Richard CONSTANS, et al.
v.
CHOCTAW TRANSPORT, INC., et al.
James PEAR.
v.
CHOCTAW TRANSPORT, INC., et al.

Nos. 97-CA-0863, 97-CA-0864.

Court of Appeal of Louisiana,
Fourth Circuit.

Dec. 23, 1997.

Appeal from the Civil District Court, for the Parish of Orleans NOS. 94- 13268 c/w 94-13269, Division "M"; Honorable Ronald J. Sholes, Judge.

Kathleen E. Simon, Simon and Rees, Covington, for Appellant.

Charles A. Boggs, Edward A. Rodrigue, Jr., Boggs, Loehn & Rodrigue, New Orleans, for Appellants.

James R.E. Lamz, Deanna J. Hamilton, Lamz & Associates, Slidell, for Appellant.

Before BYRNES, LOBRANO and JONES, JJ.

BYRNES, Judge.

*1 On August 31, 1993 an 18-wheeler tractor trailer operated by Roosevelt Samuels was involved in a collision with a Mazda 626 passenger vehicle driven by the plaintiff, James Pear. Pear had three guest passengers: Patrick Neale, Richard Constans and Stephen Thompson. Pear and his passengers were injured. The guest passengers and their spouses (hereinafter referred to simply as "the guest passengers") sued [FN1] Choctaw Transport, Inc., Debose Trucking Company, Inc., Roosevelt C. Samuels and the Northern Assurance Company of America. [FN2] It was stipulated in the course of the trial that: "Roosevelt Samuels was driving the tractor in the course of his employment with Debose and in the course of Choctaw's business with Debose pursuant to the lease agreement." [FN3]

Also named and served as a defendant in the suit brought by the guest passengers was Allstate Insurance Company as the liability insurer of James Pear. [FN4] No allegations of negligence or fault were made by the guest passengers against James Pear, individually, who was neither named in nor served with the original petition filed by the guest passengers. The trucking company interests filed an answer to the guest passengers in the Constans case and asserted an Alternative Cross-Claim naming as defendants James Pear and Allstate Insurance Company.

James Pear filed a claim against the trucking company interests. Pear's case was consolidated with the earlier filed Constans case. Shortly before the May 20, 1996 trial date the trucking company interests agreed to settle with the guest passengers. Consequently, the commencement of the trial was then postponed. The trucking company interests agreed to the following settlement:

Richard and Deborah Constans $45,000.00
Stephen and Margaret Thompson $210,000.00

he was forced to rely on the deposition testimony of the two eyewitness drivers of following vehicles, Messers. Dufour and Hutten. Mr. Hutten's testimony does not support that conclusion, and although Mr. Dart interpreted Mr. Dufour's testimony as stating that the accident occurred when the truck changed lanes, Mr. Dufour's precise deposition testimony was:

> No, like I said, the first time I noticed something was wrong was when I seen the trailer lights come on and then you know, he was in the left lane and it looked like he was moving to the right.

This was a reference to the tractor trailer brake lights coming on at the moment of impact, which, according to this testimony quoted from Mr. Dufour occurred while the truck was in the left lane. Mr. Dart hedged his testimony by suggesting that Roosevelt Samuels said that his front right wheels might have gotten near the line. Essentially, Mr. Dart's reconstruction is no better than Mr. Dufour's testimony which was not supportive at the time he was deposed and was inconclusive and inconsistent at the time of trial. As the jury evidently was unconvinced by Mr. Dufour's version of the accident, is it any wonder that they rejected the accident theory of the expert which was based on Mr. Dufour's testimony?

Mr. Clayton Daniel, Choctaw's equipment manager testified that the rear tire on the driver's side of the tractor trailer had a scrape on it and the chassis on that side had some fresh scratches on it.

Phillip Nolan, safety director at Choctaw testified that: "The only sign of contact that I could find on the tractor was the left rear pull wheel, which is the driver's side."

Although Allstate and James Pear contend that there is no evidence that James Pear caused the accident, neither suggest that the accident occurred through the fault of a phantom driver, road conditions, weather conditions, or faulty vehicle equipment or design. The jury could only conclude that the accident was caused by either the truck or the Mazda, or that both contributed to the accident in some proportion. No one contends that there was an outside third cause. Therefore, not only is the jury entitled to rely on evidence that the Mazda (James Pear) is at fault, it is also entitled to rely on evidence that the truck (Roosevelt Samuels) is not at fault, from which the jury may then draw the reasonable inference that to whatever extent Mr. Samuels is not at fault, whether in whole or in part, Mr. Pear must be.

Accordingly, we find no manifest error in the jury finding that James Pear was solely at fault in causing this accident.

IV. THE TRUCKING COMPANY INTERESTS' ANIMATED VIDEOTAPE

Allstate complains that the trial court erred in allowing the trucking interests to introduce a videotape recreation of the accident which admittedly did not conform to the laws of physics or mathematics. In effect the videotape was a series of diagrams given the effect of animation by being played sequentially in rapid succession. The video was designed to illustrate the opinion of the trucking company interests' expert on accident reconstruction on the placement of the vehicles during the course of the accident. The expert explained that the tape was an animation not a simulation and was not done in real time. Effectively, the animation was no different than if the expert had created a series of many diagrams and explained that, "First the vehicles were here, then they were here, and finally, here." The creation of the video and its limitations were explained in great detail under cross-examination for the benefit of the jury. It was made completely clear that this computer animation was not the result of computer calculations recreating the accident, but was instead a series of pictures illustrating the opinion of the expert rather than having him draw his own diagrams to illustrate his points. To put it another way, it was made abundantly clear to the jury that the video did not represent computer support and confirmation of the expert's opinion, but was merely a means of illustrating the opinion of the expert. The animation was more of a labor saving device than anything else. In essence, it saved the expert the trouble of drawing his own diagrams by hand. It was clearly explained to the jury that the vehicles were shown in the animation at locations specified by the expert just as if he had drawn them in arbitrarily, rather than necessarily being shown where the laws of physical science would indicate that they should be. The jury was also informed that the animation was not done

in real time.

*17 The animation was done to scale and therefore does not represent a physical distortion of the accident location that might be unduly prejudicial. It was made clear to the jury that the videotape reenactment of the accident was only as good as the expert opinion which it was designed to illustrate.

In Pino v. Gauthier, 633 So.2d 638 (La.App. 1 Cir.1993), writ den. 94- 0243 (La.3/18/94); 634 So.2d 858, the court sustained the exclusion of a videotape of an automobile accident. But the videotape in Pino was a computer simulation, not a computer animation. In the instant case the expert took great pains to explain that in a computer simulation the computer uses software theoretically applying the laws of physics in an attempt to realistically recreate the accident. In a simulation the computer functions in a sense as an expert itself, rendering its own opinion based on internal calculations of how the accident would have occurred. A court might feel that a jury of laypersons would be unduly impressed, influenced, and intimidated by a computer simulation. The animation in this case is not clothed in the exaggerated aura of computer infallibility (much like the emperor's new clothes), an aura that fails to take into account not only the well known computer adage, "garbage in, garbage out," but also may fail to take into account the limitations and deficiencies of the simulation software, which would involve an analysis perhaps best avoided by juries where possible. It was admitted at the outset that the emperor, in this case the emperor being the videotape animation, had no clothes. There was no attempt to represent the animation to be anything more than it was. It was very brief and was unlikely to have assumed an exaggerated or disproportionate prominence in the minds of the jury. The use of the videotape animation was not unduly prejudicial. The decision to allow its use did not constitute an abuse of the trial court's discretion.

The admission of a videotape is largely within the discretion of the trial judge. LaFleur v. John Deere Co., 491 So.2d 624, 632 (La.1986); U.S. Fidelity and Guaranty Co. v. Hi-Tower Concrete Pumping Service, Inc., 574 So.2d 424, 438 (La.App. 2 Cir.), writ denied, 578 So.2d 136, 137 (La.1991). Determination of the admissibility into evidence of videotapes must be done on a case by case basis depending on the individual facts and circumstances of each case.

In Malbrough v. Wallace, 594 So.2d 428 (La.App. 1 Cir.1991), writ den. 596 So.2d 196 (La.1992), the appellate court sustained the trial court refusal to admit a videotape into evidence. However, the videotape in that case bears no relationship to the videotape in the instant case. The videotape in Malbrough was 55 minutes long, was found to be repetitive and of very little probative value. In effect, its worth was far exceeded by its length and it could be expected, therefore, to assume a prominence in the minds of the jury greatly disproportionate to its probative value, which is another way of saying that its admission would have been prejudicial. As the Malbrough court noted where the only proper question to be addressed was the existence of plaintiff's ruptured disks:

> *18 Much of the material shown on this videotape, such as the cutting of plaintiff's fat, the smoke rising from her muscles as they were cauterized, and the removal of gory packing material from the wound, served no purpose other than to inflame and prejudice the jury. Had the videotape been restricted to only the portion showing the abnormal disks, our opinion might be different. [Emphasis added.]

Malbrough, 594 So.2d at 432.

V. SPOLIATION OF EVIDENCE AND THE MISSING BUMPER.

Allstate asserts that it was error for the trial court to refuse Allstate's request to instruct the jury on the adverse presumption rule on spoliation of evidence in connection with Choctaw's discarding of the bumper of the 18-wheeler. The truck was photographed extensively and investigated in the weeks following the accident. Allstate complains that the bumper photographs should have been clearer and more close-up. Although the photographs might have been better, they are more than adequate to demonstrate that the trucking interests were not trying to hide the bumper. During this period of time neither Allstate nor Mr. Pear made any attempt to examine the truck or the bumper. Mr. Debose testified that the bumper was changed sometime between October of 1995 and