STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0538

LAUREN E. ROBERTS

VERSUS

LAUREN RUDZIS, RICHARD FISCHER, AND
LOUISIANA FARM BUREAU INSURANCE AGENCY, INC.

Judgment Rendered: MAY 28 2014

* * * * *

On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
Trial Court No. 581,523

The Honorable Janice Clark, Judge Presiding

* * * * *

Kirk A. Patrick, III
Heather A. Cross
R. Heath Savant
Blake A. Altazan
Baton Rouge, Louisiana

Attorneys for Defendants/Appellants,
Richard Fischer and Louisiana Farm
Bureau Casualty Insurance Company

David L. Guerry
J. Wendell Clark
Mark L. Barbre
Sebastian C. Ashton
Baton Rouge, Louisiana

Attorneys for Plaintiff/Appellee,
Lauren Roberts

* * * * *

BEFORE: WHIPPLE, C.J., GUIDRY, McCLENDON,
WELCH, AND CRAIN, JJ.

Welch, J. dissents and assigns reasons

McClendon, J. dissents and assigns reasons.

CRAIN, J.

Richard Fischer and Louisiana Farm Bureau Insurance Agency appeal a judgment in favor of Lauren Roberts, challenging the trial court's determination that Fischer is liable and 100% at fault in causing the motor vehicle accident that he avoided, and the amount of damages awarded. We reverse.

FACTS

This matter arises out of an accident that occurred when the Toyota Solara driven by Roberts was rear-ended by the Kia driven by Lauren Rudzis. The accident occurred on August 26, 2008, at approximately 3:30 p.m., on Lee Drive in Baton Rouge. Roberts had been proceeding southbound on Lee Drive when she slowed and came to a stop behind stopped traffic. The vehicle immediately behind her was a Chevrolet Blazer driven by Fischer. After Roberts stopped her vehicle, Fischer's Blazer veered off of the two-lane roadway into a parking lot. Rudzis' vehicle, which had been traveling immediately behind Fischer's vehicle, collided with the rear of Roberts' stopped vehicle, which caused Roberts' vehicle to collide with the rear of the vehicle in front of her. Roberts suffered injuries as a result of the accident.

Roberts instituted this suit for damages, naming as defendants Rudzis, Fischer, and Fischer's automobile liability insurer, Farm Bureau. After Roberts stipulated that the amount in controversy did not exceed the jurisdictional amount required for a jury trial, the matter proceeded to a

bench trial against Fischer and Farm Bureau.[1] The matter was taken under advisement. In reasons for judgment, the trial court stated:

> Having carefully considered the testimony in this matter together with the evidence submitted with respect to personal injury, physical damages, and los[t] wages, and other specials, the court is firmly of the opinion that the petitioner has established that she was free from all fault in this accident and that one hundred percent of the fault should be imposed upon the defendant, Mr. Fischer. As a result of his reckless driving in leaving the road very unexpectedly creating a hazardous condition, one hundred percent of the fault is supported by the evidence. The parties hereto have stipulated to an award not to exceed $50,000 in accordance with the jurisdictional amount. Therefore, the court is constrained to award damages subject to that stipulation, which damages would otherwise exceed that amount. Therefore, the court awards $50,000.

The trial court signed a judgment on February 11, 2013, in favor of Roberts and against Fischer and Farm Bureau in the amount of $50,000.00. Fischer and Farm Bureau now appeal.

EVIDENTIARY RULING

Rudzis, the rear-ending driver, did not testify or appear at trial. With regard to liability, the trial court was presented with the testimony of Roberts, Fischer, Sergeant Eugene Rafferty, who investigated the accident, and Christy Chachere, the front passenger in Rudzis' vehicle. Sergeant Rafferty had no independent recollection of the accident and used the police report that he prepared to refresh his memory. Attached to the police report were statements by the drivers involved, including Rudzis. Over objection by Fischer and Farm Bureau, the trial court accepted into evidence the police report and written statements on the basis that it was "part of the *res gestae* and the ordinary business record." Fischer contends that the evidence is hearsay and the trial court's erroneous admission of that evidence interdicted

---

[1] The parties explain in their briefs that Rudzis was served via Louisiana's Long Arm Statute. However, Rudzis did not answer the petition, file any pleading, or otherwise make any appearance. The matter was set for trial on Roberts' motion without objection by Fischer and Farm Bureau.

the fact-finding process, thus subjecting the trial court's findings on liability to *de novo* review.

A trial court is granted broad discretion in its evidentiary rulings. *Travis v. Spitale's Bar, Inc.*, 12-1366 (La. App. 1 Cir. 8/14/13), 122 So. 3d 1118, 1126, *writs denied*, 13-2409 (La. 1/10/14), 130 So. 3d 327 and 13-2447 (La. 1/10/14), 130 So. 3d 329. The standard of review for a trial court's evidentiary rulings is abuse of discretion; the trial court's ruling will not be disturbed unless it is clearly erroneous. *Gorman v. Miller*, 12-0412 (La. App. 1 Cir. 11/13/13), ___ So. 3d ___, ___, *writ denied*, 13-2909 (La. 3/21/14), ___ So. 3d ___; *Riverside Recycling, LLC,* 112 So. 3d at 874. *De novo* review is not warranted in every case of evidentiary error. Rather, it is limited to consequential errors which interdicted the factual findings, thereby prejudicing or tainting the judgment rendered. *See Wingfield v. State, ex rel. Dept. of Transp. and Development*, 01-2668 (La. App. 1 Cir. 11/8/02), 835 So. 2d 785, 786, *writs denied*, 03-0313, 03-0339, 03-349 (La. 5/30/03), 845 So. 2d 1059 -1060, *cert. denied*, 540 U.S. 950, 124 S.Ct. 419, 157 L.Ed.2d 282. *See also McLean v. Hunter,* 495 So.2d 1298, 1304 (La.1986).

Although the trial transcript reflects that the police report and attached statements were admitted into evidence as "Plaintiff's Exhibit 3," that exhibit is not included in the appellate record.[2] The record reflects, however, that the trial court abused its discretion and was clearly erroneous in admitting the evidence as "part of the *res gestae* and the ordinary business record," over Fischer's objection to the evidence as hearsay.

---

[2] As the appellants, Fischer and Farm Bureau are charged with the responsibility of completeness of the record for appellate review, and the inadequacy of the record is imputable to them. *See Niemann v. Crosby Development Co., L.L.C.*, 11-1337 (La. App. 1 Cir. 5/3/12), 92 So. 3d 1039, 1044.

Hearsay is a statement, other than one made by the declarant while testifying at the present trial or hearing, offered into evidence to prove the truth of the matter asserted. La. Code Evid. art. 801C. Louisiana Code of Evidence article 801D(4) provides that the following is not considered hearsay:

> **Things said or done.** The statements are events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants, and not the words of the participants when narrating the events, and which are necessary incidents of the criminal act, or immediate concomitants of it, or form in conjunction with it one continuous transaction.

Article 801D(4) incorporates what was formerly Louisiana Revised Statutes 15:447 and 448, known as the *res gestae* exception to the hearsay rule. *Res gestae* is defined as events speaking for themselves under the immediate pressure of the occurrence, through the instructive, impulsive and spontaneous words and acts of the participants. *State v. Castleberry,* 98–1388 (La. 4/13/99), 758 So. 2d 749, 765, *cert. denied,* 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999); *State v. Patton*, 10-1841 (La. App. 1 Cir. 6/10/11), 68 So. 3d 1209, 1220.

While the Louisiana Supreme Court has recognized the applicability of the *res gestae* exception in civil cases, it does not apply here. *See State v. Lebleu*, 137 La. 1007, 1029 (1915), 69 So. 808, 815. Sergeant Rafferty did not witness the accident. He testified that he did not specifically recall if he obtained the statements attached to his report while he was at the scene or afterward, and acknowledged that his report did not specify when the statements were obtained. The report and attached statements do not form part of the *res gestae* and do not fall within the hearsay exception of Article 801D(4).

The trial court additionally found the police report and statements to fall within the business records exception to the hearsay rule. Louisiana Code of Evidence article 803(6) provides that certain records of regularly conducted business activities are not excluded by the hearsay rule; however, "[p]ublic records and reports which are specifically excluded from the public records exception by Article 803(8)(b) shall not qualify as an exception to the hearsay rule under this Paragraph." Article 803(8)(b) provides:

> Except as specifically provided otherwise by legislation, the following are excluded from this exception to the hearsay rule:
> (i) Investigative reports by police and other law enforcement personnel[.]
>
> . . . .
>
> (iv) Factual findings resulting from investigation of a particular complaint, case, or incident, including an investigation into the facts and circumstances on which the present proceeding is based or an investigation into a similar occurrence or occurrences.

Thus, the report and statements were not admissible under the business records exception to the hearsay rule.

On appeal, Roberts argues that the evidence, and particularly Rudzis' statement, was properly admitted under Louisiana Code of Evidence article 803(1). We disagree. The present sense impression exception of Article 803(1) allows the admissibility of a "statement describing the event or condition *made while the declarant was perceiving the event or condition, or immediately thereafter*." (Emphasis added.) The testimony of Sergeant Rafferty clearly indicates that the written statements were not made while the declarants were perceiving the events. To fall under the exception as one made "immediately thereafter," the statement must have been made immediately after perceiving the event, "allowing only for 'the time needed for translating observation into speech.'" *Buckbee v. United Gas Pipe Line*

Co. Inc., 561 So. 2d 76, 84 (La. 1990). No evidentiary foundation was laid to satisfy the critical requirement of immediacy following the accident.

Roberts additionally argues that the evidence was properly admitted as a statement of an unavailable witness under Louisiana Code of Evidence article 804, which provides, in pertinent part:

> **B. Hearsay exceptions.** The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> . . . .
>
> **(6) Other exceptions.** In a civil case, a statement not specifically covered by any of the foregoing exceptions if the court determines that considering all pertinent circumstances in the particular case the statement is trustworthy, and the proponent of the evidence has adduced or made a reasonable effort to adduce all other admissible evidence to establish the fact to which the proffered statement relates and the proponent of the statement makes known in writing to the adverse party and to the court his intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it. If, under the circumstances of a particular case, giving of this notice was not practicable or failure to give notice is found by the court to have been excusable, the court may authorize a delayed notice to be given, and in that event the opposing party is entitled to a recess, continuance, or other appropriate relief sufficient to enable him to prepare to meet the evidence.

Chachere testified that at the time of trial, Rudzis was in Cambodia with the United States Peace Corps. We need not determine whether this suffices to establish that Rudzis was unavailable for purposes of the unavailable witness exception because the record does not establish the requisite foundation required by Article 804B nor the necessary findings by the trial court.

The police report and attached statements constitute hearsay and, as they do not fall within an exception to the hearsay rule, the trial court's admission of that evidence was clearly wrong and constitutes an abuse of discretion. However, this determination alone does not warrant *de novo* review. *See Riverside Recycling, LLC*, 112 So. 3d at 874. *De novo* review

is warranted only if, in addition to determining that an evidentiary error occurred, it is determined that the evidentiary error interdicted the fact finding process. *See Riverside Recycling,* 112 So. 3d at 874. It is only when the erroneously admitted evidence interdicts the factfinder's answer to an essential question of fact, as opposed to a mere collateral question, that *de novo* review is warranted. *See Brewer v. J.B. Hunt Transport, Inc.*, 09-1408 (La. 3/16/10), 35 So. 3d 230, 237-38.

Since the erroneously admitted evidence is not included in the appellate record and the record does not reveal what weight, if any, it was afforded, we are unable to determine whether its admission interdicted the determination of an essential issue of fact by the trial court. Specifically, we cannot conclude that the admission of the evidence interdicted the trial court's finding that Fischer's actions were a cause-in-fact of the accident, which we find to be the determinative issue in the case. *Cf. Brewer*, 35 So. 3d at 238. Unable to make this determination, we must conclude that *de novo* review is not warranted in this case.[3]

LIABILITY

Fischer contends that the trial court erred in finding him liable and 100% at fault in causing the rear-end collision that he avoided. Roberts' theory of causation is that Fischer's action of leaving the roadway created a sudden emergency, which caused Rudzis' vehicle to collide with her

[3] Since we have determined that the police report and attached statements should not have been admitted, its omission from the appellate record has no effect on our analysis of the remaining assignments of error under the manifest error standard.

vehicle.[4] In its reasons for judgment, the trial court stated that Fischer was liable because his "reckless driving in leaving the road very unexpectedly [created] a hazardous condition."

Liability under the particular facts of a case is determined by the duty-risk analysis, which requires the plaintiff to prove (1) the defendant had a duty to conform his conduct to a specific standard of care, (2) the defendant failed to conform his conduct to the appropriate standard of care, (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries, (4) the defendant's substandard conduct was a legal cause of the plaintiffs injuries, and (5) actual damages. *Brewer,* 35 So. 3d at 240. Roberts had the burden of proving that Fischer owed a duty, that he breached that duty, that his substandard conduct was a cause-in-fact of her injuries, that his substandard conduct was a legal cause of the accident, and that she suffered damages. *See Id.* If Roberts failed to establish any one of these elements, her claims against Fischer and Farm Bureau must fail, and she cannot recover against them. *See Bellanger v. Webre*, 10-0720 (La. App. 1 Cir. 5/6/11), 65 So. 3d 201, 207, *writ denied*, 11-1171 (La. 9/16/11), 69 So. 3d 1149. Fischer avoided colliding with Roberts' vehicle; however, there is no statutory or jurisprudential requisite of a physical impact between

---

[4] As the following motorist in the rear-end collision, Rudzis is presumed to be negligent for having breached the duty imposed by Louisiana Revised Statute 32:81 that the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway. *See Mart v. Hill*, 505 So. 2d 1120, 1123 (La. 1987); *Eubanks v. Brasseal*, 310 So. 2d 550, 553 (La. 1975); *Ly v. State Through Dept. of Public Safety and Corrections*, 633 So. 2d 197, 201 (La. App. 1 Cir. 1993), *writ denied*, 93-3134 (La. 2/25/94), 634 So. 2d 835. Roberts argues that the sudden emergency doctrine applies in this case. Under the sudden emergency doctrine, a following motorist may escape liability for a rear-end collision by establishing that the preceding motorist created a sudden emergency that the following motorist could not have reasonably anticipated. *See Brewer*, 35 So. 3d at 241. However, our focus herein is whether *Fischer's* actions were a cause-in-fact of the rear-end collision between Roberts and Rudzis. Because we determine that they were not, and do not reach the issue of comparative fault of the parties involved, we do not address the application of the sudden emergency doctrine.

vehicles for the imposition of liability in a personal injury case arising out of a motor vehicle accident. *See Tyson v. King*, 09-963 (La. App. 3 Cir. 2/3/10), 29 So. 3d 719, 722.

Generally, cause-in-fact is the initial inquiry under the duty-risk analysis. *Granger v. Christus Health Central Louisiana*, 12-1892 (La. 6/28/13), ___ So. 3d ___, ___. The determination to be made is whether the harm would have occurred but for the defendant's alleged substandard conduct or, when concurrent causes are involved, whether defendant's conduct was a substantial factor in bringing about the harm. *Granger*, ___ So. 3d at ___. Our supreme court has explained:

> This court has made several different inquiries when applying the substantial factor test. For example, the court has stated that when there are multiple causes, clearly cause-in-fact exists when the plaintiff's harm would not have occurred absent the specific defendant's conduct. *Graves v. Page,* 96-2201, p. 9 (La. 11/7/97), 703 So. 2d 566, 570. The court has also applied the substantial factor test by asking whether each of the multiple causes played so important a role in producing the result that responsibility should be imposed upon each item of conduct, even if it cannot be said definitively that the harm would not have occurred "but for" each individual cause. *See id.* (citing *Trahan v. State, Department of Transportation & Development,* 536 So. 2d 1269, 1272 (La. App. 3 Cir.1988)). *See also* Frank L. Maraist & Thomas C. Galligan, Louisiana Tort Law, § 4-3 at 86-88 (1996) (noting that the substantial factor test operates well in cases where there are multiple possible causes-in-fact, but the trial judge or jury may not be able to conclude that the accident most likely would not have happened but for any one of the causes). Additionally, in *LeJeune v. Allstate Ins. Co.,* 365 So. 2d 471, 475 (La. 1978), the court, in describing the substantial factor test, stated that "one must consider whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm."

Perkins v. Entergy Corp., 00-1372 (La. 3/23/01), 782 So. 2d 606, 612.

A trial court's determination that a defendant's conduct was a cause-in-fact of the plaintiff's injuries is a factual determination subject to the manifest error standard of review. *Toston v. Pardon*, 03-1747 (La. 4/23/04),

874 So. 2d 791, 799-800. A reviewing court must not reverse a trial court's factual determination unless, after reviewing the entire record, it finds (1) that a reasonable factual basis does not exist for the finding, and (2) that the record establishes that the factfinder is clearly wrong or manifestly erroneous. *Toston*, 874 So. 2d at 799-800.

Roberts testified that she came to a stop on Lee Drive behind several stopped vehicles. The road was wet as it had just rained. She had been aware of vehicles traveling behind her but did not have the feeling that they were traveling too closely. Once stopped, she looked into her rearview mirror and saw the vehicle behind her (driven by Fischer) veer off of the roadway into a parking lot. She then looked back to ensure that the next vehicle stopped, and that vehicle (driven by Rudzis) "slammed into the back of [her]." Roberts clarified that she saw Fischer swerve, immediately looked back, and her vehicle was impacted, guessing that the impact occurred approximately two seconds after she realized Fischer's vehicle was off of the roadway. The impact of the collision pushed Roberts' vehicle into the vehicle in front of it, essentially causing a chain collision.

Fischer was driving his Chevrolet Blazer immediately behind Roberts' vehicle. He testified that he was approximately thirty yards behind Roberts' vehicle when he observed that she was stopped. Fischer applied his brake, but when he was approximately fifteen yards behind Roberts' vehicle determined that he could not stop behind Roberts. After discerning that it was safe for him to leave the roadway, Fischer drove through a grassy area next to a tree, skimmed the pavement, and came to rest in the corner of a semi-circle driveway in front of a daycare, which was past Roberts' vehicle. Fischer testified that he was ten to fifteen yards from Roberts' vehicle when he left the roadway and that he avoided making contact with any other

vehicles. Once stopped, he realized that an accident had occurred, checked on the drivers involved, and called 9-1-1.

Rudzis did not testify at trial and no admissible evidence was presented to establish Rudzis' account of the events preceding her vehicle rear-ending Roberts' vehicle. Rudzis' passenger, Chachere, testified that Rudzis was proceeding on Lee Drive behind Fischer's Blazer, which blocked the view of Roberts' vehicle, which was in front of Fischer's Blazer. Chachere did not remember the distance behind Fischer's Blazer that Rudzis was traveling, but estimated that it was at least a car length, and testified that prior to the Blazer leaving the roadway she had no concerns that Rudzis was following the Blazer too closely. Chachere explained that the Blazer quickly swerved off the roadway without warning, which was a surprise to her, after which she saw Roberts' vehicle for the first time. Chachere testified that Rudzis "slammed on her brakes as soon as you could when she saw that there was stopped traffic in front of her." Chachere did not think Rudzis' reaction was delayed, but was not certain. Despite braking, Rudzis' vehicle collided with Roberts' vehicle.

The duty-risk analysis is employed on a case-by-case basis. *Granger*, ___ So. 3d at ___. In this case, it is undisputed that Fischer's vehicle was ahead of Rudzis' vehicle on the two-lane road and suddenly left the roadway. Fischer's uncontradicted testimony was that he was approximately ten to fifteen yards behind Roberts' vehicle when he did so. The only admissible evidence as to Rudzis' actions and perceptions was the testimony of Chachere, Rudzis' front seat passenger. However, Chachere did not, and could not, testify as to what Rudzis actually observed and perceived before colliding with Roberts' vehicle. Chachere's uncontradicted testimony was that Rudzis' vehicle was at least one car length behind Fischer's.

Chachere's testimony establishes that Fischer's vehicle blocked Chachere's view of Roberts' vehicle, which Chachere saw for the first time after Fischer left the roadway. The evidence does not reflect when Rudzis first saw the Roberts vehicle.

When a preceding vehicle is obstructing a motorist's view ahead, the motorist has a duty to leave sufficient space between himself and the preceding vehicle to stop in case of an unexpected hazard in the road ahead. *Ly*, 633 So. 2d at 201. Considering the rainy roadway and, from Chachere's testimony, the possibility that Rudzis' visibility was obscured by Fischer's vehicle, Rudzis had a duty to reduce her speed and maintain an appropriate distance that would have allowed her to safely stop her vehicle.[5] *Compare Ly,* 633 So. 2d at 201; *Fontenot*, 512 So. 2d at 1194-95; *Urcia v. Department of Transp. and Development for State*, 94-78 (La. App. 5 Cir. 5/31/94), 638 So. 2d 416, 418.

Without any testimony by Rudzis regarding her own observations, Chachere's testimony, which was at times equivocal, does not establish by a preponderance of the evidence that Fischer's actions were a substantial factor in bringing about the harm to Roberts. It is not enough for Roberts to demonstrate that Fischer's actions might have been a contributing factor to Rudzis rear-ending her. *See Perkins*, 782 So. 2d at 618. Roberts was required to prove that it is more likely than not that Fischer's actions were a substantial factor in bringing about the injuries she suffered when Rudzis rear-ended her. *See Id.* After reviewing the admissible evidence, we find that a reasonable factual basis does not exist for the trial court's determination that Fischer's conduct was a cause-in-fact of Roberts' alleged

---

[5] If Rudzis' visibility was not obscured by Fischer's vehicle, then Rudzis should have seen Roberts' stopped vehicle and stopped safely behind her.

injuries. The trial court was clearly wrong in concluding that Roberts satisfied her burden of proof by a preponderance of the evidence.

Based on the admissible evidence, the trial court's finding that Fischer is liable for the accident is manifestly erroneous.[6] Accordingly, the judgment rendered against Fischer and his insurer, Farm Bureau, must be reversed.

CONCLUSION

For the foregoing reasons, the February 11, 2013 judgment of the trial court is reversed, and Roberts' claims against Richard Fischer and Louisiana Farm Bureau Insurance Agency, Inc. are dismissed with prejudice. Costs of this appeal are assessed to Lauren E. Roberts.

REVERSED AND RENDERED.

---

[6] As this determination resolves the issues presented in this appeal, we do not address the trial court's determination that Rudzis was not at fault or Roberts' claims against Rudzis.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0538

LAUREN E. ROBERTS

VERSUS

LAUREN RUDZIS, RICHARD FISCHER, AND LOUISIANA FARM BUREAU INSURANCE AGENCY, INC.

****

McCLENDON, J., dissents and assigns reasons.

The allocation of fault is a factual matter within the sound discretion of the trier of fact and will not be disturbed on appeal in the absence of manifest error. **Great West Cas. Co. v. State ex rel. Dept. of Transp. and Dev.**, 06-1776 (La.App. 1 Cir. 3/28/07), 960 So.2d 973, 978, writ denied, 07-1227 (La. 9/14/07), 963 So.2d 1005. Although Ms. Rudzis was presumed to be at fault for rear-ending Ms. Roberts' vehicle, I cannot conclude that the trial court was manifestly erroneous in assigning fault to Mr. Fischer. Mr. Fischer abruptly left the roadway with a sudden maneuver in order to prevent him from striking Ms. Roberts' vehicle. Clearly, Mr. Fischer was following Ms. Roberts' vehicle too closely and in a careless manner insofar as he failed to maintain control of his vehicle within its lane of travel. See LSA-R.S. 32:81(A) and 32:58. Also, Ms. Chachere testified that prior to Mr. Fischer leaving the roadway, she could not see Ms. Roberts' vehicle because the view was blocked by Mr. Fischer's vehicle, which was larger than Ms. Rudzis' vehicle. Given the facts presented to the trial court, I do not agree with the majority's conclusion that Mr. Fischer's actions were not "a substantial factor in bringing about the harm to Roberts." Accordingly, while I agree that the trial court committed manifest error in failing to assign any fault to Ms. Rudzis, I dissent to the extent that the majority fails to

apportion a percentage of fault to Mr. Fischer. Based on the evidence presented, I would have assessed a percentage of fault to both Mr. Fischer and Ms. Rudzis.

LAUREN E. ROBERTS **NO. 2013 CA 0538**

FIRST CIRCUIT

VERSUS

COURT OF APPEAL

LAUREN RUDZIS, RICHARD FISHER LOUISIANA FARM BUREAU INSURANCE AGENCY, INC. **STATE OF LOUISIANA**

WELCH, J. dissents.

I respectfully disagree with the majority opinion. The majority found, after reviewing the evidence, that a reasonable factual basis did not exist for the trial court's determination that Mr. Fischer's conduct was a cause-in-fact of Ms. Roberts' alleged injuries because Ms. Rudzis either brought the "emergency" on herself or did not use the required due care to avoid it. Thus, the majority concluded that the trial court was clearly wrong in determining that Ms. Roberts satisfied her burden of proof by a preponderance of the evidence, that the trial court's finding that Fischer was liable for the accident was manifestly erroneous, and that all claims against Mr. Fischer must be dismissed. In my opinion, the trial court legally erred in finding Mr. Fisher 100% at fault for the accident and this legal error interdicted the fact finding process insofar as it was required to allocate fault between the parties. However, I believe that the cold record precludes us from making a proper allocation of fault, and therefore, the judgment on appeal should be vacated and this matter remanded to the trial court for an allocation of fault.

Notably, the trial court's reasons for judgment and its judgment are silent with respect to the fault of Ms. Rudzis and both provide that Mr. Fischer was 100% at fault in causing the accident. Thus, the trial court obviously found that Ms. Rudzis was free from fault in causing the accident. However, the record establishes that both Ms. Rudzis and Mr. Fischer were following motorists, and

pursuant to La. R.S. 32:81(A), they both had a duty not to follow another vehicle more closely than was reasonably prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway. Furthermore, a following motorist in a rear-end collision is presumed to have breached the duty set out in La. R.S. 32:81 and, hence, is presumed negligent. **Mart v. Hill**, 505 So.2d 1120, 1123 (La. 1987); **Ly v. State, through the Dept. of Public Safety and Corrections,** 633 So.2d 197, 201, writ denied, 634 So.2d 835 (La. 1994). Thus, in this case, Ms. Rudzis, the following motorist that rear-ended Ms. Roberts, was presumed negligent and had the burden of exculpating herself from any fault for the accident.

To rebut the presumption of fault and avoid liability for the accident, the following motorist must prove that he had his vehicle under control, that he closely observed the lead vehicle, and that he followed it at a safe distance under the circumstances. Alternatively, the following motorist must show that the lead driver negligently created a hazard that could not reasonably be avoided. **King v. State Farm Insurance Co.**, 47, 368 (La. App. 2nd Cir. 8/8/12), 104 So.3d 33, 38; see also **Ly**, 633 So.2d at 201; **Fontenot v. Boehm,** 512 So.2d 1192, 1194 (La. App. 1st Cir. 1987). This alternative exception to the presumption is known as the sudden emergency doctrine. **Ly**, 633 So.2d at 201; **Fontenot v. Boehm,** 512 So.2d at 1194. Under the sudden emergency doctrine, a person "who suddenly finds himself in a position of imminent peril, without sufficient time to consider and weigh all of the circumstances or best means that may be adopted to avoid an impending danger, is not guilty of negligence if he fails to adopt what subsequently and upon reflection may appear to have been a better method, unless the emergency in which he finds himself is brought about by his own negligence." **Hickman v. Southern Pac. Transport Co.,** 262 La. 102, 112-113, 262 So.2d, 385, 389 (La. 1972); see also **King**, 104 So.3d at 38.

However, the rule of sudden emergency cannot be invoked by one who has brought the emergency upon himself by his own wrong or who has not used due care to avoid it. The sudden emergency doctrine is applicable to the standard of conduct of a motorist after an emergency has arisen, it does not apply to lower the standard of care required of motorists before the emergency occurs. **Fontenot**, 512 So.2d at 1195 (quoting 2 Blashfield, automobile Law and Practice § 102.28 (3rd ed. 1965)); **King,** 104 So.3d at 38. Although the sudden emergency doctrine was developed when contributory negligence was a complete bar to recovery, our courts continue to apply the doctrine. **Duzon v. Stallworth**, 2001-1187 (La. App. 1st Cir. 12/11/02), 866 So.2d 837, 858, writs denied, 2003-0589, 2003-0605 (La. 5/2/03), 842 So.2d 1101, 1110. Although the sudden emergency doctrine has not been subsumed by comparative fault, see **Jefferson v. Soileau,** 2003-0541 (La. App. 1st Cir. 12/31/03), 864 So.2d 250, 253, writ denied, 2004-0594 (La. 4/23/04), 870 So.2d 306, the defense of sudden emergency may be treated as one of the factual considerations used in assessing the degree of fault to be attributed to a party. See **King**, 104 So.3d at 38; **Manuel v. St. John the Baptist Parish School Board**, 98-1265 (La. App. 5th Cir. 3/30/99), 734 So.2d 766, 769, writ denied, 99-1193 (La. 6/4/99), 744 So.2d 632.

The trial court is required to compare the relative fault of the parties in assessing liability. In allocating fault, the trial court must 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 assessing the nature of the conduct of the parties, various factors may influence the degree of fault, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor, whether superior or inferior; and (5) any extenuating circumstances which might require the actor to

proceed in haste, without proper thought. **Watson v. State Farm Fire and Casualty Ins. Co.**, 469 So.2d 967, 974 (La. 1985).

After reviewing the record in its entirety, I agree with the trial court that the plaintiff, Ms. Roberts, was free from fault and that defendant, Mr. Fischer, was liable for the accident; however, I find the trial court's determination that Ms. Rudzis was free from fault and that Mr. Fischer was 100% at fault in causing the accident amounted to legal error. The trial court applied the sudden emergency doctrine and exculpated Ms. Rudzis from negligence based solely on the fact that Mr. Fischer swerved off of the road and that Ms. Rudzis collided with Ms. Roberts' vehicle, without any evidence in the record that there was unanticipated hazard that could not be reasonably avoided by Ms. Rudzis. In effect, the trial court ignored the fact that Ms. Rudzis was presumed negligent for colliding with Ms. Roberts and that Ms. Rudzis (or the plaintiff on her behalf) had the burden of proving that Ms. Rudzis' conduct was reasonable and not negligent prior to the time that Mr. Fischer swerved in order for her to be exculpated from fault in causing the accident. Neither Ms. Rudzis nor the plaintiff on her behalf sustained that burden, therefore, the sudden emergency doctrine was not applicable, and the trial court legally erred in applying it herein to absolve Ms. Rudzis from fault.

When a trial court incorrectly applies a principle of law, which causes a substantial deprivation of a party's rights or materially affects the disposition, it commits a legal error. **Evans v. Lungrin**, 97-0541 (La. 2/6/98), 708 So.2d 731, 735. Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id.* When such a prejudicial error of law skews the trial court's finding of a material issue of fact and causes it to pretermit other issues, the appellate court is required, if it can, to render judgment on the record by applying the correct law and determining the essential material facts de novo. *Id.* However, there are cases where the weight of the evidence is so nearly

equal that a first-hand view of the witnesses is essential to a fair resolution of the issues. **Ragas v. Argonaut Southwest Insurance Co.**, 388 So.2d 707, 708 (La. 1980). Where such a need arises, the case should be remanded for a new trial. *Id.* It is the duty of the appellate court to determine when the court can fairly find a preponderance of the evidence from the cold record or whether the case should be remanded. *Id.*

In this case, I believe that the trial court legally erred in applying the sudden emergency doctrine to exonerate Ms. Rudzis from fault, and that this legal error interdicted the fact finding process by causing it to pretermit an allocation of fault for this accident between Ms. Rudzis and Mr. Fischer based on the factors set forth in **Watson**, 469 So.2d at 974. However, after reviewing the record herein, the proper allocation of fault between Mr. Fischer and Ms. Rudzis must be based solely on the credibility of the witnesses, and the fact-finder's firsthand view of their testimony is essential for a fair determination of their credibility. With the need for credibility determinations, a preponderance of the evidence cannot be fairly determined from this cold record. Therefore, the interest of justice would be best served by remanding this case for a new trial. See La. C.C.P. art. 2164.

Thus, I respectfully dissent.