportionment must be so high or so low in proportion to the injury or fault that it "shocks the conscience." *Moore v. Healthcare Elmwood, Inc.*, 582 So.2d 871 (La. App. 5 Cir. 1991).

Assignments of Error

Assignment of Error Number One: Whether the trial court erred by denying the City's Motion for Involuntary Dismissal

In its first assignment of error, the City asserts that the trial court erred when it denied the City's Motion for Involuntary Dismissal. Included in their analysis on this assignment is the City's assertion that Old Gentilly Highway was owned by the State and not the City; therefore, the State, and not the City, is responsible for Mr. Bennett's alleged injuries. In support of their argument, the City states that the road was incorporated into the State Highway System by Acts 1930, No. 15 as Route 1092 and since that time, there is no evidence to show that the road was abandoned or sold by the State pursuant to LSA-R.S. 48:224. The City goes further and states that *assuming arguendo* the road was abandoned in the mid-1940's, Act 1962, No. 220 reinstated it into the state highway system. The City argues that this supposed reinstatement, coupled with the parties' stipulation that the road was not transferred at any time from that act to the time of the accident in suit, further proves that the road was a state highway at the time of the accident.

In response, with regard to the Motion for Involuntary Dismissal issue, counsel for Mr. Bennett argues that, according to La. C.C.P. Art. 1672

(B), if a plaintiff shows any right to relief by a preponderance of the evidence, the Article's plain wording requires denial of the Motion.

With regard to the ownership of the road in question, Mr. Bennett's counsel argues that, according to Article 2317 prior to 1996, ownership by itself is not dispositive of liability. According to Mr. Bennett's counsel, custody, not ownership, is determinative of fault. Counsel argues that the preponderance of the evidence shows that the City had custody and sole maintenance responsibility for Old Gentilly Highway; therefore, the City, not the State, is liable for Mr. Bennett's injuries. Additionally, Mr. Bennett's counsel argues that the evidence shows that the City, and not the State, owns the road on which the accident occurred. In short, counsel for Mr. Bennett argues that custody or ownership is sufficient to create 100% fault and liability in the City; therefore, there can be no involuntary dismissal on the basis of no ownership unless there is also no custody and no maintenance responsibility. We agree with these arguments.

At the time of this accident, according to La. C.C. Art. 2317, in order to prove liability of the defendant, the plaintiff bore the burden of proving three elements: (1) that the thing which caused the damages was in the care, custody, and control (garde) of the defendant; (2) that the thing had a vice, ruin, or defect that presented an unreasonable risk of harm; and (3) that the

vice, ruin, or defect was the cause-in-fact of the plaintiff's damages. This assignment deals with the first element.

In their argument on this assignment, Mr. Bennett's counsel also cites *Dupree v. City of New Orleans*, 99-3651 (La. 8/31/00), 765 So.2d 1002 and notes that the Louisiana Supreme Court, in *Dupree*, stated that "Liability is imposed based on custody or garde, not just ownership." We find the plain language of La. C.C. Art. 2317 and this language in *Dupree* compelling. We also find that the record evidence supports the fact that the City had "custody" or "garde" over Old Gentilly Highway. This is illustrated by evidence showing that the City was responsible for the road's maintenance. The record contains a written maintenance complaint, dated June 22, 1983, and made by "Gorman, H.", whose address is listed as "1300 Perdido." The letterhead on the next page of this complaint shows that Mr. Gorman was at that time the Director of the City Department of Streets, with his office at City Hall. The complaint involved "Ditch & Culverts" on Old Gentilly Highway. In its Reasons for Judgment, the trial court also addressed this and noted that City maintenance records contain numerous complaints about standing water on this particular road. Further, the trial court noted that 6 months before the accident that is the subject of this suit, the City and Sewerage and Water Board sent a team of people to inspect and make

recommendations in order to correct the long-standing problem.

Additionally, James Parker, a civil engineer who at the time of trial had been with the Sewerage and Water Board for 28 years, testified that at the time of the accident, the Department of Streets (now the Department of Public Works) was responsible for the open ditches that run on either side of Old Gentilly Highway. Mr. Parker further testified that he was "satisfied...that Old Gentilly Road was a City street and didn't belong to the State."

With regard to the City's ownership, James Clary, the plaintiff's road construction expert, testified that in his professional opinion, the City, not the State, owns this stretch of highway.

All of this evidence is more than enough to allow a reasonable person to conclude that the City bore responsibility for any defects in Old Gentilly Highway and any accidents that resulted therefrom. We find no error in the trial court's denial of the City's Motion for Involuntary Dismissal. There is no merit to this assignment of error.

Assignment of Error Number Two: Whether the trial court erred by failing to apply a heightened burden of proof in a case based on circumstantial evidence.

In this assignment of error, the City argues that the trial court erred because it failed to provide the appropriate standard of proof regarding: 1)

how the accident happened; and 2) the relation of the accident to the injuries and damages alleged. First, according to the City, because Mr. Bennett was in the opposing lane of traffic when the accident occurred, the trial court should have applied the clear and convincing standard of proof to the evidence as opposed to the preponderance of the evidence burden of proof. The City states that Mr. Bennett failed to introduce any evidence sufficient to meet this heavy burden, and, as a result, the trial court failed in ruling that he had.

Second, the City argues that, because of a lack of direct evidence and testimony regarding this accident and alleged resulting injuries, this was a purely circumstantial case. The City argues that this is another reason that the trial court should have used the clear and convincing standard burden of proof when making its determinations.

In response, with regard to the fact that Mr. Bennett was in the opposing lane of traffic at the time of the accident and its relation to the burden of proof that should have been applied, counsel for Mr. Bennett argues that the cases cited by the City on this point are distinguishable from the case at bar because they involve driver negligence. According to Mr. Bennett's counsel, it was standing water on the roadway, and not any driver negligence, that caused the Bennett vehicle to spin out of control, leave the

correct travel lane and swerve into the path of the oncoming cement truck.

With regard to the City's assertion that there was no direct evidence and testimony in this case, Mr. Bennett's counsel responds that this assertion is simply false. Counsel points out several examples of direct evidence and testimony that refute this. We agree. After careful review of the record evidence in this case, we find that the trial court did not err in its review of the evidence and testimony and its subsequent conclusions based upon same.

While it is true that it is well established in Louisiana that when a collision occurs between two vehicles, one of which is in the wrong lane of travel, there is a presumption that the driver in the wrong lane was negligent, and that the burden is on him (the driver) to show that the collision was not caused by his negligence, *Jones v. Continental Cas. Co. of Chicago, Ill.*, 246 La. 921, 169 So.2d 50 (La.1964); *Rizley v. Cutrer*, 232 La. 655, 95 So.2d 139 (La.1957); *Noland v. Liberty Mut. Ins. Co.*, 232 La. 569, 94 So.2d 671 (La.1957). However, this presumption is rebuttable. We find that Mr. Bennett rebutted this presumption. We also find that the evidence in this regard, even if viewed with a clear and convincing burden of proof, is sufficient to prove that Mr. Bennett's collision was caused by a defect in the roadway.

With respect to the City's assertion that there was a lack of direct

evidence and testimony in this case, we find that the record proves that this is simply not true. Both parties admitted the New Orleans Police Department Accident Report into evidence. The narrative section of this report recorded statements from both the driver of the cement truck, Charles Ratliff ("Mr. Ratliff"), and the driver of the slower-moving vehicle that Mr. Bennett passed before the accident, John Rabelais ("Mr. Rabelais"). These two people were eyewitnesses to the accident, and they saw exactly what happened. Both Mr. Ratliff and Mr. Rabelais stated that Mr. Bennett lost control of his vehicle only after he hit a large pool of standing water on the roadway. Additionally, neither of these eyewitnesses stated that Mr. Bennett was driving in an unsafe or negligent manner. Further, the officer who prepared the accident report noted that Mr. Bennett was traveling within the 50 mile per hour posted speed limit at the time of the accident. Other direct evidence in this case included police photographs of the accident scene, photographs of the wrecked Bennett vehicle and Mr. Clary's photographs of this stretch of highway. We find that all of this is indeed direct evidence as to how this accident occurred. We further find that, despite what the City claims, there was indeed more than just circumstantial evidence in this case. This assignment of error has no merit.

Assignment of Error Number Three: Whether the trial court erred by refusing to apply the legal presumptions asserted by the City.

In this assignment of error, the City argues that because Mr. Bennett's case-in-chief was devoid of so many relevant facts, the trial court, in accord with the Code of Evidence, was required to apply the adverse presumption rule in determining the merits of Mr. Bennett's case. According to the City, the trial court failed to apply this presumption and therefore erred.

The City once again claims that there is no direct testimony in the record regarding how the accident in suit happened. The City bases this assertion on the fact that Mr. Bennett and Mr. Melancon could not really recall how the accident happened. Additionally, the City takes issue with the fact that Ms. Bennett failed to appear and testify at trial. Finally, the City states that because none of Mr. Bennett's treating physicians appeared to testify at trial, there was no medical or other corroborating testimony sufficient to explain Mr. Bennett's loss of memories or the various long-term injuries he stills claims to suffer. Because of all this, the City argues that the trial court should have applied the adverse presumption rule to the plaintiff's case and failed to do so.

In response, Mr. Bennett's counsel once again argues that the direct evidence regarding how the accident occurred came from the narrative statements of the two eyewitnesses to the accident. Mr. Bennett's counsel also notes that both Mr. Bennett and Mr. Melancon did provide in their trial

testimony some details, albeit fragmentary, about the accident. They argue that the trial court judge directly observed their testimony and found it believable; this should be accorded great deference.

With regard to Ms. Bennett's failure to appear at trial, the counsel for Mr. Bennett argues several things. First, counsel argues that Ms. Bennett's failure to appear was not crucial, as she was not at the accident scene. Second, counsel argues that Ms. Bennett was a nominal plaintiff as nominal owner of the accident vehicle who decided not to assert at trial her 16-year-old claim for damages to what was, at the time of the accident, an 8-year-old vehicle. Counsel notes that the City failed to issue a trial subpoena to Ms. Bennett. Counsel also notes that on one trial day at the opening of Court, they made Ms. Bennett available as a witness and the City abandoned its request to have Ms. Bennett testify. Counsel points out testimony of the City's attorney to support this point.

Mr. Bennett's counsel also responded to the City's assertion that counsel failed to call Mr. Bennett's treating physicians to testify. On this point, Mr. Bennett's counsel notes that three treating physicians testified by deposition: Dr. Smith, the treating emergency medicine physician; Dr. O'Brien, the oral and maxillofacial surgeon who performed three surgeries in 1983; and Dr. Lindsey, the treating plastic and hand surgeon who

performed two surgeries on Mr. Bennett in 1997. They argue that depositions are testimony. They further argue that all of these physicians testified to Mr. Bennett's injuries, their relation to the accident in suit, and the residual disability Mr. Bennett continues to suffer as a result of this accident. Because we find Mr. Bennett's counsel's arguments convincing, we agree with their assertions.

Generally, when a party fails to produce a witness who is available to him and gives no reasonable explanation for the failure, a presumption arises that the witness' testimony would have been adverse to the party. *Jones v. Trailor*, 93-2144 (La.App. 4 Cir. 4/28/94), 636 So.2d 1112; *Williams v. General Motors Corp.*, 639 So.2d 275 (La.App. 4 Cir. 2/11/94). This adverse presumption has been specifically applied in cases where a plaintiff fails to call his treating physician. *Jones v. Trailor, supra*; *Guillot v. Miller*, 580 So.2d 1104 (La.App. 4 Cir. 5/30/91); *Bush v. Winn-Dixie of Louisiana, Inc.*, 573 So.2d 508 (La.App. 4 Cir. 10/11/90), *writ denied*, 578 So.2d 930 (La. 1991).

We find no reason for the application of the adverse presumption rule in this case. As discussed in detail in Assignment of Error Number Two, there was indeed direct evidence presented at trial. Both Mr. Bennett and Mr. Melancon testified at trial, and the judge was also presented with the

eyewitness testimony provided in the police report, along with other direct evidence. We agree with Mr. Bennett's counsel regarding the fact that Ms. Bennett was a nominal plaintiff. Her failure to be called as a witness did not have a crucial impact on this case. Additionally, Mr. Bennett's physicians did testify by deposition. Therefore, the trial court judge did not err by not applying the adverse presumption rule in this case. This assignment of error lacks merit.

Assignments of Error Numbers Four and Five: Whether the trial court erred in its apportionment of fault; Whether the trial court erred in its award of damages

In their fourth assignment of error, the City argues that the trial court failed to make a determination regarding who owned the road in question. We pretermit any discussion of this particular point, as we already discussed it in our analysis of Assignment of Error Number One.

The City also argues that the trial court failed to appropriately consider the apportionment of fault. After a careful review of the record, we find that the trial court did not abuse its discretion when it found the City 100% at fault for the accident. There is no merit to this assignment of error.

In their fifth assignment of error, the City argues that the trial court award of damages was excessive. In response, Mr. Bennett's counsel argues that the trial court award of damages was not excessive and cites the

testimony of Mr. Melancon regarding the vast changes in Mr. Bennett after the accident. The City also points out how the trial court judge arrived at the figures for medical damages ($69,469.87), lost earnings ($400,000, based on Mr. Bennett's pre-accident wage of $10.87 per hour), and general damages ($1,600,000).

Keeping in mind that with regard to the award of damages, the "discretion vested in the trier of fact is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages," *Courteaux v. State ex rel. Dept. of Transp. and Development*, *supra*, *quoting*, *Youn v. Maritime Overseas Corp.*, we find that the trial court judge did not abuse her vast discretion by awarding these damages to Mr. Bennett. A careful review of the record evidence in this case reveals that the injuries sustained by Mr. Bennett were undeniably severe, and his disability is permanent. There is no merit to this assignment of error.

Assignment of Error Number Six: Whether the trial court erred by refusing to exclude the testimony of Dr. Kupperstein

In this assignment of error, the City argues that Dr. Kupperstein, Mr. Bennett's accident reconstruction expert, based his testimony upon "pure speculation of what Mr. Bennett might have been doing in his vehicle" during the moments that he lost control. The City further claims that Dr. Kupperstein's "reconstruction of the accident was based on assumptions not

supported by the physical evidence." The City states that without sufficient supportive bases, Dr. Kupperstein's testimony is nothing more than conjecture. Because of this, the City argues that the trial court judge should have excluded his testimony.

Mr. Bennett's counsel responds by pointing out that "Such testimony is well within the expertise of a stipulated expert in highway engineering." We agree.

After a careful review of the record, we can find no reason to say that the trial judge erred by refusing to exclude Dr. Kupperstein's testimony. This assignment of error has no merit.

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

AFFIRMED