

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0130

KALEIGH EKINIA

VERSUS

**ACE AMERICAN INSURANCE COMPANY, NATIONAL SERVICE
INDUSTRIES, INC. AND JERRY A. THOMAS JR.**

Judgment Rendered: June 10, 2011

**Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 2007-0003934**

The Honorable W. Ray Chutz, Judge Presiding

**John Noble
Covington, LA**

**Counsel for Plaintiff/Appellee,
Kaleigh Ekinia**

**George Nalley, Jr.
Metairie, LA**

**Counsel for Defendants/Appellants,
Ace American Insurance Company and
Alco, Inc.**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

*McCleendon, J. concurs and assigns reasons.
McDonald, J. dissents and will assign reasons.*

WHIPPLE, J.

This is an appeal from a judgment of the Twenty-First Judicial District Court. Plaintiff, Kaleigh Ekinia, and defendant, Jerry A. Thomas, Jr., were involved in an automobile accident at approximately 5:30 a.m. on March 13, 2007, in Hammond, Louisiana. Ekinia, who was driving a 2005 Dodge Neon sedan, had exited Interstate 12 and was heading south on Airport Road while Thomas, who was driving an 18-wheeled tractor trailer rig in the course and scope of his employment with AlSCO, Inc., was in the process of making a left-hand turning maneuver onto the northbound lane of Airport Road from Tom Drive.¹ At the time of the accident, the area was still dark. Ekinia testified that although she saw headlights facing her in the northbound lane as she approached, she was unaware that Thomas had not completed his turn and that the trailer portion of his rig was still across the southbound lane of Airport Road. By the time Ekinia realized the trailer was straddling the roadway and in her lane of travel, she was unable to stop her vehicle in time and collided into the trailer.

Ekinia filed the instant suit for damages, and after a bench trial, the trial court rendered judgment apportioning 80% fault to Thomas and 20% to Ekinia. The trial court also found in her favor on the issue of damages and awarded Ekinia \$50,000.00 in damages to be reduced by her assigned percentage of fault. AlSCO, Inc. now appeals, assigning the following as error:

1. The trial court erred as a matter of law in finding Mr. Thomas negligent.
2. The trial court erred in failing to find that Ekinia's negligence was the primary, if not sole, cause of this accident.
3. The trial court's allocation of 80% comparative fault to Mr. Thomas was manifestly erroneous.
4. The trial court's findings of fact regarding Ms. Ekinia's inability to see the trailer from a distance greater than 190 feet was manifestly erroneous.

¹Thomas testified that in order to make a left turn from Tom Drive onto Airport Road with his tractor trailer rig, he had to pull out, back up, and pull out again completely on the roadway, which he contended took only 30 seconds to perform.

5. The trial court erred by failing to properly account for Ms. Ekinia's excessive speeding and her failure to be wearing her required glasses in its allocation of comparative fault.

6. The trial court erred in its interpretation and application of the evidence and testimony regarding the reflectivity and visibility of the trailer's reflectors and the concept of disability glare.

Thus, although AlSCO, Inc. asserts, in part, that the trial court committed legal error, AlSCO, Inc. is essentially challenging the trial court's factual findings, apportionment of fault, and interpretation of the evidence. Finding no manifest error herein, we affirm.

DISCUSSION

A trial court's finding of fact may not be reversed absent manifest error or unless clearly wrong. Stobart v. State, though Department of Transportation and Development, 617 So. 2d 880 (La. 1993). 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. Miller v. Clout, 2003-0091 (La. 10/21/03), 857 So. 2d 458, 462. As a reviewing court, even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder'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).

Here, the trial court was presented with conflicting evidence regarding whether, and to what extent, the parties to this litigation were at fault. In apportioning fault, the trial court provided written reasons for judgment, which set forth numerous factual findings and determinations made by the trial court in weighing the evidence and determining the cause of the accident. After a thorough review of the record and relevant jurisprudence, and mindful of the precepts that govern our review herein, we are unable to say the trial court was

clearly wrong or manifestly erroneous in its findings, which are supported by the record. In particular, considering the record herein and the trial court's written reasons for judgment, which thoroughly explain and support the decision of the trial court, and which we attach hereto and incorporate as Appendix "A," we cannot say that the trial court's findings on liability and causation were clearly wrong.

Moreover, with reference to the trial court's apportionment of fault, we are again unable to say the trial court was clearly wrong, as the judgment was reasonable and based on a permissible view of the evidence presented. While this court may have apportioned fault differently had we been the trier of fact, it is not the function of an appellate court to substitute its judgment for that of the trial court. See Couvillion v. Shelter Mutual Insurance Company, 95-1186 (La. App. 1st Cir. 4/4/96), 672 So. 2d 277, 282.

Further, to the extent that AlSCO, Inc. contends that the trial court "erred as a matter of law in finding Thomas was negligent and that his negligence was a cause of the accident," we likewise find no merit. As recognized by the trial court and acknowledged by AlSCO, Inc. in its brief, Thomas clearly had a duty to exercise reasonable care in making a left turn across the road, and in the face of an approaching vehicle, all of which took place in an area of darkness. Further, we reject AlSCO, Inc.'s contention that there was "no evidence or testimony" to support the finding that Thomas breached his duty of care and caused the accident. The trial court obviously rejected his estimation of the time it took for him to make his turn and his claim that there was sufficient time for him to complete the maneuver. Further, we find the trial court clearly considered Ekinia's speed and conduct, as reflected in the trial court's judgment and assignment of comparative fault to her. Thus, on the record before us, we find no "error of law."

CONCLUSION

For the above reasons, we find no merit to AlSCO, Inc.'s assignments of error on appeal. Thus, in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1(B), the August 23, 2010 judgment of the trial court is affirmed. Costs of this appeal are assessed to the Defendant/Appellant, AlSCO, Inc.

AFFIRMED.

KALEIGH EKINIA

NUMBER: 07-3934 DIVISION "A"

VERSUS

21ST JUDICIAL DISTRICT COURT

ACE AMERICAN INSURANCE
COMPANY, NATIONAL SERVICE
INDUSTRIES, INC. AND JERRY A.
THOMAS, JR.

PARISH OF TANGIPAHOA

STATE OF LOUISIANA

FILED *July 22, 2010*
[Signature]
CLERK OF COURT

REASONS FOR JUDGMENT

This matter came to be heard pursuant to regular assignment as a judge only trial on June 22, 2010. After the conclusion of the presentation of the evidence, the matter was taken under advisement. The court has reviewed all exhibits introduced, testimony (both live and by deposition) and after carefully considering all applicable law now issues the following reasons for judgment.

JUL 22 2010
11:20 AM
CLERK OF COURT

FACTUAL FINDINGS:

Sometime prior to 5:30 a.m., on March 13, 2007, Jerry A. Thomas, Jr., a tractor trailer operator employed by National Service Industries, Inc., was attempting to make a left turn onto South Airport Road from Tom Street. The Tom Street/South Airport Road intersection is located approximately .7 (7/10) mile south of Interstate 12 in Tangipahoa Parish. Mr. Thomas testified he had been driving the same route to return to Schreveport, Louisiana for some time and was quite familiar with the intersection. Because of the length of the tractor/trailer rig and the relative short turning radius, Mr. Thomas had to execute a three step turning maneuver. He would pull out onto South Airport and start turning left and pull into a truck driving school driveway on the opposite side of South Airport. He would then stop and back up the tractor, jack-knifing the trailer, stop and then pull forward headed North on South Airport Road. Mr. Thomas testified the entire three step turning maneuver took somewhere between 20-30 seconds. He had complained to his employer of the problem encountered when turning left onto South Airport on at least two occasions prior to the morning of March 13, 2007. On the morning of the accident Mr. Thomas testified he looked both North and South and determined South Airport Road was clear before he began his turning maneuver. However at some point he did see headlights of a vehicle exiting Interstate 12 and heading South (towards him) on South Airport Road. Thomas testified he felt he could safely make the turn after he observed the oncoming headlights. The oncoming vehicle was a Dodge Neon

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driven by the plaintiff, Lakeigh Ekinia. She testified she could see headlights in the northbound lane. She was momentarily blinded, and looked slightly to the right of the headlights and continued to proceed south. At some point she realized the trailer was still completely blocking her lane and she hit her brakes, but was unable to stop and collided with the trailer. After the accident Tangipahoa Sheriff deputy Corey Michelli determined the Dodge Neon created 140 feet of skid marks.

Lakeigh Ekinia received a contusion to the left forehead and a semi-circular laceration under her left eye brow just above her eye. She was transported to North Oaks Hospital and received eight stitches as treatment for the laceration under her left brow. She followed her medical treatment with doctor Nicholas Cefalu with complaints of back and neck pain. Dr. Cefalu diagnosed Ms. Ekinia with a probable TMJ, cervical and lumbar strain and began a regime of conservative heat treatment for the neck and back and then ordered an MRI to determine if Ms. Ekinia was suffering from TMJ (temporomandibular joint disorder). Ms. Ekinia attempted to have the MRI on 2 or 3 occasions, but she was claustrophobic and could not complete the diagnostic procedure. Ms. Ekinia treated with Dr. Cefalu for approximately 6 months. At the time of the trial she was no longer having back pain, but has neck pain approximately three times a week, has jaw pain and experiences situations where her jaw will lock open if she opens her mouth. She has a notifiable scar running just under her left brow semi-circular in shape continuing to a point approximately equal to the midline of her left eye.

The defense called as an expert Oscar Franlin Griffith, III, a physics professor currently teaching at the University of New Orleans. Mr. Griffith opined that the 140 feet of skid marks required the Ekinia vehicle to have been traveling at a speed of approximately 54-55 miles per hour. When asked if Ms. Ekinia could have been momentarily blinded by the headlights of the tractor driven by Mr. Jerry Thomas, Jr., Mr. Griffith acknowledged such a condition and referred to it as "disability glare." Mr. Griffith also testified to the existence of amber trailer lights and omnidirectional reflectors along the length of the trailer. While he did not tests on the trailer that was actually involved in the instant accident, he stated that from prior studies the omnidirectional reflectors should have good reflectivity up to 60-70 degrees. However he had no opinion as to the angle of the instant trailer relative to the direction of the Ekinia vehicle.

FINDINGS OF FAULT


From the above facts it is clear that the condition created by Thomas utilizing a three step turning maneuver completely blocked the south bound lane until he completed the turn. Thomas testified he thought he could make the turn in 20-30 seconds. Utilizing the same calculations used by Mr. Griffith it would have taken the Ekinia vehicle 45-46 seconds to travel the entire .7 (7/10) mile if it were traveling a constant 55 mile per hour. Thomas testified he looked both directions before beginning his turning maneuver. After he began the turn he saw the Ekinia vehicle head lights. The fact that the Ekinia vehicle struck the trailer before it had cleared the south bound lane indicates to this court Thomas's turning maneuver must have taken very close to a minute if not more to complete. Consequently, this court places very little weight on Mr. Thomas's estimate of the time for completion of the turn. The only warning Ms. Ekinia had was the amber trailer lights and the omni-directional reflectors located on the trailer. Mr. Griffith testified the reflectors should be more visible than the amber trailer lights. However the actual angle of the trailer relative to the Ekinia vehicle is unknown. As that angle increases the reflectivity of the reflectors become less visible. Allowing for some "disability glare" it is quite apparent to this court Ms. Ekinia had no fore warning that her lane was completely blocked and she was literally driving into a trap until approximately 1 to 1.1 seconds before she applied her brakes and began to skid. The accident and resultant injuries were caused by the combined fault of both Ms. Ekinia and Mr. Thomas. The court assesses Ms. Ekinia at 20%. The remaining 80% are borne by Mr. Thomas and his employer National Service Industries, Inc.

DAMAGES

Ms. Ekinia's medical bills totaled \$7,133.68. She treated regularly with Dr. Cefalu approximately 6 months, beginning March 21, 2007 through September 25, 2007, with two follow up visits on April 17, 2008 and May 6, 2008. Dr. Cefalu found Ms. Ekinia to still be symptomatic on the last visit in May, 2008. At the time of the trial Ms. Ekinia testified she still had problems closing her jaw after opening her mouth wide. Dr. Cefalu initially diagnosed Ms. Ekinia's jaw problems as TMJ and will at a minimum require additional medical treatment and possible surgery to correct. Ms. Ekinia's total damages sustained would exceed the \$50,000.00 stipulated to as the maximum by the

parties. Consequently, Ms. Ekinia is entitled to judgment against National Service Industries, Inc., and it's insurer in the amount of 80% of \$50,000.00 with interest from the date of judicial demand and for all costs.

Amite, Louisiana this ²²20th day of July, 2010.



WAYNE RAY CHUTZ, JUDGE
DIVISION "A"

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STATE OF LOUISIANA

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KALEIGH EKINIA

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**ACE AMERICAN INSURANCE COMPANY, NATIONAL SERVICE
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McCLENDON, J., concurs and assigns reasons.

Based on the evidence presented, I would have apportioned a greater percentage of fault to the plaintiff had I been sitting as the trier of fact. However, I cannot find that the trial court's apportionment was manifestly erroneous.

KALEIGH EKINIA

STATE OF LOUISIANA

VERSUS

COURT OF APPEAL

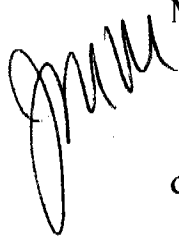
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McDONALD, J. DISSENTING:

JUN 29 2011



With all due respect to the majority and the district court, I respectfully dissent from the allocation of fault in this matter. I believe the appellant is correct in the assignment of error that “[t]he trial court erred in failing to find that Ekinia’s negligence was the primary, if not sole, cause of this accident.” Appellants called an accident reconstruction expert who testified about the dynamics of the accident. His testimony was not refuted by the plaintiff. His calculations indicate that the plaintiff was speeding almost 20 mph in excess of the 35 mph speed limit. At speeds even up to 50 mph she would have been able to stop without striking the defendant’s trailer. The district court, evidently, ignored this testimony. Additionally, the truck driver testified that he saw Ekinia’s headlights a great distance down the road when he began his turning maneuver. Had the plaintiff been traveling at the posted speed limit he would have had sufficient time to complete his turn safely.

Thus, I believe it was clearly wrong for the district court to assess only 20% fault on the plaintiff. Her actions clearly warrant a greater assessment of fault. For these reasons, I respectfully dissent.