

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NUMBER 2007 CA 1482

SADIE ROBINSON

VERSUS

GARY M. FERRARI, JR. AND
ACADIAN AMBULANCE SERVICE, INC.

Judgment Rendered: February 8, 2008

Appealed from The Twenty-third Judicial District Court
in and for the Parish of Ascension
State of Louisiana
Suit Number 66897

The Honorable Thomas J. Kliebert, Jr., Judge

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Sadie Robinson

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Acadian Ambulance Service, Inc.

BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

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GAIDRY, J.

Both the plaintiff, Sadie Robinson, and the defendant, Acadian Ambulance Service, Inc., (Acadian), seek modification of a judgment rendered in connection with a motor vehicle/bicyclist collision, as a result of which the bicyclist was killed. The defendant,¹ Acadian, appeals the judgment's assessment of 35% fault against it, asserting the bicyclist was solely at fault. Additionally, the defendant contends the trial court erred in failing to apply the emergency vehicle exception found in La. R.S. 32:24(C). The decedent's mother, the plaintiff, Sadie Robinson, answered the appeal, seeking a reduction of the 65% allocation of fault to her son, asserting it should be significantly lowered, and also seeking an increase in the award of damages, which she asserts is abusively low. After a thorough review of the arguments raised, the applicable law, and the evidence in the record before us, we affirm in part (the allocation of fault), and amend in part (increase the award of general damages) for the following reasons.

FACTUAL AND PROCEDURAL BACKGROUND

This wrongful death action arises out of a tragic accident that occurred on April 28, 1999, in which a bicyclist, Marty Dufrene, was struck and killed by an Acadian ambulance driven by Gary M. Ferrari, Jr., while responding to an emergency dispatch.

The undisputed facts establish that the accident occurred at approximately 10:30 at night, on a dark portion of Highway 30.² Prior to impact, both the ambulance and the bicyclist were traveling on Highway 30, in opposite directions,

¹ The driver of the ambulance, Gary M. Ferrari, Jr., was originally a named defendant. However, at the close of trial, the plaintiff dismissed her claims against him, and Acadian remained the sole defendant.

² Officer Victoria Smith, the investigating officer at the scene of the accident, testified by deposition introduced into the record. She described the lighting at the scene as follows: "The lighting is a little odd because of the placement of the streetlights. The road is elevated and the streetlights are placed on poles which are off the elevation of the roadway, down a ditch and off to the side. So it kind of creates a real odd type of lighting pattern in the area because the lights are actually on poles which are lower than – the lights themselves are not lower than the roadway, but they're lower than normal. So it's really very dark, even though it has streetlights."

each in their proper lanes of travel.³ The siren on the ambulance was not activated prior to the accident. There was no braking or evasive maneuver taken by the driver of the ambulance prior to impact.

It is also undisputed that the bicyclist, who had been traveling in the opposite lane of travel from the ambulance, inexplicably and unexpectedly turned in a northerly direction to traverse Highway 30, veering into the path and lane of travel occupied by the ambulance. A collision ensued, and the bicyclist was pronounced dead upon impact at the scene of the accident by the passenger paramedic in the ambulance, John Latiolais.

By joint stipulation, the parties also agreed that pursuant to Acadian's Policies and Procedures for the operation of an ambulance, the maximum speed allowed on an Interstate is 70 miles per hour; when driving on a major thoroughfare within city limits, the maximum speed allowed is 10 miles per hour over the posted speed limit; and, when responding to a priority 1 or 2 (emergency) call, the driver of the ambulance has discretion with respect to the use of a siren during the nighttime or early morning hours; however, the use of emergency lights is authorized.

Disputed facts at trial included whether the ambulance had its emergency lights in operation prior to impact; the speed at which the ambulance was traveling; whether, and when, the driver of the ambulance momentarily averted his eyes from the road; whether the driver of the ambulance saw the victim prior to impact; and the exact location or angle of the bicycle when it was struck by the ambulance.

The trial court, giving detailed reasons for judgment, made findings of fact, discussed below, based on the documentary and physical evidence, as well as the testimony and the demeanor and credibility of the witnesses. Judgment was rendered assessing 35% fault to Acadian and 65% fault to the bicyclist.

³ The ambulance was travelling in a westerly direction on Highway 30 (toward I-10); the bicycle was travelling in an easterly direction, prior to veering in a northerly direction into the path of the ambulance.

Mrs. Robinson was awarded special damages for the medical and burial expenses of her decedent son, in the amount of \$7,259.42, and general damages for the wrongful death of her son in the amount of \$40,000.00, to be reduced by the 65% fault allocated to her son. Unlike the detailed reasons given by the court for its allocation of fault determinations, the trial court gave no reasons for its award of damages.

STANDARD OF REVIEW

The issues raised in this appeal all involve factual findings made by the court. As such, we may not disturb those conclusions in the absence of manifest error. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989). Where two permissible views of the evidence exist, the fact finder's choice between them cannot be manifestly erroneous. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 883 (La. 1993). Moreover, a trier of fact is vested with much discretion in its allocation of fault. **Clement v. Frey**, 95-1119, pp. 5-6 (La. 1/16/96), 666 So.2d 607, 609-10. A trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. The allocation of fault determination is also subject to review under the manifest error standard. **Duzon v. Stallworth**, 01-1187, p. 33 (La. App. 1st Cir. 12/11/02), 866 So.2d 837, 862, writs denied, 03-0589, 03-0605 (La. 5/2/03), 842 So.2d 1101, 1110. Accordingly, we review the record before us in accordance with these standards.

APPLICATION OF LEGAL PRINCIPLES

According to the driver of the ambulance, Mr. Ferrari, in a written report executed by him the night of the accident, while en route in response to an emergency dispatch, he turned to his partner "for a split second and after returning [his] eyes immediately back to the road [he] noticed a flash and witness[ed] an individual hitting the front of [the] ambulance. The subject came out of nowhere and [Ferrari] was unable to react." In the accident report executed by Officer

Smith and entered into evidence, she also reports that Mr. Ferrari told her that he was not looking at the road immediately before striking the bicycle and, therefore, had no time to react. During questioning at trial, Mr. Ferrari could not deny having given this previous statement; however, at the time of the trial, he did not recall having taken his eyes off the road immediately prior to the collision with the bicycle. In fact, at trial he testified that he saw the victim on a bicycle less than fifteen feet away, heading toward the ambulance, slightly to the left of the left corner of the hood, approximately one to one and a half seconds prior to impact. According to Mr. Ferrari, despite having seen the victim, he had no time to react. Mr. Ferrari admitted that the siren was not activated on the ambulance, but testified that the emergency lights were in operation prior to the accident.

John Latiolais, a paramedic who was a passenger in the ambulance, also gave a written statement on the date of the incident. He stated that as he was riding in response to the emergency dispatch, he was reading the dispatch notes off the DXT and relaying them to Mr. Ferrari. He stated that just as he finished reading the notes, he looked up a "fraction" prior to impact and saw a man on a bike in front of the ambulance. According to Mr. Latiolais, the victim flew into the air, impacted the ambulance on the passenger side hood and windshield, and rolled off, landing in a ditch with a concrete culvert. According to Mr. Latiolais, the driver, Mr. Ferrari, did not hit the brakes either immediately prior to impact, or for a few hundred yards after impact. Mr. Latiolais testified that Mr. Ferrari appeared to be in shock, because he had to tell him repeatedly that they had struck someone and to stop or turn the ambulance around. Consistent with the testimony of Mr. Ferrari, Mr. Latiolais admitted that the siren was not activated, but that the emergency lights were activated prior to the accident.

This testimony was disputed by the lone eyewitness to the accident, Mr. Curtis Williams, who testified he was standing in the parking lot in front of his

apartment, which is approximately 30 to 40 yards from Highway 30, when he heard a vehicle approaching that caught his attention because it sounded as though it was approaching at a very high rate of speed. Thinking it was a high speed chase, Mr. Williams ran to where he could see the road, and at that moment, witnessed the bicycle coming across Highway 30 and being struck by the ambulance. According to Mr. Williams, there were no sirens or flashing emergency lights activated on the ambulance, and the ambulance driver did not brake or otherwise attempt to avoid the collision.

Officer Smith's deposition reflects that she took measurements at the scene of the accident, interviewed all persons involved, including the one eyewitness, and completed a motor vehicle accident report. In her report, based on the measurements taken of the accident scene, Officer Smith determined the point of impact between the ambulance and the bicycle to be near the center grill of the ambulance and slightly toward the passenger side. She noted that a piece of the front license plate of the ambulance was embedded in the rear tire of the bicycle. This testimony was corroborated by photographs of the ambulance and bicycle. She further confirmed that impact occurred completely within the lane of travel occupied by the ambulance. Officer Smith testified that the bicycle involved in the accident was dark in color, had no lights and just a few reflectors, and the victim was not wearing a helmet. Officer Smith's report states that the ambulance was traveling with "its headlights and all other non-emergency lights activated." She confirmed in her deposition that she was advised by Mr. Ferrari (as well as the eyewitness, Mr. Curtis) that neither the siren nor the emergency lights were activated at the time of the accident.

The trial court expressly considered Mr. Williams' testimony to be "very credible" and concluded that the ambulance had neither its siren nor its emergency lights activated at the time of the accident, and also that it was traveling at least ten

miles per hour above the posted speed limit, both in violation of Acadian's own policies.

EMERGENCY VEHICLE EXCEPTION

In addition to errors assigned in the allocation of fault determination and damages awarded, Acadian also assigns error to the trial court's refusal to allow Acadian the benefit of the statutory emergency vehicle exception, which requires a showing of gross negligence on the part of the ambulance driver before liability can be imposed. The trial court, after making pertinent factual determinations, found the exception inapplicable, held the defendant driver to an ordinary negligence standard of care, and found that he breached that standard. Acadian asserts the trial court erred in denying it the benefit of the exception.

Louisiana Revised Statutes 32:24, entitled "Emergency vehicles; exceptions" confers certain detailed driving privileges on the driver of an authorized emergency vehicle when responding to an emergency. Subsection C of the statute specifically makes the exceptions applicable "only when such vehicle is making use of audible or visual signals sufficient to warn motorists of their approach." The effect of the protection afforded by the statute as interpreted by the Supreme Court in **Lenard v. Dilley**, 01-1522, p. 7 (La. 1/15/02), 805 So.2d 175, 180, is that when a driver of an authorized emergency vehicle comports with the provisions of the statute, the driver can only be held liable for actions that constitute gross negligence.

In ruling on the applicability of the exception, the trial court noted the privilege can be claimed only if the ambulance is operating with the activation of visual or audible signals sufficient to warn motorists of its approach. The court then also noted the undisputed fact in this case that the siren on the Acadian ambulance was not activated prior to the impact with the victim. The court further made a factual finding based on its evaluation of the disputed evidence regarding

the emergency lights and concluded that the emergency lights on the ambulance also were not activated prior to impact. Based on this factual finding, the court held the exception inapplicable. Reviewing the record in its entirety, we find a sufficient and reasonable basis for the fact findings made by the trial court; thus, there is no abuse of discretion. Having found no abuse in the court's underlying factual findings, we likewise conclude the trial court did not err in finding the exception inapplicable.

ALLOCATION OF FAULT

For the same reasons that we find no manifest error in the factual findings made by the trial court relative to the application of the exception discussed above, we find no manifest error in the trial court's allocation of fault, for which there is also an ample basis in the record. As noted earlier, the trial court has great discretion in determining the credibility of witnesses and the weight to be afforded their testimony. **Duzon**, 01-1187 at p. 33, 866 So.2d at 862. The evidence in this case presented several permissible views, and the trial court's conclusions cannot be manifestly erroneous. The evidence presented establishes clear negligence on the part of both parties. The ambulance admittedly was being operated without the use of a siren. This fact, together with the trial court's factual finding that it also was operating without emergency lights, establishes that the driver was negligent in the operation of the ambulance and that he was in violation of the policies and procedures of his employer, requiring him to give proper warning of the ambulance's approach. Moreover, there is sufficient evidence from which the trial court reasonably could have concluded that Mr. Ferrari momentarily took his eyes off the road immediately prior to impact, resulting in his failure to see the bicycle in his lane and his inability to take evasive or braking action.

At the same time, the record also supports a finding of negligence as to the bicyclist. Most significantly, the victim failed to keep his bicycle in its proper lane

of travel and indeed, although inexplicably, veered right into the path of the oncoming ambulance. The bicycle was being operated on a dark street, at night, with no lights, inadequate reflectors, and the victim was not wearing a helmet.

Based on the foregoing, the trial court allocated 35% fault to Acadian and 65% to the bicyclist. As with factual findings, the trial court is granted great discretion in its allocation of fault based on its being in a better position to evaluate live witnesses and make reasonable evaluations of credibility and inferences based thereon. As long as there is a reasonable factual basis in the record for the trial court's conclusion, it cannot be disturbed, even though the appellate court may feel its own evaluations and inferences are as reasonable. **Weatherford v. Commercial Union Insurance**, 94-1793, pp. 9-10 (La. 2/20/95), 650 So.2d 763, 768. The record clearly establishes negligence on the part of both the ambulance driver and the bicyclist, and based on the evidence presented and the factual findings called for, we cannot say the trial court manifestly erred in allocating fault as it did. Therefore, we cannot disturb that finding.

QUANTUM

As noted earlier, without giving detailed reasons therefor, the trial court awarded Ms. Robinson \$40,000.00 in general damages for the death of her son. She has answered the appeal, contending this amount is abusively low. For the following reasons, we agree and raise it to the lowest amount that could reasonably be awarded under the facts and circumstances, \$125,000.00. See **Hanchett v. State, Department of Transportation**, 06-1678, p. 6 (La. App. 1st Cir. 11/7/07), ___ So.2d ___, ___, where this court held that damages in the amount of \$75,000.00 each to parents for the wrongful death of a major child with whom they had a close and loving relationship was so low as to constitute an abuse of discretion, and that \$125,000.00 per parent is the lowest award reasonably within the court's discretion.

Ms. Robinson, aged 79 at the time of trial, was a single mother who worked hard and did the best she could to support her two sons, whom she reared single-handedly during their childhoods. Marty, the decedent, was 42 at the time of his death. Ms. Robinson testified that she was very close to Marty and that he had taken her and a friend of hers out to eat just a few days before his death. She testified that, as adults, they were together on all holidays and that Marty often stayed with her at her home in Baton Rouge. She testified that she spoke frequently with Marty on the telephone, that he always sent her cards on birthdays and Mother's Day, and that he gave her money from time to time. In addition to her testimony, the record also contains medical records from BHC Meadow Wood Hospital, where Ms. Robinson was admitted on suicide precautions approximately one week following the tragic accident in which Marty was killed. She was readmitted in June of that same year (approximately one month later) because of increased depression and grief over the death of her son. The record also contains Ms. Robinson's records from the Grief Recovery Center, where she received therapy and counseling following Marty's death. These records reveal in painful detail the grief suffered by Ms. Robinson as a result of the tragic and sudden death of her son. Indeed, and understandably, at the time of trial, Ms. Robinson's pain and grief also were reflected in her testimony.

Under these facts and circumstances, we find the trial court's award of only \$40,000.00 for Ms. Robinson's general damages to be abusively low and woefully inadequate. Accordingly, we raise that award to the lowest amount that reasonably could have been awarded, \$125,000.00.

For the foregoing reasons, the judgment of the trial court is amended to increase the award of general damages from \$40,000.00 to \$125,000.00. In all other respects, the judgment is affirmed. Costs of this appeal are to be assessed at

65% to the plaintiff, Sadie Robinson, and 35% to the defendant, Acadian Ambulance Service, Inc.

AMENDED; AFFIRMED AS AMENDED.