

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1945

EVA TAYLOR

VERSUS

JESSE J. FORET

*CONSOLIDATED WITH*

NUMBER 2006 CA 1946

KEVIN JOSEPH LEDET

VERSUS

JESSE J. FORET

**Judgment Rendered: June 8, 2007**

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Appealed from the  
Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne  
State of Louisiana  
Docket No. 139991 c/w 140339

Honorable David W. Arceneaux, Judge

\*\*\*\*\*

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Jesse J. Foret

\*\*\*\*\*

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.



**GUIDRY, J.**

The driver of a motorboat that ran onto a rock levee injuring himself and his two passengers appeals a judgment of the trial court finding him liable for the injuries sustained by the passengers. After considering the law and evidence, we affirm.

**FACTS AND PROCEDURAL HISTORY**

In conjunction with the Independence Day holiday of 2003, several friends and co-workers gathered at a camp on Bayou Decade in Terrebonne Parish. Among those present at the camp for the weekend were Jesse J. Foret, Eva Taylor, and Kevin Joseph Ledet. Foret brought his seventeen and a half foot, 125 horsepower motorboat with him to the camp for the weekend. Most, if not all, of the people gathered at the camp that weekend consumed alcoholic beverages over the course of the weekend and particularly on July 4, 2003.

On July 5, 2003, after he had consumed some beer, Foret invited Taylor and Ledet to accompany him in his boat to obtain a hydro slide from a nearby camp. While traversing an expanse of water that connected Bayou Decade to Lake Jug, the boat suddenly drove onto a rock levee that ran alongside one side of Bayou Decade, throwing all of the occupants from the boat. All three occupants were injured, with Taylor sustaining the worst injuries.

Following the accident, Foret was arrested and later pled guilty to charges of vehicular negligent injuring and first degree vehicular negligent injuring, for which crimes Ledet was sentenced to a combination of home and weekend incarceration that allowed him to go to work during the week. Foret was also ordered to pay Taylor and Ledet \$10,000 each in restitution as part of his criminal sentence.

Additionally, Taylor and Ledet (collectively "plaintiffs") filed separate petitions for damages against Foret based on the accident, which actions were later consolidated for purposes of trial. In response thereto, Foret filed answers denying

liability and later filed a peremptory exception raising the objection of res judicata to the plaintiffs' original petitions. The plaintiffs amended their petitions to assert an additional claim for exemplary damages pursuant to La. C.C. art. 2315.4 and Taylor further amended her petition to assert a claim for loss of consortium on behalf of her minor child. Foret excepted to the additional claims raised by the plaintiffs in their amended petitions, asserting the objection of prescription.

On August 23, 2005, prior to commencing the trial on the merits, the trial court considered the exceptions. Taylor agreed to dismiss the loss of consortium claim filed on behalf of her son, and after hearing the arguments of counsel, the trial court overruled Foret's exceptions based on res judicata and prescription. Thereafter, a trial on the merits commenced on the issue of liability only. Subsequently, the trial court found that Foret negligently caused the boating accident that injured the plaintiffs and that Foret was intoxicated at the time of the accident; however, the trial court did not find Foret's actions to be wanton or reckless and therefore denied the plaintiffs' claims for exemplary damages pursuant to La. C.C. art. 2315.4. The trial court further found no comparative fault on the part of the plaintiffs. Accordingly, the trial court rendered judgment against Foret awarding the plaintiffs damages, interest, and court costs in accordance with the parties' stipulation.<sup>1</sup> A judgment to this effect was signed on February 6, 2006, from which Foret devolutively appeals.

### **ASSIGNMENTS OF ERROR**

In this appeal, Foret urges that the judgment be reversed based on the following alleged errors committed by the trial court:

- A. The court erred in [overruling] defendant's exception of res judicata.

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<sup>1</sup> The parties stipulated that Ledet had sustained \$200,000 in damages and that Taylor had sustained \$4,000,000 in damages. In addition to stipulating to the amount of damages the plaintiffs sustained, the parties stipulated that judicial interest on the award would accrue from December 2, 2005, until paid and that Foret would pay all court costs.

- B. The [c]ourt erred in finding that the defendant was intoxicated at the time of the accident.
- C. The court erred in making a determination as to the ultimate issue of liability prior to the presentation of the defendant's case.
- D. The [c]ourt erred in finding that the accident was a result of defendant's negligence.
- E. The court erred in finding that the plaintiffs were not comparatively negligent or had not assumed the risk.

### **DISCUSSION**

In his first assignment of error, Foret contends that the trial court erred in denying the exception urging the objection of res judicata based on his assertion that the plaintiffs' receipt of restitution in connection with Foret's criminal sentence precluded the plaintiffs from seeking any additional damages. We find no merit in this assignment of error.

For the crime of vehicular negligent injuring, Foret was sentenced to a period of six months imprisonment in parish jail, with the jail term being suspended upon the payment of \$150 and court costs. Foret was also ordered to pay \$10,000 in restitution to Ledet as the victim of that crime. For the crime of first degree vehicular negligent injuring, Foret was fined \$300 and sentenced to a term of five years imprisonment at hard labor with the Department of Public Safety and Corrections, subject to a credit for time served pending trial. Said sentence, however, was suspended, and Foret was placed on probation for a period of four years, subject to several conditions, including: (1) that he serve 52 consecutive weekends in the parish jail; (2) that he be placed on home incarceration for the first six months of his probationary term, with activity outside of the home limited to traveling to and from work and attending church services, alcoholic anonymous meetings, or any other special arrangements agreed to by Foret's probation officer; and (3) the payment of \$10,000 in restitution to Taylor as the victim of the crime.

The trial court's order of restitution was governed, in part, by the provisions of La. C.Cr.P. arts. 883.2 and 895.1(A), which provide, in pertinent part:

**Art. 883.2. Restitution to victim**

In all cases in which the court finds an actual pecuniary loss to a victim, or in any case where the court finds that costs have been incurred by the victim in connection with a criminal prosecution, the trial court shall order the defendant to provide restitution to the victim as a part of any sentence that the court shall impose.

**Art. 895.1. Probation; restitution; judgment for restitution; fees**

A. (1) When a court places the defendant on probation, it shall, as a condition of probation, order the payment of restitution in cases where the victim or his family has suffered any direct loss of actual cash, any monetary loss pursuant to damage to or loss of property, or medical expense. The court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain. However, any additional or other damages sought by the victim and available under the law shall be pursued in an action separate from the establishment of the restitution order as a civil money judgment provided for in Subparagraph (2) of this Paragraph. The restitution payment shall be made, in discretion of the court, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant.

(2)(a) The order to pay restitution together with any order to pay costs or fines, as provided in this Article, is deemed a civil money judgment in favor of the person to whom restitution, costs, or fines is owed, if the defendant is informed of his right to have a judicial determination of the amount and is provided with a hearing, waived a hearing, or stipulated to the amount of the restitution, cost, or fine ordered. In addition to proceedings had by the court which orders the restitution, cost, or fine, the judgment may be enforced in the same manner as a money judgment in a civil case. Likewise, the judgment may be filed as a lien as provided by law for judgment creditors. Prior to the enforcement of the restitution order, or order for costs or fines, the defendant shall be notified of his right to have a judicial determination of the amount of restitution, cost, or fine. Such notice shall be served personally by the district attorney's office of the respective judicial district in which the restitution, cost, or fine is ordered.

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(3) The court which orders the restitution shall provide written evidence of the order which constitutes the judgment.

(4) The court may suspend payment of any amount awarded hereunder and may suspend recordation of any judgment hereunder during the pendency of any civil suit instituted to recover damages, from said defendant brought by the victim or victims which arises out

of the same act or acts which are the subject of the criminal offense contemplated hereunder.

(5) The amount of any judgment by the court hereunder, shall be credited against the amount of any subsequent civil judgment against the defendant and in favor of the victim or victims, which arises out of the same act or acts which are the subject of the criminal offense contemplated hereunder.

The order to pay restitution found in the Code of Criminal Procedure can only be imposed after a conviction for some criminal conduct. It is clear that restitution is meant to rehabilitate and to deter future criminal conduct by requiring the perpetrator of a crime to compensate the victim of the crime. The restitution provision is not triggered by a "fault" determination as in civil law, but rather by an adjudication of guilt. State v. Boudreaux, 484 So. 2d 160, 164 (La. App. 5th Cir. 1986). Furthermore, a plain reading of Article 895.1(A) shows that although restitution may be ordered to compensate the victim for damages sustained as a result of a defendant's criminal conduct, the article clearly contemplates that such an order of restitution may not be sufficient to fully or adequately compensate a victim for the damages sustained, and in such cases, the law recognizes that "any additional or other damages ... available under the law shall be pursued in an action separate from the establishment of the restitution order." La. C.Cr.P. art. 895.1(A)(1). Thus, it is clear that an order of restitution included in a defendant's criminal sentence does not bar a victim from filing a civil action for any additional or other damages the victim may have suffered.

Nor do we find persuasive Foret's argument that his plea agreement was a transaction or compromise to which the preclusive effects of res judicata attached to bar the plaintiffs from asserting subsequent civil claims for additional damages related to the same occurrence. To be a valid compromise under La. C.C. art. 3071, the transaction or compromise must evidence an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their

differences by mutual consent, in the manner which they agree on, and such agreement must be either reduced into writing or recited in open court. Although the minute entry of Foret's sentencing hearing contains the notation that the plaintiffs had agreed to the plea agreements, there was no statement in the minute entry or evidence presented in the civil proceeding that the plaintiffs agreed not to seek additional compensation or damages in exchange for Foret's payment of restitution.

Further, as non-parties to the criminal prosecution, the plea agreement could not be held to preclude the plaintiffs from instituting a civil action to recover damages in their own right. For res judicata to apply La. R.S. 13:4231 requires an identity of parties. Absent such identity, Foret's criminal sentencing judgment does not have a res judicata effect of precluding the plaintiffs' civil action for damages based on the same boating accident. Criminal prosecution is brought in the name of the state for the purpose of bringing to punishment one who has violated a criminal law; a person injured by the commission of an offense is not a party to the criminal prosecution, and his rights are not affected thereby. La. C.Cr.P. art. 381.

In his fourth assignment of error, Foret contends that the trial court erred in finding him negligent in causing the boating accident. We find no error in this finding. Negligence has been defined as conduct that falls below the standard of care established by law for the protection of others against an unreasonable risk of harm. Detraz v. Lee, 05-1263, p. 8 (La. 1/17/07), 950 So. 2d 557, 562. The factfinder's determination of whether a party acted negligently is subject to the manifest error standard of review on appeal. See Lam ex rel. Lam v. State Farm Mutual Automobile Insurance Company, 05-1139, p. 6 (La. 11/29/06), 946 So. 2d 133, 138. Under the manifest error standard of review, an appellate court must review the record in its entirety to determine whether a reasonable factual basis existed for the finding of the trial court and whether the trial court's finding was

not clearly wrong. Arceneaux v. Domingue, 365 So. 2d 1330, 1333 (La. 1978); Mart v. Hill, 505 So. 2d 1120, 1127 (La. 1987). Furthermore, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Rosell v. ESCO, 549 So. 2d 840, 844-845 (La. 1989).

At trial, Foret and Taylor both testified that they could not remember the precise moment of the accident; however, Ledet, who was riding in the bow of the boat, gave the following accounts of what occurred when the boat ran aground on the rock levee:

We got in the boat and we took off across Jug Lake and it seem like we were gonna, turning into the canal. I seen the rocks coming and I went to turn around to see what the driver was doing, but we were going [too] fast it just hit the rocks and we went flying.

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[W]hen I was watching where we was going, it looked like we were going straight for the rocks. I mean, I went to turn around to see what [Foret] was doing, but it happened so fast I didn't – I turned my head one way, and, before I knew it, I was flying. So I really – it wasn't no sudden jerk. It was just like we were going toward the rocks. I went to turn around and before I knew it we were flying. I felt like Superman, and I was coming down.

In its reasons for judgment, the trial court gave the following observations regarding the evidence presented at trial:

Mr. Foret's explanation as to how the accident actually happened was I don't know. There were then suggestions of possibilities, but no evidence that anything occurred or that he actually believed these events had taken place. Even the statement he wrote for the Wildlife and Fisheries Department four days later, which was actually written by his attorney and adopted by him, didn't suggest an underwater obstruction and, again, just suggested possibilities. No explanation that anything real happened that might make those possibilities probabilities.

The trial court then went on to find that Foret acted negligently in causing the boating accident that injured the plaintiffs.



Counsel for Foret elicited lots of speculative testimony from witnesses regarding the possibility that a mechanical malfunction or a collision with an underwater obstruction could have caused the boat to run aground; however, Foret's and the plaintiffs' testimonies discredit those speculations. As observed by the trial court, none of the parties testified about any thump, noise, or vibration that would indicate contact with an underwater obstruction. Further, although Foret testified that the boat's engine had recently been replaced, he stated that he did not notice any malfunctioning while operating the boat earlier that day or at the time of the accident. Ledet testified that the boat went toward the rocks at a high rate of speed. There is no explanation given by Foret as to why, if he was attentive, he would not have seen what Ledet saw and why he took no evasive action.

Thus, based on the evidence presented, the most plausible explanation for the accident is that Foret negligently drove the boat onto the rock levee. Accordingly, we cannot say that the trial court was manifestly erroneous in its determination that the accident was caused by Foret's negligent operation of the motorboat. In so concluding, we pretermitt as unnecessary any discussion of Foret's second assignment of error regarding the trial court's finding that he was intoxicated at the time of the accident.

We further find no merit in Foret's third assignment of error regarding the trial court's ruling prior to the presentation of his case-in-chief. The trial court is generally prohibited from engaging in a pattern of judicial conduct that demonstrates prejudice to one party or partiality to the other party. Improper conduct by the trial court constitutes reversible error, however, only when a review of the record as a whole reveals the conduct was so prejudicial that the complaining party was deprived of a fair trial. Straughter v. Government Employees Insurance Company, 05-699, pp. 10-11 (La. App. 5th Cir. 3/14/06), 926 So. 2d 617, 623.

Although it was improper for the trial court to render its ruling prior to Foret presenting his defense, the record in this bench trial reveals that the trial court did so while acting under the mistaken assumption that the defense had no witnesses to present. Once the trial court was made aware of its mistake, it apologized and allowed Foret to present his defense. The trial court made a specific point of clarifying that its premature ruling was simply an expression of its assessment of the evidence presented thus far.<sup>2</sup> As this was a bench trial and much of the testimony presented by Foret's witnesses was duplicative of the testimony elicited from witnesses in the plaintiffs' case-in-chief, we find the mistake did not rise to the level of reversible error, and so we reject this assignment of error.

As for Foret's final assignment of error, there is nothing in the record to support a finding that the plaintiffs had any fault in causing the boating accident or assumed any risks relative thereto. All of the witnesses who were present at the camp on the date of the accident stated that Foret did not appear intoxicated or impaired in any way. The plaintiffs further testified that they did not observe nor were they aware that Foret had consumed any alcoholic beverages on the date of the accident. Finally, both Foret and the plaintiffs testified that up until the actual moment of the accident, Foret did not seem to operate the boat in an unsafe or erratic manner. Although Ledet testified that the boat seemed to be traveling at a high rate of speed, he explained "I mean I wasn't used to riding in a fast boat, but beings that mine was so slow compared to his, it seem like everything was – [Foret] had everything under control." Based on this evidence, we find no error in trial court's finding that the plaintiffs were not comparatively at fault and had not

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<sup>2</sup> Specifically, the trial court made the following remarks in regard to the premature ruling:

If it was based on just the evidence I heard, that would be the result

\* \* \*

I completely overlooked the fact that you had not presented your evidence, so go ahead.

assumed the risk of the accident.<sup>3</sup>

## CONCLUSION

As our review of the record reveals that the evidence supports the trial court's finding that Foret was negligent in causing the boating accident sued upon, we affirm the judgment. All costs of this appeal are cast to the defendant, Jesse J. Foret.

**AFFIRMED.**

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<sup>3</sup> It should be observed that the concept of assumption of risk as a complete bar to recovery has been abandoned in favor of the civilian concepts of comparative fault and duty-risk. See Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1133 (La. 1988).