NOT DESIGNATED FOR PUBLICATION

MICHAEL COOPER AND DONALD EARLS	*	**NO. 2008-CA-0892**
	*	
VERSUS		**COURT OF APPEAL**
	*	
ANNA MATHIEU, TRANSIT MANAGEMENT OF SOUTHEAST LOUISIANA, INC. AND REGIONAL TRANSIT AUTHORITY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2004-5167, DIVISION "F-10"
Honorable Yada Magee, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge David S. Gorbaty)

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AFFIRMED

Plaintiffs, Michael Cooper and Donald Earls, appeal the trial court's judgment rendered in favor of defendants, Transit Management of Southeast Louisiana, Inc., Regional Transit Authority ("RTA"), and Anna Mathieu (collectively "defendants"), dismissing plaintiffs' personal injury claims. For the reasons that follow, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY:

On September 10, 2003, plaintiffs were passengers on an RTA bus, which was operated by Ms. Mathieu. Although there was no collision, plaintiffs contend they sustained injuries when the bus came to a sudden stop. On April 6, 2004, plaintiffs filed a joint petition against the defendants alleging negligence on the part of the bus driver.

A bench trial was conducted on October 10, 2007, and April 23, 2008. The trial court heard testimony from plaintiffs and Ms. Mathieu.

Ms. Mathieu testified that on September 10, 2003, she was operating the bus along her regular route, toward the river on Washington Avenue. She claimed that she stopped at the intersection of Washington Avenue and Galvez Street (a four-way stop), let passengers disembark, closed the door, looked both ways, and

proceeded across the first two lanes of travel on Galvez Street. She testified that as the bus reached the median ("neutral ground") she observed a car on Galvez Street approaching the intersection. Ms. Mathieu stated that when she realized the car was not going to stop at the stop sign, she stopped the bus, explaining, "If I wouldn't have stopped, I would have hit him."

Ms. Mathieu further testified that she did not see the other vehicle when she first started across the street to the median because the vehicle had just turned onto Galvez Street. Finally, Ms. Mathieu stated that none of the passengers fell as a result of the stop, but she called the RTA to report the incident because some of the passengers were "a little shook up."

Plaintiff, Michael Cooper, testified he was seated in the middle of the bus on the day of the incident. He stated that the bus was crowded and there were people standing. Mr. Cooper testified that the bus driver never stopped at the stop sign at the intersection of Washington Avenue and Galvez Street, but slammed on the brakes when she got to the neutral ground area. Mr. Cooper stated that he did not know why the bus stopped suddenly. He did state, however, that he saw a vehicle turn onto Galvez Street from Toledano Street. Mr. Cooper alleged that the sudden stop caused him to hit the seat in front of him and fall, injuring his left knee, neck, and back.

Plaintiff, Donald Earls, testified that he was standing in the middle of the bus at the time of the incident. He stated that he fell to the floor when the bus came to a sudden stop, injuring his wrist and back. Mr. Earls did not know why the bus came to a sudden stop.

Judgment was rendered on May 30, 2008, in favor of defendants. The trial judge determined that the bus driver's actions were not negligent under the general

negligence standard. In written reasons for judgment, the trial court stated: "After weighing all of the evidence and the relative interest of the witnesses, the court finds that it is illogical, incredible, and improbable that the bus proceeded through the intersection without stopping, either to let passengers off or to observe the stop sign." Plaintiffs' timely devolutive appeal followed.

STANDARD OF REVIEW:

Our review of the trial court's findings in the present case is subject to the manifest error rule. An appellate court may not set aside a trial court's finding of fact in the absence of manifest error or unless it is clearly wrong, and where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Cole v. Department of Public Safety & Corrections,* 01-2123 (La. 9/4/02), 825 So.2d 1134; *Stobart v. State through Dept. of Transp. and Dev.*, 617 So.2d 880 (La. 1993). 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 v. ESCO,* 549 So.2d 840 (La. 1989). When the findings are based on determinations regarding the credibility of witnesses, the manifest error-clearly wrong standard demands great deference to the findings of fact, for only the fact finder is cognizant of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. *Id*.

DISCUSSION:

The record reflects that the trial court applied a general negligence standard as opposed to the stricter standard applicable to common carriers. In *Jacobs v. Regional Transit Authority*, 03-2158, p. 3 (La. App. 4 Cir. 4/14/04), 872 So.2d

571, 573, this Court explained the proper standard to be applied in cases involving the RTA as follows:

> Pursuant to La. R.S. 48:1656(23), as amended by Acts 199, No. 735, effective August 15, 1995, the RTA is not considered a common carrier in a suit for personal injuries. As such, the RTA is not held to the previous higher standard of care that allowed a plaintiff to make out a prima facie case of liability merely by showing that he/she was a fare-paying passenger and sustained an injury, thereby shifting the burden to the RTA to exculpate itself from liability.
>
> The 1995 amendment to La. R.S. 48:1656(23) states:
> Notwithstanding the provisions of any other law to the contrary, including the provisions of R.S. 45:161 et seq., the authority created herein shall not be deemed a "person" as defined in R.S. 45:162(12) or a "common carrier" as defined in R.S. 45:162(5) nor shall the authority be construed of interpreted to be such. *Additionally, the authority shall not be deemed to be a common carrier, or interpreted to be such by any court of this state in a suit for personal injury or property damage*. (Emphasis added).

Absent the stricter standard of proof for common carriers, the proper standard in the present case, as correctly applied by the trial court, is general negligence.

On appeal, plaintiffs present two assignments of error for consideration. First, the trial court erred in finding in favor of defendants where the evidence failed to support the bus driver's claim that a phantom vehicle caused her to stop the bus suddenly. Second, the trial court erred in finding in favor of defendants when it was undisputed that Ms. Mathieu proceeded from a stop sign without being able to safely clear the intersection.

1. Failure to prove existence of phantom vehicle.

Plaintiffs contend that based on the lack of corroborating evidence of a phantom driver, Ms. Mathieu should be assessed 100% fault in the accident for slamming on her brakes and causing plaintiffs' injuries. Plaintiffs cite *Sciortino v. Wood*, 2002-0233 (La. App. 5 Cir. 9/18/02), 829 So.2d 476, in support of the

position that the existence of a phantom vehicle must be proven through the testimony of an independent and disinterested witness.

Defendants counter that the court in *Sciortino* was applying the standard in La. R.S. 22:1406 (repealed by Acts 2003, No. 456, § 3, and redesignated as La. R.S. 22:680(1)(d)(i)) that requires an independent and disinterested witness to prove the existence of a phantom vehicle in uninsured motorist cases. Defendants submit that this standard is required for an insured to recover under his uninsured motorist coverage, but does not apply in this case where no uninsured motorist carriers are implicated. This distinction was recognized by the Second Circuit in *State, Dept. of Transp. and Dev. v. Cecil*, 42,433 (La. App. 2 Cir. 9/19/07), 966 So.2d 131.

In *Cecil*, the court explained that in claims against an uninsured motorist carrier for damages in which no physical contact occurred, a situation, often called a "miss and run" claim, La. R.S. 22:680(1)(d)(i), requires the injured party to show, "by an independent and disinterested witness, that the injury was the result of the actions of another vehicle whose identity is unknown or who is uninsured or underinsured." *Cecil*, 42,433, p. 6, 966 So.2d at 135. On the other hand, where an uninsured motorist claim is not involved, there is no special statute requiring corroboration by an independent and disinterested witness. *Id.*, p. 7, 966 So.2d at 135. The present case does not involve an uninsured motorist claim.

The court is required to determine the fault of all persons causing or contributing to injury, death or loss, regardless of whether the person is a party to the action or a nonparty. La. Civ. Code art. 2323(A); *Foley v. Entergy Louisiana, Inc*., 06-0983 (La. 11/29/06), 946 So.2d 144. The person alleging the fault of a nonparty must prove it by a preponderance of the evidence. *Woodbury v. State*,

Dept. of Transp. and Dev., 03-13 (La. App. 5 Cir. 5/28/03), 848 So.2d 104. The conduct of a phantom driver may be such that he or she is entirely responsible for the plaintiff's loss. *Ward Chevrolet Olds Inc. v. State Farm*, 37,119 (La. App. 2 Cir. 4/9/03), 843 So.2d 601.

Based on Ms. Mathieu's testimony, which the trial court found to be credible, together with the testimony of Mr. Cooper, that he saw a vehicle turn onto Galvez Street from Toledano Street just prior to the bus making a sudden stop, we find no error in the trial court's determination that a phantom vehicle caused Ms. Mathieu to bring the bus to a sudden stop.

2. Failure to remain at the stop sign until it was safe to proceed.

Plaintiffs argue that Ms. Mathieu had a duty to remain at the stop sign until it was safe for her to clear the bus through the entire intersection. Specifically, plaintiffs submit that the fact that Ms. Mathieu left the stop sign, and slammed on her brakes in the middle of the intersection in order to allegedly avoid a collision with an unidentified vehicle, establishes that she failed to meet her duty under La. R.S. 32:123[1] to remain at the stop sign until it was safe to proceed. We disagree.

[1] La. R.S. 32:123(B) provides: "Except when directed to proceed by a police officer or traffic-control signal, every driver and operator of a vehicle approaching a stop intersection indicated by a stop sign shall stop before entering the cross walk on the near side at a clearly marked stop line, but if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right of way to all vehicles which have entered the intersection from another highway or which are approaching so closely on said highway as to constitute an immediate hazard."

As Ms. Mathieu testified at trial, she did not see the other vehicle when she first started across the intersection because, at that time, the vehicle had not yet turned onto Galvez Street. Ms. Mathieu further explained that this particular section of Galvez Street (where Galvez Street begins) is a very short block, which would explain why the other vehicle was able to reach the intersection at Washington Avenue so quickly. Moreover, although he could not say why the bus came to a sudden stop, Mr. Cooper did admit to seeing another vehicle turn onto Galvez Street just prior to Washington Avenue. This testimony tends to corroborate Ms. Mathieu's version of the incident.

In a supplemental brief, plaintiffs argue that a newly rendered decision of this Court held that the party with the stop sign must be assessed at least eighty percent of the fault in an accident where one party has the stop sign and the other does not. After reviewing *Edwards v.Pierre*, 08-0177 (La. App. 4 Cir. 9/17/08), 994 So.2d 648, we find the case inapplicable.

As noted in defendants' response to the supplemental brief, the accident in question involved a four-way stop intersection. That was not the case in *Edwards.* Once Ms. Mathieu entered the intersection, she had the right of way. There was no stop sign on the median requiring her to again stop the bus. To the contrary, the driver of the car on Galvez Street did have a stop sign. As Ms. Mathieu testified, if she had not stopped the bus she would have hit the other vehicle. Additionally, if Ms. Mathieu had not been attentive, as was the case of the offending driver in *Edwards*, she would not have seen the other vehicle and a collision would have ensued.

CONCLUSION:

Considering the evidence presented at trial, and giving proper deference to the trial court's factual findings, we cannot say that the trial court erred in finding no negligence on the part of defendants. As there is no manifest error, the judgment of the trial court is affirmed.

AFFIRMED