NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1050

CODY RABALAIS

VERSUS

THERESA H. DORION, WEST BATON ROUGE FIRE PROTECTION DISTRICT #6 AND AMERICAN ALTERNATIVE INSURANCE CORPORATION

Judgment Rendered: February 11, 2011

Appealed from the
Eighteenth Judicial District Court
In and for the Parish of West Baton Rouge, Louisiana
Docket Number 36,653

Honorable James J. Best, Judge Presiding

****

Chuck Granger
Opelousas, LA

Counsel for Plaintiffs/Appellants, Cody Rabalais and Sharon Bihm

Scott E. Mercer
Baton Rouge, LA

Counsel for Defendants/Appellees, Theresa H. Doiron, West Baton Rouge Fire Protection Subdistrict No. 6, and American Alternative Insurance Corporation

****

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

This is an appeal from a January 28, 2010 judgment of the Eighteenth Judicial District Court in West Baton Rouge Parish, granting the defendants' motion for new trial and dismissing with prejudice plaintiffs' claims for damages resulting from an automobile accident with an emergency vehicle. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On the afternoon of July 26, 2007, Theresa Doiron,[1] a volunteer certified first responder serving as assistant chief of West Baton Rouge Fire Protection Subdistrict No. 6 ("Subdistrict No. 6"), received a call to respond to an automobile accident with injuries that had occurred on Highway 190 at South Winterville. Doiron, who was home at the time, left her home within approximately five minutes and proceeded to the fire station to retrieve the rescue unit. According to Doiron, after retrieving the rescue unit, she activated the emergency lights and sirens and proceeded south on Bueche Road toward Highway 190 to report to the accident scene.

When she approached the intersection of Bueche Road and Highway 190, Doiron came to a complete stop at the stop sign on Bueche Road and was forced to wait at the intersection for several minutes because the vehicles passing on Highway 190 did not yield to the emergency vehicle. After seeing the right, outer lane of westbound traffic on Highway 190 come to a stop and after seeing no traffic in the left, inner lane of westbound traffic, Doiron began to cross the westbound lanes of travel to make a left turn onto Highway 190.

---

[1]Although the petition and caption refer to the defendant as "Dorion," the answer and other documents of record show her name is actually spelled "Doiron."

Meanwhile, Cody Rabalais was proceeding westbound in the right, outer lane on Highway 190 in a 1997 Plymouth Breeze behind a "little white car." As the two cars approached the intersection with Bueche Road, the white car in front of Rabalais began to slow down. To avoid having to slow down or stop, Rabalais, who was traveling approximately fifty-five miles per hour, switched from the right, outer lane of travel to the left, inner lane and began to pass the white car that had been in front of him. At that point, the vehicle Rabalais was driving collided with the driver's side of the rescue truck behind the cab.

Thereafter, on October 25, 2007, Rabalais filed suit against Doiron, Subdistrict No. 6, and American Alternative Insurance Corporation as the insurer of Subdistrict No. 6, seeking recovery for damages and injuries sustained in the accident. The petition was later amended to add Sharon Bihm, Rabalais's mother, as an additional plaintiff, as the alleged owner of the vehicle being driven by Rabalais at the time of the accident. In response to the suit, defendants contended that Doiron was operating an emergency vehicle with its lights and sirens activated. Thus, they asserted as an affirmative defense that they were entitled to immunity pursuant to LSA-R.S. 32:24, which shields emergency vehicle drivers from liability for ordinary negligence under certain circumstances.

A bench trial was conducted on January 7, 2010. At the conclusion of trial, the trial court found as fact that Doiron was responding to an emergency, that Doiron had activated the emergency lights and sirens on the vehicle, and that both Rabalais and Doiron had failed to see what they should have seen. However, while the trial court further found that Doiron had been "cautious" and that Rabalais had "peel[ed] off" into the inside lane, the trial court nonetheless concluded that Doiron's failure to see what she

should have seen was "a step up from ... general negligence." Accordingly, the trial court found that Doiron was not shielded from liability and apportioned the fault of Rabalais and Doiron at fifty percent each. The trial court rendered judgment in favor of Rabalais for damages.

Defendants then filed a timely motion for new trial, arguing that pursuant to this court's opinion in Matthews v. Maddie, 2001-1535 (La. App. 1st Cir. 6/21/02), 822 So. 2d 739, 742, writ denied, 2002-2420 (La. 11/22/02), 829 So. 2d 1052, the failure to see what should have been seen is only ordinary negligence and is not sufficient to impose liability on an emergency vehicle driver. After hearing argument from counsel and reviewing the jurisprudence, the trial court granted the motion, vacated its prior judgment, and rendered judgment dismissing plaintiffs' claims with prejudice.

From this judgment, plaintiffs appeal, contending that the trial court erred in: (1) holding that the Doiron vehicle was responding to an emergency pursuant to LSA-R.S. 32:24; (2) holding that the Doiron vehicle had audible and visual signals sufficient to warn motorists pursuant to LSA-R.S. 32:24; (3) applying the reckless disregard standard of care under LSA-R.S. 32:24 instead of ordinary negligence; and (4) holding that Doiron did not recklessly disregard the safety of others.

DISCUSSION

Considering the "high social value and premium placed on protection and rescue efforts," Lenard v. Dilley, 2001-1522 (La. 1/15/02), 805 So. 2d 175, 180, LSA-R.S. 32:24 sets forth certain privileges and limited immunity

for drivers of emergency vehicles,[2] in pertinent part, as follows:

> A. The driver of an authorized emergency vehicle, when responding to an emergency call … may exercise the privileges set forth in this Section, but subject to the conditions herein stated.
>
> B. The driver of an authorized emergency vehicle may:
>
> * * *
>
> (2) Proceed past a red or stop signal or stop sign, but only after slowing down or stopping as may be necessary for safe operation;
>
> * * *
>
> C. The exceptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of audible or visual signals sufficient to warn motorists of their approach, except that a police vehicle need not be equipped with or display a red light visible from in front of the vehicle.
>
> D. The foregoing provisions shall not relieve the driver of an authorized vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Subsection D of LSA-R.S. 32:24 sets out two standards of care for an emergency vehicle driver depending on the circumstances of the case. If, and only if, an emergency vehicle driver's actions fit within subsections A, B, and C of LSA-R.S. 32:24 will an emergency vehicle driver be held liable solely for actions which constitute reckless disregard for the safety of others. On the other hand, if the emergency vehicle driver's conduct does not fit within subsections A, B, and C, the driver's actions will be gauged by a standard of "due care" or ordinary negligence. Lenard, 805 So. 2d at 180.

Thus, in order for Doiron's actions to be scrutinized under the reckless

---

[2]The corresponding statute regarding the duty of other motorists to emergency vehicles is LSA-R.S. 32:125 (A), which states in pertinent part:

> Upon the immediate approach of an authorized vehicle making use of audible or visual signals … the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the highway clear of any intersection, and shall stop and remain in such position until the authorized emergency vehicle has passed … .

disregard standard of care, the following requirements must be met: (1) Doiron was operating an authorized emergency vehicle and was responding to an emergency call; (2) the accident arose out of Doiron's actions in proceeding past a stop sign after slowing down or stopping as may have been necessary for safe operation; and (3) Doiron had made use of audible or visual signals sufficient to warn motorists of her approach. See LSA-R.S. 32:24; see also Lenard, 805 So. 2d at 180.

In their first, second, and third assignments of error, plaintiffs contend that the trial court erred in finding that the first and third requirements for the application of the reckless disregard standard of care were met and, thus, in failing to apply the lesser standard of care in determining liability. Specifically, plaintiffs contend that the trial court erred in finding as a fact that Doiron was responding to an emergency call and in finding that Doiron made use of audible or visual signals that were sufficient to warn motorists of her approach.

With regard to the issue of whether Doiron was responding to an emergency call, plaintiffs aver that because as much as thirty-two minutes had passed from the time Doiron received the emergency call until the time of the accident with Rabalais and because Doiron was aware that a fireman from the station was en route to the accident scene, she could not be considered to be responding to an emergency. Plaintiffs contend that the trial court erred, as a matter of fact and law, in finding this portion of the statute's requirement was satisfied. We disagree.

According to Doiron's testimony, she left her home within five minutes of receiving the emergency call and was en route to the accident site at the time of the accident with Rabalais. When asked if, in her mind, the accident presented an emergency requiring her to report to the scene of the

accident, Doiron responded "yes" and explained that she was attempting to get there as quickly as she could while "being safe." The record further establishes that Doiron did not know whether an ambulance had yet arrived at the scene of the accident or, if other first responders were present, whether additional assistance was needed.

Moreover, Anthony Moran, the chief of the Rosehill Fire Department and Doiron's supervisor, testified that despite the passage of some period of time, Doiron was still considered a first responder. He explained that even if an ambulance is on the scene, the medics may need assistance with many things, especially if there is more than one injury. Thus, he explained that they are to consider a call an "emergency" until they get to the scene and are told otherwise. Accordingly, considering this testimony and the record as a whole, we find no manifest error in the trial court's factual finding that Doiron was responding to an emergency call.

Moreover, we likewise find no merit to plaintiffs' contention that the trial court manifestly erred in finding that Doiron made use of audible or visual signals that were sufficient to warn motorists of her approach. Plaintiffs contend that because other vehicles traveling westbound on Highway 190 had not yielded to Doiron, the lights and sirens on the emergency truck must not have been sufficient to warn motorists. However, the record establishes that in addition to being equipped with sirens, the emergency truck had flashing lights on the top of the cab, four red and white flashing strobe lights on the top of the bed of the vehicle at a height of over ten feet, in addition to flashing strobe lights on the front and rear of the vehicle. Moreover, while others unfortunately and for unknown reasons refused or failed to yield to the emergency vehicle, Rabalais testified that the only vehicle in front of him was a "little white car," which should not have

obstructed his ability to observe an emergency vehicle with emergency strobe lights at a height of over ten feet and with sirens. Accordingly, we find no error in the trial court's conclusion that the requirements for the application of the reckless-disregard standard of care were met. Plaintiffs' first, second, and third assignments of error are without merit.

In the fourth assignment of error, plaintiffs contend that the trial court erred in finding that Doiron did not recklessly disregard the safety of others. As discussed above, this finding was made by the trial when it granted defendants' motion for new trial. Pursuant to LSA-C.C.P. art. 1972(1), a trial court shall grant a new trial when the verdict or judgment appears clearly contrary to the law and the evidence. Although the language of the article is mandatory, the jurisprudence interpreting the provision recognizes the trial court's discretion in determining whether the judgment is contrary to the law and evidence. Martin v. Heritage Manor South Nursing Home, 2000-1023 (La. 4/3/01), 784 So. 2d 627, 630. Thus, the applicable standard of review of the trial court's grant of a motion for new trial is whether the trial court abused its discretion. Martin, 784 So. 2d at 632.

In the instant case, the trial court found as fact that Doiron had been "cautious" at the time of the accident, but had failed to see what she should have seen. While the trial court originally found that her actions amounted to reckless disregard of the safety of others, or gross negligence, in ruling on the motion for new trial, and considering this court's opinion in Matthews, the trial court concluded that the failure of a defendant to see what should have been seen is only ordinary negligence, not gross negligence. Accordingly, the trial court granted the motion for new trial. On review, we conclude that the trial court's ultimate factual findings are well supported by the record and are not manifestly erroneous or clearly wrong.

"Reckless disregard" connotes conduct more severe than negligent behavior and is, in effect, "gross negligence." Rabalais v. Nash, 2006-0999 (La. 3/9/07), 952 So. 2d 653, 658. Gross negligence has been defined as the "want of even slight care and diligence" and the "want of that diligence which even careless men are accustomed to exercise." Rabalais, 952 So. 2d at 658. Gross negligence has also been described as the entire absence of care, the utter disregard of prudence amounting to complete neglect of the rights of others, and the extreme departure from ordinary care or the want of even scant care. Rabalais, 952 So. 2d at 658. Thus, the question before the trial court was whether Doiron's behavior in being "cautious," but in failing to see Rabalais's vehicle, which admittedly had just moved from the outside, right lane where traffic was stopping for the emergency vehicle to the inside, left lane, constituted an "extreme departure from ordinary care" or the "want of that diligence which even careless men are accustomed to exercise."

In Matthews, this court considered whether the actions of an emergency vehicle driver in failing to see an approaching vehicle in the inside left lane of an intersecting highway constituted reckless disregard or gross negligence. The plaintiff therein, who was driving a pickup truck on the inside, left lane of Plank Road, failed to observe an emergency vehicle with sirens and flashing lights that was attempting to cross Plank Road at its intersection with Comite Drive in Baton Rouge and struck the emergency vehicle. The trial court found that both parties were at fault in causing the accident and assessed fifty percent fault to each party. Matthews, 822 So. 2d at 740.

On appeal, this court found that while the emergency vehicle driver's failure to see the plaintiff's car approaching at forty miles per hour as he slowly pulled the emergency vehicle into the intersection "may have

constituted ordinary negligence, [the emergency vehicle driver's] actions do not rise to the level of gross negligence or a reckless disregard for the safety of others." Accordingly, this court reversed the trial court's assessment of fifty percent fault against the emergency vehicle driver. Matthews, 822 So. 2d at 742.

Considering the facts of this case, as well as the holdings in Matthews, we find no abuse of the trial court's discretion in granting defendants' motion for new trial and dismissing plaintiffs' claims. Doiron's actions clearly amounted to only ordinary negligence, and without a finding of reckless disregard or gross negligence, defendants could not be held liable for plaintiffs' damages. Matthews, 822 So. 2d at 742. Accordingly, this assignment of error is also without merit.

CONCLUSION

For the above and foregoing reasons, the trial court's January 28, 2010 judgment dismissing plaintiffs' claims with prejudice is hereby affirmed. Costs of this appeal are assessed against plaintiffs, Cody Rabalais and Sharon Bihm.

AFFIRMED.