

NOT DESIGNATED FOR PUBLICATION

NOEL CASSANOVA * **NO. 2007-CA-0493**
VERSUS * **COURT OF APPEAL**
JAMES THOMAS AND * **FOURTH CIRCUIT**
ALLSTATE INSURANCE *
COMPANY * **STATE OF LOUISIANA**

* * * * *

APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 04-55409, SECTION "A"
Honorable Wilson F. Shougrue, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love, and Judge Roland L. Belsome)

BELSOME, J., CONCURS IN PART AND DISSENTS IN PART.

Salvador M. Brocato, III
LAW OFFICE OF SALVADOR M. BROCATO, III, APLC
800 North Causeway Boulevard
Suite 100
Metairie, LA 70001

COUNSEL FOR PLAINTIFF/APPELLANT

Noel Cole Young
LAW OFFICES OF HAROLD G. TOSCANO
650 Poydras Street
Suite 1950, Poydras Center
New Orleans, LA 70130

-AND-

James L. Donovan, Jr.
DONOVAN & LAWLER, APLC
4640 Rye Street
Metairie, LA 70006

COUNSEL FOR DEFENDANTS/APPELLEES

DECEMBER 5, 2007

AFFIRMED

Plaintiff/appellant, Noel Cassanova, and defendant/appellee, James Thomas, were involved in a vehicular accident. After a judge trial on the merits, the trial court dismissed Mr. Cassanova's claims against Mr. Thomas's insurer, Allstate Insurance Company, with prejudice. Mr. Cassanova now appeals this final judgment. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Mr. Cassanova and Mr. Thomas were the drivers of two vehicles that collided on July 19, 2004, at the intersection of Bienville Avenue ("Bienville") and North Carrollton Avenue ("N. Carrollton") in Orleans Parish. Mr. Cassanova was traveling northbound on Bienville and Mr. Thomas was traveling eastbound on N. Carrollton. Both Mr. Cassanova and Mr. Thomas claim to have encountered a green light signal as they entered the intersection of Bienville and N. Carrollton. Mr. Cassanova filed suit against Mr. Thomas and his insurer, Allstate Insurance Company.

After reviewing the photographs, listening to the witnesses, and reading the sworn affidavit and deposition of Dewayne Thomas, the trial court found that Mr. Cassanova failed to establish fault on the part of Mr. Thomas. Accordingly, the trial court ordered that Mr. Cassanova's claim against Allstate Insurance Company be dismissed with prejudice.

On appeal, Mr. Cassanova alleges the following assignments of error: (1) that the trial court abused its discretion by finding him to be 100% at fault as the cause of the accident; (2) that the trial court abused its discretion by not allowing his rebuttal witness, Leonard Estopinal, to testify at the trial; and (3) that the trial court abused its discretion by allowing the introduction of Dewayne Thomas's deposition into evidence.

Issue One: Whether the trial court abused its discretion by finding Mr. Cassanova to be 100% at fault as the cause of the accident.

In *Rosell v. ESCO*, 549 So.2d 840 (La.1989), the Louisiana Supreme Court stated that it is well settled that an appellate court may set aside a factual finding of a trial court only where the finding was based on a "manifest error" or was "clearly wrong". *Id.* at 844. Further, where there is conflict in the testimony, a trial court's reasonable evaluations of credibility and reasonable inference of fact should not be disturbed on appeal, even though the appellate court may feel that its own evaluations and inferences are as reasonable as those of the trial court or jury. *Id.* Additionally, where there are two permissible views of the evidence, the trial court's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

If a trial court has based findings of fact on a determination regarding the credibility of the witnesses, the manifest error or clearly wrong standard of review requires even greater deference to the findings of the trier of fact. *Id.* This is

because only the finder of fact can be aware of the variations in the demeanor and tone of voice of the witnesses that bear so heavily on the listener's understanding of and belief in what is said. *Id.*

At trial, Mr. Cassanova testified that he had been at Mandina's restaurant to pick up dinner and was on his way home when the accident occurred. Specifically, Mr. Cassanova testified that after the light turned green, he "looked to the left and the right, and then I looked to the left again. I didn't see anything. There was – I didn't see any traffic – there was no traffic that night. It was a quiet night. I entered the intersection. I was almost across I guess on the railroad tracks, the streetcar tracks or close to it, around the middle of the intersection, and I got smashed."

To support Mr. Cassanova's version of the accident, Richard Heltz, (a/k/a "Sinbad") was called as a witness. Although Mr. Heltz did not see the accident, he testified that he saw a light colored vehicle (which later was identified as Mr. Cassanova's vehicle) in front of him as he was traveling down Bienville Avenue. Mr. Heltz, before reaching the N. Carrollton and Bienville intersection, turned right into a parking lot that faced N. Carrollton at Bienville. Mr. Heltz stated that, prior to the turn into the parking lot, he noticed the Bienville light was green. However, on cross examination, Mr. Heltz testified that he did not know what color the lights were when the accident occurred and that the accident didn't occur until after he had made his turn into the parking lot.

Mr. Thomas testified that he had been traveling on N. Carrollton and had caught a red light at the intersection of N. Carrollton and Canal. Mr. Thomas testified that as the light changed to green, he proceeded forward. While approaching N. Carrollton and Bienville, Mr. Thomas testified that there was a

vehicle on Bienville stopped and that the vehicle accelerated as he entered the intersection on a green light.

The witness who stated he knew neither party, Dewayne Thomas “Dewayne”, testified by deposition.¹ Dewayne testified that he saw the accident occur while he was standing in the parking lot on N. Carrollton and Bienville. Specifically, Dewayne testified as follows:

So standing in that parking lot, we were talking, waiting on some friends to meet with us for dinner. I just happened to turn and glance, and I was looking out toward Bienville and Carrollton. And I noticed a white car coming down Bienville Street going toward the lake, and there was a truck coming down Carrollton heading toward City Park.

We were standing there talking, and I’m standing and I’m watching the cars come down. And I watched the Buick. As it came up, it slowed down some and then it’s like he accelerated some. And as the truck was coming, the gentleman in the truck had the green light. He was coming.

* * *

The guy with the white car was in the intersection where the gentleman was going across, and he nailed him. And the collision was so loud, I really thought someone had gotten killed....

* * *

Q. The vehicle traveling on Carrollton was the truck; is that correct?

A. That’s correct.

Q. Did the truck have the green light?

A. The light was green.

Q. I assume from your statement you were able to see the color of the light from where you were standing?

A. Yeah, I could see the lights because the light that was green going up, the light was green for uptown and the light was green – because of the way the lights were situated on the corner, you could see all the lights.

¹ At the time of trial, Dewayne Thomas lived in Alpharetta, Georgia.

Q. So the light on Carrollton if you were headed uptown on Carrollton was green?

A. It was green.

Dewayne's affidavit was also filed into the record. The affidavit of Dewayne specifically states, in pertinent part: (1) that he did not and does not know or have any relationship with either of the drivers of the two vehicles involved in the accident; (2) that he specifically recalls that the Dodge truck which was in the accident was traveling in a legal manner down N. Carrollton at the time of the accident; (3) that he specifically recalls that the white Buick car which was in the accident was traveling down Bienville attempting to cross N. Carrollton at the time of the accident; (4) that he specifically recalls that the white Buick car which was in the accident ran a red light on Bienville while attempting to cross N. Carrollton at the time the accident; and (5) that he specifically recalls that the Dodge truck which was in the accident had a green light at the time of the accident.

After reviewing the record in its entirety, we find the trial court was reasonable when it failed to assess Mr. Thomas with any degree of fault. We believe the trial court was in a better position to judge the credibility of Mr. Thomas's testimony, and, apparently it found his version to be more credible and adequately substantiated by the testimony of Dewayne who witnessed the accident. Accordingly, we find no merit to this assignment of error.

Issue Two: Whether the trial court abused its discretion by not allowing Mr. Cassanova's rebuttal witness, Leonard Estopinal, to testify at the trial.

Mr. Cassanova argues that the trial court erred when it refused to allow Leonard Estopinal, an investigator, to testify as a rebuttal witness to the testimony of Dewayne. Specifically, Mr. Estopinal was to testify he went to the scene of the accident, took photographs, and that he could rebut Dewayne's testimony that he

could see the accident from where he was standing in the parking lot. The trial judge, in its ruling, stated that he didn't think "that's clear and convincing." We agree.

Article 611 E of the Louisiana Code of Evidence states, "[t]he plaintiff in a civil case and the state in a criminal prosecution shall have the right to rebut evidence adduced by their opponents." The trial court has great discretion in controlling the presentation of evidence, including the power to admit or refuse to admit rebuttal evidence. *Knight v. First Guar. Bank*, 577 So.2d 263, 272 (La. App. 1 Cir. 3/5/91). Given the broad discretion afforded the trial judge in controlling the presentation of the evidence, we find no error in the trial court's decision to preclude Mr. Estopinal from testifying, especially in light of the fact that counsel for Mr. Cassanova was able to cross-examine Dewayne on this issue (i.e. whether there was a building obstructing his view at the time of the accident) at the time of the deposition.

Issue Three: Whether the trial court abused its discretion by allowing the introduction of Dewayne's deposition into evidence.

Mr. Cassanova argues that Dewayne's deposition should not have been allowed into evidence because defendants failed to show he was not available for trial. We find no merit in this assignment of error for the following reasons: (1) Dewayne testified at the deposition that he had lived in Alpharetta, Georgia since October of 2005; (2) counsel for Mr. Cassanova did not object at the deposition to its use at trial; and (3) counsel for Mr. Cassanova submitted the deposition of Dewayne into evidence himself.

For these reasons, we affirm the judgment of the trial court, which found in favor of Allstate Insurance Company and dismissed Mr. Cassanova's claim against it with prejudice.

AFFIRMED