NOT DESIGNATED FOR PUBLICATION

LEO DESSELLE		NO. 02-CA-543
VERSUS		FIFTH CIRCUIT
LOUISIANA-1 GAMING PARTNERSHIP IN COMMENDAM AND LOUISIANA GAMING ENTERPRISING, INC. D/B/A BOOMTOWN BELLE CASINO & ABC CORPORATION		COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 550-436, DIVISION "B"
HONORABLE FREDERICKA H. WICKER, JUDGE PRESIDING

OCTOBER 29, 2002

WALTER J. ROTHSCHILD
JUDGE

Panel composed of Judges James L. Cannella, Clarence E. McManus and Walter J. Rothschild

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AFFIRMED

Following a bench trial in this personal injury case, the trial court rendered judgment in favor of defendant, dismissing plaintiff's suit with prejudice. Plaintiff now appeals from this ruling. Finding no manifest error in the trial court's judgment, we affirm.

Facts and Procedural History

Leo Desselle filed the instant suit for damages against Louisiana-1 Gaming, the owner of Boomtown Belle Casino, and its insurer alleging that he was injured on a mechanical ride during a three-dimensional movie on the casino's premises on May 15, 1999. Defendant answered the suit, generally denying all allegations of plaintiff's petition. Defendant subsequently filed a third-party demand for contribution and indemnity against IWERKS Entertainment, Inc., the manufacturer of the mechanical ride on which plaintiff was allegedly injured. IWERKS in turn filed a cross-claim against Louisiana-1 Gaming.

Trial on the merits was held on October 30, 2001. The parties stipulated to the introduction of medical records, bills and physicians' depositions. Two witnesses testified at trial as follows:

Leo P. Desselle, Jr., the plaintiff, testified that on May 15, 1999, he and his wife took their two adopted children to the Boomtown Casino to play arcade games. Mr. Desselle's son, Danny, obtained a coupon for a free admittance to a movie within the casino arcade, and the two decided to attend that event.

Plaintiff testified that they entered a dark room where they were instructed by the attendant to be seated and put on a seatbelt. The attendant then turned on the movie, and the seat in which plaintiff was seated began to move. Plaintiff stated that the movement continued for approximately four minutes, during which time his eyeglasses were thrown off his face. He stated that he was very sore following the movie, and the following day, he could not move his neck and immediately sought medical treatment. Plaintiff testified that he did not see any type of warning signs in or near the movie theater indicating the nature of the event.

Plaintiff testified that he was 75 years old at the time of trial. He suffered from substantial vision and hearing losses. Plaintiff denied that he suffered from any prior neck problems. However, defense counsel pointed out excerpts from the deposition of plaintiff's treating physician who stated that plaintiff had previously complained of neck pain. Plaintiff stated he did not remember making those complaints.

Following this testimony, plaintiff rested his case. Defendant then called as a witness Raiana Prince, the Boomtown employee who was on duty in the movie theater on the date of plaintiff's accident.

Ms. Prince testified that on the date of plaintiff's accident, plaintiff and his son were the only two patrons in the movie theater. She stated she told plaintiff to sit in a seat and to put on a seatbelt. She also told plaintiff that if he felt uncomfortable during the ride to raise his hand, but that neither plaintiff nor his son

indicated during the ride that they wanted to stop. Following the ride, plaintiff told Ms. Prince that it was a rough ride.

Ms. Prince testified that she worked in the theater for approximately a year and a half, and that she was not aware of any other incidents or injuries that occurred on the ride. She stated that at the time of this incident, there were two large warning signs outside the theater that stated that people with neck or back problems should not ride. However, she stated that the signs were removed when the movie theater was taken out of the casino, and defendant did not introduce any photographs of the signage. Following the testimony of Ms. Prince, defendant rested its case.

At the conclusion of trial, the court ruled from the bench that plaintiff failed to establish a case in either products liability or negligence. The court therefore found in favor of the defense, and on November 13, 2001, the court signed a judgment dismissing plaintiff's suit against Louisiana-1 Gaming with prejudice. The court also dismissed the third party demand and cross-claim between the two defendants.

Plaintiff appeals on the basis on one assignment of error: the trial court erred in failing to find defendant was negligent in failing to warn him of the risks associated with participating in the three-dimensional movie/ride. Plaintiff contends that the evidence establishes that the ride caused an aggravation of a pre-existing neck condition for which defendant is liable.

Law and Discussion

A court of appeal may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." Rosell v. ESCO, 549 So.2d 840, 844 (La.1989). The supreme court has announced a two-part test for the reversal of the factfinder's determinations: (1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the

trial court, and (2) the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). Stobart v. State, 617 So.2d 880, 882 (La.1993). The issue to be resolved by the reviewing court is not whether the trier of fact is right or wrong but whether the factfinder's conclusion was a reasonable one. Id. at 882. Where the testimony of the witnesses differs, it is the responsibility of the trier of fact to determine which evidence is the most credible. Theriot v. Lasseigne, 93-2661 (La.7/5/94), 640 So.2d 1305, 1313. The reviewing court must always keep in mind that if the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. Sistler v. Liberty Mut. Ins. Co., 558 So.2d 1106, 1112 (La.1990).

In order to determine whether liability exists under the facts of a particular case, Louisiana courts have adopted a duty-risk analysis. Pinsonneault v. Merchants & Farmers Bank & Trust Co., 01-2217 (La. 4/3/02), 816 So.2d 270. Under this analysis, plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the defendant breached the requisite duty and the risk of harm was within the scope of protection afforded by the duty breached. Berry v. State, Through Dept. of Health and Human Resources, 93-2748 (La.5/23/94), 637 So.2d 412, 414.

At trial, plaintiff had the burden to prove that defendant breached a duty of care owed to casino patrons. Plaintiff failed to introduce any type of evidence that the movie/ride was defective or unreasonably dangerous. On appeal, plaintiff contends that defendant was negligent in failing to warn those participating in the three-dimensional movie of the dangers of the ride. Plaintiff testified that there were no warning signs posted near the theater. However, the attendant working in the theater on the day of the incident gave testimony that conflicted with that of

plaintiff. Ms. Prince testified that there were two large warning signs posted near the movie theater, and that she specifically remembered explaining the nature of the ride to plaintiff. Ms. Prince testified that although plaintiff was told he could tell her to stop the ride at any time, plaintiff failed to do so.

The trial court apparently accepted the testimony of Ms. Prince that the casino had adequately warned patrons of the nature of the ride and rejected the testimony of plaintiff that no warnings were provided. The trial court was in the best position to evaluate the credibility and demeanor of both witnesses. Based on our review of the record, we find this factual determination to be reasonable.

Plaintiff also contends on appeal that the trial court erred in failing to find that the movement of the ride caused an aggravation of plaintiff's pre-existing neck injury. The determination of cause in fact is a question of fact that may not be overturned in the absence of manifest error. Oubre v. Union Carbide Corp., 99-63 (La. App. 5th Cir. 12/15/99), 747 So.2d 212, 224, writs denied, 00-472, 473 (La. 4/20/00), 760 So.2d 346.

Plaintiff contends that the element of causation was established at trial by a showing that after he saw the 3-D movie, plaintiff began to experience problems with his neck. At trial, plaintiff denied that he had previously experienced problems with his neck. This testimony conflicted with the deposition testimony of plaintiff's family physician, Dr. Nicholas Chetta, who stated that plaintiff's neck complaints dated back to 1973 and continued through at least 1995. Further, the record contains the deposition testimony of Dr. Daniel Gallagher, the orthopedic surgeon who saw plaintiff after this incident in the casino. Dr. Gallagher stated that the plaintiff denied prior neck problems when his history was taken in May of 1999. Dr. Gallagher also found that the incident in the casino caused no significant worsening of plaintiff's previous condition or any permanent problems.

Faced with conflicting testimony regarding the onset of plaintiff's neck problems, the trial court apparently chose to credit the testimony of plaintiff's treating physicians over the testimony of plaintiff. The trial court apparently concluded that plaintiff's neck complaints were a continuation of the condition for which he previously received treatment and did not result from any negligent conduct of defendant. This is a reasonable determination based on plaintiff's denial of previous neck problems at trial. As the ruling of the trial court was based on the decision to credit the testimony of certain witnesses over others and the record reasonably supports this determination, we fail to find that finding to be manifestly erroneous or clearly wrong.

Conclusion

Accordingly, for the reasons assigned herein, we find no manifest error of the trial court in finding that plaintiff failed to establish negligence on the part of defendant. The judgment of the trial court dismissing plaintiff's demand and defendants' third party demand and cross-claim is therefore affirmed. Plaintiff shall bear all costs of this appeal.

AFFIRMED

Court of Appeal

FIFTH CIRCUIT
STATE OF LOUISIANA

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CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY OCTOBER 29, 2002 TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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PETER J. FITZGERALD, JR.
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