

**STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY AS SUBROGEE
OF YVETTE NORMAN**

*
*
*

**NO. 2007-CA-0918
COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA**

VERSUS

**GREGORY R. LEROUGE,
MARY J. LEROUGE,
HARTFORD INSURANCE
COMPANY, DONNELL L.
DUCRE, SEWERAGE AND
WATER BOARD OF NEW
ORLEANS, AND NATIONAL
UNION FIRE INSURANCE
COMPANY**

*
*
*

CONSOLIDATED WITH:

**MARY JANE LEROUGE AND
SHIRLEY LEROUGE**

VERSUS

**NEW ORLEANS SEWERAGE AND
WATER BOARD, NATIONAL
UNION FIRE INSURANCE
COMPANY, DONNELL L. DUCRE,
HARTFORD INSURANCE
COMPANY OF THE MIDWEST
AND GREGORY R. LEROUGE,
YVETTE NORMAN AND STATE
FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

CONSOLIDATED WITH:

GREGORY R. LEROUGE

VERSUS

**NEW ORLEANS SEWERAGE AND
WATER BOARD, NATIONAL
UNION FIRE INSURANCE
COMPANY, DONNELL L. DUCRE,
HARTFORD INSURANCE
COMPANY OF THE MIDWEST,
YVETTE NORMAN AND STATE
FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY**

CONSOLIDATED WITH:

NO. 2007-CA-0919

CONSOLIDATED WITH:

NO. 2007-CA-0920

LANDRIEU, J. PRO TEMPORE, DISSENTS IN PART WITH REASONS

I respectfully dissent from the majority opinion insofar as it amends the judgment of the trial court to allocate sixty-five percent of fault to the defendants, Donnell Ducre and his employer, the Sewerage and Water Board of New Orleans (“S&WB”).

Pursuant to La. R.S. 13:5105, the claims against Mr. Ducre and the S&WB were tried to the district court judge. Following the trial, the trial judge rendered judgment in favor of the defendants, finding that the S&WB and Mr. Ducre were not liable for the injuries sustained by the LeRouge plaintiffs as a result of the accident in question because Mr. Ducre, while driving the S&WB truck, was confronted with an emergency pursuant to the sudden emergency doctrine¹, which was caused by Mr. LeRouge’s failure to exercise due care before striking Yvette Norman’s vehicle.

As a basis for conducting a *de novo* review of the judge’s findings of fact and amending the trial court judgment, the majority holds that the trial judge committed legal error by failing to consider Mr. Ducre’s admitted violation of La. R.S. 32:81(A)² in allocating no fault to him and the S&WB. According to the majority, Mr. Ducre’s “statutory violation constitute[d] negligence *per se*” and was “a substantial factor in bringing about the harm to the plaintiffs, that is, it was a

¹ The sudden emergency doctrine, set forth by the Louisiana Supreme Court in *Hickman v. Southern Pacific Transport Co.*, 262 La. 102, 262 So. 2d 385 (La. 1972), provides:

One who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence.

Hickman, 262 La. at 112-113, 262 So. 2d at 389.

² La. R.S. 32:81 (A) provides, “[t]he 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.”

cause in fact of the accident and the ensuing damages suffered by the plaintiffs.” I disagree.

Nothing in the record before us indicates that the trial judge, in finding no liability on the part of Mr. Ducre and the S&WB, either failed to consider or rejected Mr. Ducre’s deposition testimony admitting that the investigating officer had issued him a citation for following too closely and that he chose to pay the fine rather than contest the citation in court. Moreover, the Louisiana Supreme Court and this court have rejected the concept that a violation of a statute is negligence *per se* which renders a defendant liable to a plaintiff. *Boyer v. Johnson*, 360 So. 2d 1164 (La. 1978); *Weber v. Phoenix Assurance Co. of New York*, 273 So. 2d 30 (La. 1973); *Laird v. Travelers Insurance Company*, 263 La. 199, 267 So. 2d 714 (1972); *Lee v. Louisiana Transit Company, Inc.*, 414 So. 2d 838 (La. App. 4th Cir. 1982); *Martinez v. Modenbach*, 396 So. 2d 471 (La. App. 4th Cir. 1981). There are instances where the violation of a statutory duty is not negligence. *Laird, supra*, 263 La. at 209, 267 So. 2d at 717; *Ketcher v. Illinois Central Gulf Railroad Company*, 440 So. 2d 805 (La. App. 1st Cir. 1983).

As I do not agree with the majority that the trial judge committed an error of law in adjudicating the claims against the Mr. Ducre and the S&WB, I believe the trial judge’s findings of fact must be reviewed under the manifest error or clearly wrong standard of review.

In order to reverse a fact finder’s determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determine that the record establishes that the fact finder is clearly wrong or manifestly erroneous. *Lam v. State Farm Mutual Automobile Insurance Company*, 2005-1139, pp. 6-7 (La. 11/29/06), 946 So. 2d 133, 138. 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. *Stobart v. State, Department of Transportation and Development*, 617 So. 2d 880, 882-883 (La. 1993).

In this particular case, the deposition testimony of Mr. Ducre and Ms. Norman were introduced into evidence while the plaintiffs, Mr. LeRouge, Mary LeRouge, and Shirley LeRouge testified at the trial. Mr. Ducre testified that he was driving a S&WB trash truck in the middle lane of the Westbank Expressway, at a speed of thirty-five or forty miles per hour, approximately fifteen feet behind Mr. LeRouge's van, when he saw the van suddenly run into the back of Ms. Norman's car. He said he hit his brakes in an attempt to avoid hitting the van, slid into the van at an estimated speed of fifteen to twenty mile per hour, and testified that he thought the van hit the car again. According to Mr. Ducre, had he attempted to swerve to avoid the van, he would have hit the vehicles that were on either side of his truck.

Ms. Norman testified that at the time of the accident she was driving down the Westbank Expressway looking along the roadway for a service station; her vehicle was making a pinging noise and she wanted to have it checked out. When she saw a service station on the other side of the expressway, she put on her left turn signal and looked to see if she could pull out of the lane of traffic, and, while looking in her rear view mirror, was struck from behind by Mr. LeRouge's van. She denied that her car was stalling when the van struck it. Ms. Norman emphasized that she had not applied her brakes, and her foot was still on the gas pedal when her car was hit. Ms. Norman also testified that the van struck her car twice, with the first impact being more severe. She testified that she heard nothing to indicate that the driver of the van had applied his brakes prior to the first or second impacts. According to her, the second impact occurred "right after" the first.

Mr. LeRouge testified that he was driving within the speed limit with the flow of traffic when he realized that the car in front of him had slowed and almost stopped. He applied his brakes, and as his car stopped, it bumped Ms. Norman's car. Almost instantaneously, no more than two seconds later, he heard the screeching of brakes and his van was struck from behind by the S&WB truck.

Mary Jane LeRouge testified that she was reading a newspaper in the backseat of the van when she felt a tap and put the paper down to see what had occurred. Neither she nor anyone in the van had experienced anything unusual. Instantly thereafter, the S&WB truck struck the rear of the LeRouges' van.

Shirley LeRouge testified that she was in the front seat of her son's van and saw Ms. Norman's car stopped ahead of them with no brake lights. She said Mr. LeRouge slowed down, applied his brakes, and then "tipped" the car. Then she felt what she described as a "wham," when the S&WB truck struck the van. Shirley LeRouge equivocated on the amount of time that had elapsed between the first and second collisions. Initially, she testified that two or three minutes had passed between them. However, when questioned further, she testified that the interval between the two collisions was less than a minute, and more of a matter of seconds.

The trial judge found that Mr. Ducre and the S&WB were not at fault in causing the accident because Mr. Ducre was confronted with an emergency caused by Mr. LeRouge's failure to exercise due care before striking Ms. Norman's vehicle. After reviewing the record and in view of the conflicting testimony, I cannot say the trial judge's finding was clearly wrong. Further, there is clearly evidence in the record to support the trial judge's finding that Mr. Ducre's actions were not the cause of the initial collision, *i.e.* the emergency.

Accordingly, I would affirm the trial court judgment in all respects.

