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FROM : CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **16th day of January, 2008**, are as follows:

**BY WEIMER, J.**:

2006-C -2001 C/W 2006-C -2164

JOHN AND KLEA HEBERT v. RAPIDES PARISH POLICE JURY, ET AL. (Parish of Rapides)

We affirm the amount of the damage award rendered by the court of appeal, subject to the award against the Rapides Parish Police Jury being limited to 40 percent, as found by the district court. We remand this matter to the district court for a determination of a specific amount of court costs to be paid by the Rapides Parish Police Jury, and for a judgment expressing the award of costs in a dollar amount. See LSA-R.S. 13:5112(A).
AFFIRMED; REMANDED WITH INSTRUCTIONS.

01/16/08

# SUPREME COURT OF LOUISIANA

**No. 06-C-2001 c/w No. 06-C-2164**

**JOHN AND KLEA HEBERT**

**VERSUS**

**RAPIDES PARISH POLICE JURY, ET AL.**

*On Writ of Certiorari to the Court of Appeal,*
*Third Circuit, Parish of Rapides*
*On Rehearing*

**WEIMER, Justice**

This court granted a rehearing to address the plaintiffs' alternative argument that, in light of our original opinion in which the State, Department of Transportation and Development (DOTD) was dismissed from the suit,[1] fault should be reallocated between the decedent and the Rapides Parish Police Jury (RPPJ). Finding that the trial court was not manifestly erroneous in allocating forty percent fault to the RPPJ, we will not disturb that factual determination.

In the original opinion this court explained the procedural posture of this litigation at the time these writs were granted. The opinion notes that although there was a bifurcated trial which resulted in inconsistent verdicts, the purpose of the writ grant was to address whether DOTD owed a duty to the plaintiffs, not to address bifurcation and harmonization of the verdicts. (See **Hebert v. Rapides Parish Police**

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[1] When we granted the writ application filed by DOTD, we also granted the writ application of the plaintiffs, **Hebert v. Rapides Parish Police Jury**, 06-2164 (La. 11/9/06), 941 So.2d 29.

**Jury**, No. 2006-2001, 2007 WL 1108851, at *3 n.4 (La. 4/11/07).) Further, the original opinion purposely omits comment on the correctness of the appellate court's harmonizing of inconsistent verdicts, an issue that was raised in the writ applications. (See **Herbert**, 2007 WL 1108851, at *3 n.6 and *4 n.7.) Thus, it was implied that our dismissal of DOTD from plaintiffs' claim eliminated the need to reconcile inconsistent verdicts and left only a determination of whether the trial court's allocation of fault was clearly wrong.

On rehearing, we specifically hold that our dismissal of DOTD from the plaintiffs' suit, coupled with the trial court's finding DOTD was not at fault, removes DOTD from the allocation of fault equation. In effect, the trial against DOTD to the jury has no legal efficacy. The portion of the trial court's allocation of fault subject to scrutiny for manifest error is its allocation of 40 percent fault to RPPJ and the remainder (60 percent) to the deceased driver.

**MANIFEST ERROR**

The Louisiana Constitution provides that our jurisdiction in civil cases extends to both law and facts. LSA-Const. art. V, § 5(C). This provision, resulting from Louisiana's history as a civilian jurisdiction, has been interpreted as giving this court the power to decide factual issues de novo. The exercise of this power is limited, however, by the jurisprudential rule of practice that a trial court's factual findings will not be upset unless they are manifestly erroneous or clearly wrong. **Ferrell v. Fireman's Fund Insurance Co.**, 94-1252, pp. 3-4 (La.2/20/95), 650 So.2d 742, 745. Under this rule, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La.1993). If the factual findings are reasonable in light of the record

reviewed in its entirety, a reviewing court may not reverse even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. ***Id.*** at 882-883.

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 factfinder 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. **Rosell v. ESCO**, 549 So.2d 840, 844 (La.1989). However, where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face that a reasonable factfinder would not credit the witness's story, a reviewing court may well find manifest error even in a finding purportedly based upon a credibility determination. ***Id.*** at 844-845. Where such factors are not present, however, and a factfinder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. ***Id.*** at 845. The rule that questions of credibility are for the trier of fact applies equally to the evaluation of expert testimony, including the evaluation and resolution of conflicts in expert testimony. **Lasyone v. Kansas City Southern Railroad**, 00-2628, p. 13 (La.4/3/01), 786 So.2d 682, 693.

These standards for manifest error review are not new. These standards are the guiding principles that aid our review of a trial court's factual determinations. A manifest error review is applicable to the fact-driven determinations presented in this case, and specifically on rehearing, the finding of percentages of fault by the trier of fact. See **Clement v. Frey**, 95-1119, p. 7 (La.1/16/96), 666 So.2d 607, 610.

In **Duncan v. Kansas City Southern Railway Co.**, 00-0066, pp. 10-11(La.10/30/00), 773 So.2d 670, 680-681, we summarized the standard for reviewing allocation of fault determinations as follows:

> This Court has previously addressed the allocation of fault and the standard of review to be applied by appellate courts reviewing such determinations. Finding the same considerations applicable to the fault allocation process as are applied in quantum assessments, we concluded "the trier of fact is owed some deference in allocating fault" since the finding of percentages of fault is also a factual determination. **Clement v. Frey**, 95-1119 (La.1/16/96); 666 So.2d 607, 609, 610. As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. ***Id.*** Therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award, and then only to the extent of lowering it or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. **Clement**, 666 So.2d at 611; **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La.1977).

Thus, an analogy exists 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. Therefore, if an appellate court finds a "clearly wrong" apportionment of fault, it should adjust the award, but only to the extent of lowering or raising it to the highest or lowest point, respectively, which is reasonably within the trial court's discretion. **Clement**, 95-1119 at 7-8, 666 So.2d at 610, 611.

We are cognizant of the admonition in **Clement** that allocation of fault is not an exact science, or the search for one precise ratio, but rather an acceptable range, and that any allocation by the factfinder within that range cannot be "clearly wrong." **Foley v. Entergy Louisiana, Inc.**, 06-0983, p. 32 (La. 11//29/06), 946 So.2d 144, 166. "This allocation of shares of negligence, however, is not an easy task for the

factfinder, and the Louisiana statute [LSA-C.C. art. 2323] does not describe with particularity how it should be accomplished." **Watson v. State Farm Fire and Casualty Insurance Co.**, 469 So.2d 967, 971 (La.1985) ("[T]he trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relationship between the conduct and the damages claimed.").

In **Clement**, this court held that any allocation of fault falling between a ratio of 50/50 and 75/25 would be reasonable, thus approving a very broad range. Mindful that in quantum determinations, **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257 (La.1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994), affords the factfinder "great, even vast" discretion, we note the **Clement** analogy mandates that considerable latitude be extended to the trial court in matters of fault allocation. **Clement**, 95-1119 at 7-8, 666 So.2d at 610, 611.

In the instant case, a ratio of 50/50 would certainly be reasonable; thus, a variation of 10 percent either way would allow a range from 60 percent for the decedent/40 percent for RPPJ to 40 percent for the decedent/60 percent for RPPJ. It is simply not persuasive to argue that the 60 percent fault of the decedent, as found by the trial court, is beyond the range that would also include 50 percent. Although it is possible that a review of the record might support 50 percent as an upper limit of fault allocable to the decedent, such an adjustment would be, on its face, the sort of micro-management of fault allocation by this court which **Clement** does not contemplate, absent compelling support in the record.

We find nothing in the record to support the plaintiffs' suggestion that the decedent's fault allocation should be reduced and the allocation to RPPJ should be increased. We cannot say that a reasonable trier of fact could not assess the RPPJ's fault at 40 percent.

In this case, in addition to determining that DOTD was not at fault, the district court also determined that both the decedent and RPPJ were negligent and that each bore some degree of responsibility for this tragic accident. The court determined that under the facts and circumstances of this case, an allocation of 40 percent of the fault to the RPPJ was appropriate. The record fully supports this factual determination by the district court.

At the time of trial, the thrust of plaintiffs' claim against the only remaining defendants, DOTD and RPPJ, was that the absence of guardrails at the end of the bridge rails was the primary cause of the driver's death. However, as we noted in our original opinion: "After the impact, the vehicle rolled, coming to rest on the rail overturned with the front of the vehicle projecting from the bridge outward and suspended precariously above the creek. As a result of metal crush, Katie sustained severe mortal injuries and was tightly "pinned" within the vehicle." **Hebert**, 2007 WL 1108851, at *3. "While the end of the bridge rail punctured the interior of the car between the front and rear seats, there is no indication in the record the rail pierced [the driver's] body." ***Id.*** at *3 n.1.

Both RPPJ and DOTD countered the plaintiffs' contentions with the argument that the speed of the Hebert vehicle upon entering the curve was the cause of the accident and resulting injuries.

As indicated, the trial court determined DOTD was not at fault. Given this finding of a lack of fault on the part of DOTD, it is apparent that the trial court weighed the evidence to determine the percentages of fault attributable to the only other parties, the deceased driver and RPPJ. As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. Therefore, an appellate court should only disturb the trier of fact's allocation of fault when the trier

of fact is clearly wrong or manifestly erroneous. Thus, we apply the manifest error standard of review of this portion of the judgment.

The RPPJ presented the testimony of Joseph D. Blaschke, who was accepted as an expert in accident reconstruction, traffic engineering, and highway design and safety. He testified as to the condition of Philadelphia Road at the time of the accident. The asphalt roadway was dry and dark during the nighttime hours; the lane markings were unclear and defective; the shoulder was defective; and the grade was relatively level.

As to the drop-off, Blaschke noted that it was located at the point where the vehicle left the road and was between six to eight inches in depth. The pavement in the area along the roadway where the decedent exited was "becoming somewhat unraveled." However, there was no drop-off at the point where the vehicle re-entered the roadway.

Upon viewing pictures of the vehicle and the bridge, Blaschke noted that it took significant energy to bend the frame of the vehicle in the manner that it was bent. More significantly, a portion of the concrete structure of the bridge was "uprooted" by the vehicle. The concrete section was 20 to 25 feet in length, and would have probably weighed about the same as the car.

Blaschke gave several opinions concerning the accident. First, that the young driver must have been familiar with Philadelphia Road and, thus, should have exercised caution on the well-worn, relatively narrow and winding roadway.

Second, he concluded the primary factor was the driver's failure to negotiate the curve after she exited the outside of the curve; she overcorrected the vehicle to the left, returned to the pavement area, and then overcorrected back to the right. The vehicle eventually turned sideways and struck the bridge railing. The loss of vehicle

control began after the vehicle first exited the paved portion of the road, meaning that the roadway itself did not cause the loss of control. The record contained no evidence that the driver slid off the roadway because of the condition of the roadway itself.

Third, despite the absence of warning signs, if the driver was familiar with the roadway, the presence of the curve should not have surprised her.

Fourth, Blaschke concluded the drop-off really did not cause a loss of control. Because of the significance of the drop-off depth, the driver may have scraped the bottom of the car, but she probably did not experience any "scrubbing" which would have made it difficult to reenter the roadway.

Fifth, the bridge rail was not a typical one, and Blaschke did not know how it would have performed if struck at an angle; there was no guardrail on the approach to the rail.

Finally, Blaschke concluded the driver was traveling at a high rate of speed as she approached the rail. He gave several reasons for reaching this conclusion. The damages to the vehicle indicated a severe impact, including a bending of the frame of the vehicle, which would require a significant impact speed. Also, the vehicle was beginning to overturn when it struck the railing, which was due to the position of the vehicle and speed. As previously mentioned, the impact of the vehicle caused significant damage to the bridge structure that held the railing in place, which damage would not be expected at a low-speed impact. A slower impact speed would have been inconsistent with the damages. Because the vehicle would have slowed after exiting the roadway, the vehicle was probably traveling at a speed higher than the impact speed when it exited.

As an expert, Blaschke opined that if the excessive speed factor were removed, there would still have been an accident, but with less severe damages.

The plaintiffs' witness, Duaine T. Evans, was accepted by the court as an expert in traffic engineering and accident reconstruction. He stated that Philadelphia Road had a "good surface" built from loose aggregate and liquid asphalt that was "binded" together. However, he opined that the absence of traffic signs – speed limit or warning signs for the "sharp curve" – was a "contributing factor" in causing the accident.

Evans was questioned about the "critical speed" for a vehicle taking this particular curve. He defined the term as the speed at which a vehicle would begin to slide off the road. However, Evans concluded from the evidence that the Hebert vehicle did not slide off the road, thus inferring that it did not reach the critical speed for this particular curve. Parenthetically, we note that if the vehicle did not reach critical speed, the causative effect of the absence of advisory signs is minimized.

In reviewing the testimony of these two experts, it is obvious that they differ in a crucial fact – the speed of the Hebert vehicle at the time it reached the curve and left the roadway. Although both experts agree the vehicle did not slide off the road, the plaintiffs' position is that the driver was not exceeding a safe speed while the defendant's expert concluded her speed upon entering the curve was a cause of the accident and her injuries. When a factfinder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. **Rosell**, 549 So.2d at 845. Thus, we cannot find manifest error in the trial court's apparent acceptance of the defense expert's conclusion and its allocation of a percentage of fault to RPPJ that was less than the percentage of fault remaining to be assessed to the decedent.

## CONCLUSION

In sum, we reject the plaintiffs' alternative argument that we should reallocate fault between RPPJ and the decedent driver in light of our dismissal of DOTD from this lawsuit. Additionally, we find no manifest error in the trial court's original allocation of fault.

Finally, we note that the increase in the damage awards made by the court of appeal has become part of the final judgment because RPPJ did not apply for writs to this court following the rendition of that judgment.

## DECREE

We affirm the amount of the damage award rendered by the court of appeal, subject to the award against the Rapides Parish Police Jury being limited to 40 percent, as found by the district court. We remand this matter to the district court for a determination of a specific amount of court costs to be paid by the Rapides Parish Police Jury, and for a judgment expressing the award of costs in a dollar amount. See LSA-R.S. 13:5112(A).

**AFFIRMED; REMANDED WITH INSTRUCTIONS.**