NOT DESIGNATED FOR PUBLICATION

ESTABON EUGENE, SR. AND WANDA EUGENE	*	**NO. 2007-CA-0541**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
JOSHUA STEWART, SHAWN WILLIAMS, SOUTHERN UNITED FIRE INSURANCE COMPANY, WENDELL TOLIVER, JR. AND STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	*	**STATE OF LOUISIANA**
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APPEAL FROM
FIRST CITY COURT OF NEW ORLEANS
NO. 2005-53406, SECTION "B"
Honorable Angelique A. Reed, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

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

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DECEMBER 19, 2007

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AFFIRMED

The Appellants, Wendall Toliver, Jr. and State Farm Mutual Insurance Company, appeal the judgment of the district court finding them solely at fault for an automobile accident. The Appellee, Estabon Eugene, Sr., filed a cross appeal challenging his award for general damages. We affirm on both appeals.

The accident at issue happened on I-10 West in Metairie, Louisiana on March 13, 2005. Mr. Eugene was traveling westbound in the right lane in a Mazda MVP. Joshua Stewart was traveling in the right lane behind Mr. Eugene in a Chevrolet Camero. Mr. Toliver was in the center lane driving a Toyota Camry. Trial testimony from both sides corroborated that the traffic begin to slow for another accident when Mr. Toliver's vehicle hit Mr. Eugene's vehicle. Throughout trial Mr. Toliver maintained that his vehicle was hit by Mr. Stewart's vehicle when Mr. Stewart changed lanes from the right lane to the center lane causing Mr. Toliver to collide with Mr. Eugene.

Mr. Eugene and Wanda Eugene[1] filed a Petition for Damages in First City Court for the Parish of Orleans naming Joshua Stewart, Shawn Williams, Southern United Fire Insurance Company, Wendell Toliver, Jr., and State Farm Mutual

[1] Wanda Eugene was later dismissed. She sought a claim for property damage as owner of the vehicle; however, the case law established that the vehicle was community property thus prohibiting her from the need to file.

Automobile Insurance Company as defendants. Mr. Eugene later voluntarily dismissed Southern United Fire and Casualty Insurance Company from the case after learning that the policy covering Mr. Stewart was ineffective.

A bench trial was held on December 12, 2006, wherein the district court concluded that Mr. Toliver was following Mr. Eugene too closely and that the accident occurred due to the sole negligence of Mr. Toliver. Judgment was rendered in favor of Mr. Eugene against Mr. Toliver and State Farm as follows: general damages, $7000; medical specials $3156.62; property damages, $2400 and lost wages $800. It is from this judgment that Mr. Toliver and State Farm take the instant appeal.

In their sole assignment of error, Mr. Toliver and State Farm argue that the trial court erred in finding Mr. Toliver to be solely at fault for the accident and in failing to find any fault on the part of Joshua Stewart.

> An appellate court can only reverse a fact finder's determinations when: (1) it finds from the record that a reasonable factual basis does not exist for the findings of the trial court, and (2) it further determines that the record establishes the findings are manifestly erroneous. *Stobart v. State through Department of Transportation and Development*, 617 So.2d 880, 883 (La.1993). If the jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeals may not reverse, even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. *Sistler v. Liberty Mutual Insurance Co.*, 558 So.2d 1106, 1112 (La.1990); *Arceneaux v. Domingue*, 365 So.2d 1330 (La.1978).

De La Cruz v. Riley 2004-0607 (La.App. 4 Cir. 2/2/05) 895 So.2d 589, 592-593.

Mr. Toliver and State Farm contend that the evidence established that Mr. Stewart was negligent and admitted at to the investigating officer that he hit Mr.

Toliver's vehicle. They maintain that the physical evidence corroborated with the testimony clearly subjects Mr. Stewart to some responsibility for the accident. The Appellants rely on La. R.S. 32:81[2] arguing that Mr. Stewart was traveling to close to Mr. Toliver and therefore should be presumed negligent. Further, The Appellants quote *Barrociere v. Batiste*, 99-1800 (La. App. 4 Cir. 2/20/00), 752 So.2d 324, 327, wherein this Court established that the burden of proof is on the motorist who changed lanes immediately proceeding an accident to show that his movement could be safely maneuvered.

Mr. Estabon contends that Mr. Toliver admittedly had a friend traveling directly behind him who pulled to the side after the accident. Mr. Estabon argues that the fact that the friend was never called to testify (nor did she give a statement to the trooper) was suspicious in and of itself because she would have been in the best position to be called as a witness.

Throughout trial and in both parties briefs the argument centers around a series of "booms" that were heard before and after the accident. Mr. Eugene testified that he heard the first "boom" of Mr. Toliver's vehicle hitting his vehicle, and then he heard another "boom" which he believed to be Mr. Toliver's vehicle hitting Mr. Stewart's vehicle. Mr. Toliver testified that the first "boom" was Mr. Stewart colliding with his vehicle.

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[2] A. The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway.

B. The driver of a motor truck, when traveling upon a highway outside a business or residential district, shall not follow another motor truck within four hundred feet, but this shall not be so construed as to prevent one motor truck from overtaking and passing another.

C. Motor vehicles being driven upon any roadway outside of a business or residence district in a caravan or motorcade, whether or not towing other vehicles, shall be so operated as to allow sufficient space between each such vehicle or combination of vehicles so as to enable any other vehicle to enter and occupy such space without danger. This provision shall not apply to a funeral procession.

Clearly there is conflicting testimony in the record from Mr. Toliver and Mr. Eugene. Further, Mr. Stewart was the only person who received a citation (for traveling too close) in the accident. The accident report of State Trooper Rhonda Barnaby establishes that Mr. Stewart told her that he lost control of his vehicle and hit Mr. Toliver's vehicle. Mr. Toliver was the only person who testified that there was a chain reaction. At trial when Trooper Barnaby was asked why Mr. Toliver did not receive a ticket she replied "He wasn't at fault. In my investigation, I didn't find him at fault in the accident."

> The standard for appellate review is set forth in the Louisiana Supreme Court decision of *Canter v. Koehring* (*citation omitted*): "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." 283 So.2d 716 at 724 (La., 1973).
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> This standard has been clarified and refined by the decision of *Arceneaux v. Domingue*, 365 So.2d 1330 (La., 1979). In that decision, the Louisiana Supreme Court made the following statement regarding the appellate standard of review: "-the appellate court should not disturb such a finding of fact, unless it is clearly wrong." *Arceneaux v. Domingue, supra* at 1333.

Smith v. Alexander 415 So.2d 1016, 1018 (La.App. 4 Cir.,1982)

The district court had to decipher through conflicting testimony and evaluate the damage to the vehicles to establish whether Trooper Barnaby submitted a consistent report. Accordingly, the district court is in a better posture to determine the credibility of the witnesses absent a clear factual error, *Smith v. Alexander*. The fact that Mr. Stewart received a ticket, does not negate Mr. Toliver from fault. Trooper Barnaby reasoned that if the parties to an accident have conflicting statements, she then evaluates the damage to the vehicles to establish fault. In the instant case, the damage to Mr. Toliver's vehicle was on his front bumper and right rear fender, from there it is difficult to determine which damage occurred first. Neither party offered an expert on the reconstruction of accidents. Giving weight to the conflicting testimony, we cannot conclude that the district court erred in determining that Mr. Toliver was the sole cause of the accident.

Cross Appeal

In his cross appeal, Mr. Eugene argues that the district court erred in awarding him $7000 in general damages. He maintains that he treated for a soft tissue injury for 4 months and only stopped due to Hurricane Katrina. He cites *Delery v. Schenider* 410 So. 2d 857, wherein the court awarded $2000 per month for a soft tissue injury. Mr. Eugene seeks to have this court increase his award for general damages to 15,000; $2000 for 4 months of treatment and an additional $5000 because he continued to suffer even after treatment. An award for damages must be reviewed in a light most favorable to the party who prevailed at trial. *Harvey v. State, Dept. of Transportation and Development,* 2000-1877, (La.App. 4 Cir. 9/26/01), 799 So.2d 569, 576, *writ denied,* 2002-0003 (La.3/15/02), 811 So.2d 910. An appellate court may not overturn an award for damages unless it is so out of proportion to the injury complained of that it shocks the conscience. *Id.* 799

So.2d at 577. In fact, the fact-finder has vast discretion in determining a general damages award. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993); *Moore v. Kenilworth/Kailas Properties* 2003-0738 (La. App. 4 Cir. 1/7/04) 865 So.2d 884. There is no merit to Mr. Eugene's cross appeal.

Decree

For the reasons stated above we affirm the finding of the district court as to the liability of Mr. Toliver and further find the award for general damages as to Mr. Eugene sufficient.

AFFIRMED