

**KENNETH CASSARD AND  
RACHEL CASSARD**

**VERSUS**

**BUD'S BOAT RENTAL, INC.,  
AND XYZ INSURANCE  
COMPANY**

**\* NO. 2000-CA-1590  
\* COURT OF APPEAL  
\* FOURTH CIRCUIT  
\* STATE OF LOUISIANA**

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APPEAL FROM  
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT  
NO. 43-702, DIVISION "A"  
Honorable Luke Petrovich, Judge

**\* \* \* \* \***

**Charles R. Jones  
Judge**

**\* \* \* \* \***

(Court composed of Judge Charles R. Jones, Judge Max N. Tobias, Jr., and  
Judge David S. Gorbaty)

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**AFFIRMED**

Plaintiff/appellant, Kenneth Cassard, appeals the judgment of the district court, which dismissed his cause of action against Bud's Boat Rental, Inc., for injuries he sustained while aboard a vessel owned and navigated by Bud's Boat Rental, Inc. (hereinafter "BBR"). Following a review of the record, we affirm the judgment of the district court and assess the cost of this appeal to the defendant, BBR.

***FACTS***

Mr. Cassard, a roustabout/rigger employed by Fab Con, Inc., boarded a crew boat named the M/V MR. WALTER to be transported to the top of the West Delta 32 platform in the Gulf of Mexico in order to provide construction services to the GrayStar Production Company. Mr. Cassard, along with two other contract workers, boarded the vessel in the early morning hours of September 12, 1997 for the one and one-half hour journey from Venice, Louisiana to the West Delta 32 platform. Captain Shane Heister and two deck hands, David LeBlanc and Denise LeBlanc were employed by BBR to navigate the vessel to the platform.

Approximately thirty minutes into the voyage, Captain Heister relinquished the vessel into David LeBlanc's control while he retired to a nearby bunk for a twenty to thirty minute nap. When the vessel reached "Tiger Pass," a term used to describe the location of the West Delta 32 platform, Mr. LeBlanc allegedly placed the vessel in neutral and alerted the captain of the vessel's location. Captain Heister entered the location in his logs and proceeded to the stern controls in order to place the vessel in reverse and to position it directly under the personnel basket extending from the platform. The personnel basket was used to off load any and all workers, cargo and equipment that were to be used on the platform.

When Captain Heister attempted to move the vessel in reverse, he noticed that the engine merely whined as it continued to drift with the current. When the vessel would not respond, Captain Heister realized that the deckhand had not placed the vessel in neutral so he proceeded to the wheelhouse control room to correct the problem. As the captain ran towards the wheelhouse control room, the vessel ran directly under the platform and struck a crossbeam. Just seconds before the collision with the crossbeam, Mr. Cassard alleges that he was positioned on the second step leading to the stern door located in the rear of the passenger compartment. When the vessel hit the crossbeam, Mr. Cassard alleges that he was thrown from the second step

over two other passengers and landed on the floor near the front section of the passenger compartment.

Following the allision, Mr. Cassard and the two other workers exited the vessel via the personnel basket and proceeded to perform their specific duties about the platform. Approximately an hour after boarding the platform, Mr. Cassard began feeling some discomfort in his neck and back area. He then approached his supervisor and requested that he be released to go home due to the persistent pain in his neck and back.

Mr. Cassard subsequently filed a Workers' Compensation claim against his employer when he was unable to return to work. He also filed a Petition for Damages against BBR for the allision that took place on September 12, 1997. Fab Con, Inc. intervened for reimbursement for all medical expenses paid on Mr. Cassard's behalf. Following a one-day bench trial, the district court concluded that Mr. Cassard did not present sufficient evidence to indicate that his injuries resulted from the allision while aboard the M/V MR. WALTER.

Accordingly, the district court dismissed Mr. Cassard's cause of action against BBR, and the district court also dismissed the employer's Petition for Intervention. In conjunction with its judgment, the district court submitted its Reasons for Judgment, which outlined in great detail its

findings in the instant case. Mr. Cassard then filed a Motion for a New Trial, which was heard and subsequently denied. It is from this judgment that Mr. Cassard filed the instant appeal.

### ***STANDARD OF REVIEW***

According to the district court's Reasons for Judgment, its judgment was based on the witnesses' credibility offered during the course of the trial. Thus, we, as the reviewing court, must accord deference to the fact finder, and must be cognizant of our duty to review facts, not merely to decide if we would have found the facts differently, but to determine whether the district court's judgment was manifestly erroneous, clearly wrong based on the evidence or was it without evidentiary support. *Abdullah v. Simmons*, 98-0564 (La. App. 4 Cir. 9/13/00), 772 So.2d 698, writ denied 2000-3440 (La. 2/16/01), 786 So.2d 101. Moreover, considering that credibility determinations, including the evaluation and resolution of conflicts in testimony, factual issues are to be resolved by the trier of fact, which will not be disturbed on appeal in the absence of manifest error. *Seal v. Sealexco, Inc.*, 98-548 (La. App. 5 Cir. 4/27/99), 734 So.2d 162, 165-166, writ denied, 99-1532 (La. 9/17/99), 747 So.2d 1109. Jurisprudence has held that a trial court is in a better position to make credibility determinations by examining variations in demeanor and tone of voice of the witnesses. *Lopez*

*v. Lopez*, 2000-00660 (La. App. 3 Cir. 11/2/00), 772 So.2d 364.

### ***DUTY-RISK ANALYSIS***

In a suit for damages allegedly caused by the tortious conduct of the defendant, the plaintiff carries the initial burden of proof at trial. *Pinkins v. Cabes*, 98-1803 (La. App. 4 Cir. 1/27/99), 728 So.2d 523. Thus, in order to prove a prima facie case of negligence, the plaintiff must prove three specific and distinct things: (1) fault; (2) causation; and (3) damages. *Id.*; see also *Godfrey v. Boston Old Colony Insurance Co.*, 97-2568 (La. App. 4 Cir. 5/27/98), 718 So.2d 441.

In Louisiana, these concepts are the embodiment of a four-tier test commonly referred to as the “duty-risk” analysis. See *Gardner v. Griffin*, 97-379 (La. App. 1 Cir. 4/8/98), 712 So.2d 583. The test obligates the plaintiff to show, by a preponderance of the evidence, the following elements: (1) that the defendant owed a duty of care to the plaintiff; (2) that this particular duty was breached; (3) the breach of that duty caused the plaintiff’s harm; and (4) the plaintiff suffered actual damage.

#### *(1) Duty*

LSA-R.S. 34:851.18 and LSA-R.S. 34:802 specifically states that the

owner or operator of a ship or watercraft has a legal duty to operate or navigate said vessel in a reasonably safe manner so as not to cause harm or damage to another. In the instant case, Mr. Cassard was an invitee aboard the M/V MR. WALTER; therefore, both BBR and Captain Heister held a statutory duty to safeguard Mr. Cassard and the other passengers from harm while aboard the vessel.

*(2) Breach of Duty*

Captain Heister testified that he was the assigned captain for the M/V MR. WALTER on September 12, 1997. He also testified that he obtained his Coast Guard license (i.e., 100-ton masters license) in 1995, and had been working for BBR for four years before the incident in question. Prior to the incident, Captain Heister testified that he had had problems with the vessel's air starter in the past, which required him or the deck hand to bleed the air tank before operating the vessel.

On the date of the accident, Captain Heister testified that he allowed David LeBlanc to operate the vessel in open waters in order for him to get some training on operating the M/V MR. WATER since he was in the process of obtaining his master's license. When Captain Heister assumed control of the vessel at 5:00 a.m., he admitted that he did not check to see whether Mr. LeBlanc had properly placed the vessel in neutral before he

proceeded to the pilothouse room to put the vessel in reverse and off load the passengers and equipment. Therefore, when the vessel's controls failed to respond Captain Heister testified that he immediately ran to the wheelhouse room and put the controls in neutral so that he could place the vessel in reverse.

As he proceeded towards the wheelhouse, Captain Heister testified that the vessel had drifted under the rig and struck a crossbeam. Although he did not check the status of his passengers following the impact, Captain Heister described the impact as a "medium bump" that had the possibility of throwing a passenger back if he were not cautious. Captain Heister testified that the crossbeam was connected to two legs of the platform under which the bow of the vessel passed. Even though the crossbeam had not been damaged, Captain Heister testified that the impact damaged the top portion of the starboard cabin, the windshield and the windshield braces of the vessel.

In corroboration of Captain Heister's testimony, Mr. LeBlanc conceded that he did not properly place the vessel in neutral since he ascertained whether the vessel was in neutral by the sound of the engine when he maneuvered the stern controls. Notwithstanding Mr. LeBlanc's testimony, the record reveals that prior to the instant accident Captain



Heister was involved in two similar incidents when he operated the M/V MISS CATHERINE. Accordingly, we find that BBR, through its employees, Captain Heister and Mr. LeBlanc, did breach its duty of care when it allowed an unlicensed person to operate a passenger vessel without proper supervision.

### (3) Causation

A causation finding is a factual finding which should not be disturbed on appeal unless there is a showing of manifest error. *Skansi Oyster Corp. v. Louisiana Land & Exploration Co.*, 97-1888 (La. App. 4 Cir. 3/11/98), 709 So.2d 329. Generally, the reviewing courts undertake the “but for” inquiry to determine cause-in-fact; in other words, if the plaintiff probably would not have sustained injuries but for the defendant’s conduct then the conduct is a cause-in-fact of the plaintiff’s injuries. *Gagliano v. Amax Metals Recovery, Inc.*, 96-1751, 96-1752 (La. App. 4 Cir. 5/7/97), 693 So.2d 889, writ denied 97-1738 (La. 10/13/97), 703 So.2d 619. However, where the “but for” inquiry is inadequate to determine cause-in-fact, courts may use the “substantial factor” test under which cause-in-fact is identified when the defendant’s conduct was a substantial factor in causing the plaintiff’s harm. *Id.*

In the instant case, the district court concluded that BBR was not the

cause-in-fact or a substantial factor in causing Mr. Cassard's alleged injuries since the only other witness to corroborate Mr. Cassard's testimony was Captain Heister. According to the record, Captain Heister testified during cross-examination that he did not have any problems with the air starter three days prior to the accident. Further, he testified that he had tested positive for marijuana when BBR, according to standard procedure, requested that he submit to a drug test following the accident. Additionally, Captain Heister testified that he tested positive for marijuana when he was employed as a deck hand with BBR.

According to the record, Mr. Cassard testified that after he boarded the vessel, he and the other passengers laid down on the benches in the passenger compartment. When the deck hand notified Mr. Cassard that the vessel was near West Delta 32, he awoke the other passengers and proceeded to put on his shoes. Mr. Cassard then testified that he proceeded to exit the passenger compartment when the vessel struck something underneath the platform. He testified that he was thrown from the second step of the rear exit of the passenger compartment to the floor of the vessel. Though he testified that the impact caused him to fall over two other passengers also attempting to leave the passenger compartment, Mr. Cassard did not specifically tell the captain or any one of the deck hands that he fell

during the impact. In fact, the record reflects that Mr. Cassard and the other passengers exited the vessel onto the platform and began working without showing any signs of discomfort.

Patrick Pelas, one of the passengers aboard the M/V MR. WALTER at the time of the allision, testified for Mr. Cassard, stating that he was in the process of getting dressed when the vessel collided with something in the water. In fact, Mr. Pelas testified that he believed the vessel was struck by another vessel. Even though he described the impact as “hard,” he denied seeing anyone flying in the air, and he testified that no one informed him that they were injured from the allision. On cross examination, Mr. Pelas testified that he collected \$3,200 in workers’ compensation benefits from his employer and settled the lawsuit he filed against BBR for injuries to his neck, back, shoulders and legs.

Mr. LeBlanc, the senior deckhand, testified that the engine did not malfunction on the date the incident occurred. He also testified that when he went to check the status of the passengers after the allision no one had fallen and no one informed him that they were injured. In fact, Mr. LeBlanc testified that when he went to the passenger compartment, the passengers were fully dressed with their luggage in their hands. He also testified that two of the passengers were carrying toolboxes, but he was unable to identify

those passengers carrying the toolboxes.

Denise LeBlanc, the junior deck hand aboard the M/V MR.

WALTER, testified that September 12, 1997, was the first day she traveled on the M/V MR.

WALTER. She also testified that her responsibilities aboard the vessel were to cook meals, wash the window curtains, and buy groceries for the crew.

Minutes prior the impact, Ms. LeBlanc testified that she had just started brewing coffee on the stove in the kitchen when the collision occurred.

Following the impact, Ms. LeBlanc testified that she did not lose her footing during the collision. Further, she testified that the coffee did not spill and the dishes did not fall. She described the impact as a minor jolt, but nothing strong enough to cause someone to fall to the floor.

Therefore, the district court did not commit manifest error in finding that the actions of BBR did not cause Mr. Cassard's injuries.

*(4) Actual damage to Mr. Cassard*

We do not find that the district court erred in finding that Mr. Cassard's testimony lacked credibility with regard to actual injury sustained as a result of the accident. When findings are based on determinations regarding the credibility of witnesses, the manifest error—clearly wrong standard demands great deference to the trier of fact's findings. *Courteaux*

*v. State through the Department of Transportation and Development*, 99-0352, 99-0353, p. 11 (La. App. 4 Cir. 9/22/99), 745 So.2d 91, 98.

Mr. Cassard worked for an hour or less paint chipping, then simultaneously with Mr. Pelas complained of back pain, of having fallen at the time of the allision, and both expressed their desire to report to a physician. The district court reasoned that based on the evidence none of the passengers were actually injured during the allision, especially since Mr. Cassard nor the other passengers ever complained to the captain or any of the crew of being hurt or injured.

Considering that the duty-risk analysis is a fact sensitive inquiry, there was sufficient evidence on which the district court based its findings. Thus, we find that the district court did not err in finding that Mr. Cassard's injuries were not caused by the allision on September 12<sup>th</sup>.

#### ***LIMITED LIABILITY***

We pretermit discussion of whether the district court erred in limiting the liability of the BBR since we find that BBR was not liable for any injuries to Mr. Cassard.

#### ***MOTION FOR NEW TRIAL***

Mr. Cassard argues that the district court improperly denied his Motion for New Trial because the district court's ruling was contrary to the

facts and the law applicable to the case and newly discovered evidence.

The ruling was based upon the conclusion that Mr. Cassard did not fall. Mr. Cassard argues that Mr. Myron Smith testified in a discovery deposition that Mr. Cassard had in fact fallen on top of him at the time of the allision and that this information is important to Mr. Cassard's cause. Mr. Cassard further argues that this information was not made available to him until after the trial. Additionally, Mr. Smith was issued a subpoena to appear at trial, but failed to do so. Therefore, Mr. Cassard argues that he was unable to secure this testimony at trial.

Mr. Cassard also argues that following trial Mr. Pelas presented an affidavit, which contradicted his trial testimony. Although at trial Mr. Pelas testified that upon impact Mr. Cassard was not within his visual range and that he did not recall seeing Mr. Cassard lying across Mr. Smith, he testified by affidavit that he saw Mr. Cassard on the floor of the vessel following the allision. Mr. Cassard argues that there was no way for him to have elicited this testimony at trial.

BBR argues that the district court did not err in denying Mr. Cassard's Motion for New Trial. BBR argues that the district court found Mr. Cassard's version of the events to be physically impossible, and consequently weighed credibility of the witnesses in favor of BBR when

making the determination of liability.

Further, BBR argues that the new testimony of Mr. Smith and Mr. Pelas was obtainable prior to trial. BBR also argues that Mr. Cassard did not take the necessary measures to take Mr. Smith's deposition, enforce the subpoena power against Mr. Smith, proffer his expected testimony to the district court, or request that the record remain open until his testimony was obtained. Further, BBR argues that Mr. Cassard's counsel did not request a copy of Mr. Smith's deposition nor did he depose him, even though initially, Mr. Cassard's counsel represented Mr. Smith in this matter. Additionally, BBR argues that Mr. Cassard's counsel had ample opportunity to elicit testimony regarding Mr. Cassard's fall from Mr. Pelas at trial, however, counsel failed to pursue an appropriate line of questions in that regard. BBR also argues that the new testimony of Mr. Smith and Mr. Pelas is not significant enough to merit a new trial. We agree.

According to La. C.C.P. art. 1972,

[a] new trial shall be granted, upon contradictory motion of any party, in the following cases:

- (1) When the verdict or judgment appears clearly contrary to the law and the evidence.
- (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during trial.

The district court did not find Mr. Cassard's testimony regarding his

having fallen to be persuasive. We cannot surmise that the judgment of the district court was clearly contrary to the law and the evidence simply because the court did not find Mr. Cassard's version of events credible. Additionally, Mr. Cassard's counsel failed to exhaust his options in securing the testimony of Mr. Smith, and to properly query Mr. Pelas during trial to elicit testimony regarding Mr. Cassard's alleged fall. For Mr. Cassard's counsel to secure contradictory testimony from Mr. Pelas post trial when Mr. Pelas appeared at trial is also not persuasive. Mr. Cassard has failed to satisfy his burden of demonstrating due diligence to procure the testimony of Mr. Smith and Mr. Pelas before or during trial, thus the district court did not err when the Motion for New Trial was denied.

***RELATIONSHIP BETWEEN THE JUDGE AND THE APPELLEE***

Mr. Cassard also seeks annulment of the judgment based on the alleged fraudulent behavior of Ad Hoc Judge Luke Petrovich for purposefully failing to disclose "his financial and attorney relationship [sic]" with BBR, as well as, "his financial and personal relationship [sic]" with Philip Cossich, BBR's previous and now current attorney. Mr. Cassard argues that Judge Petrovich previously had been attorney of record and in fact represented BBR in numerous matters and had been associated with Attorney Cossich, associate counsel for BBR in this case. Mr. Cassard



further argues that as a result of this relationship, Judge Petrovich rendered an unfair and partial decision in this matter.

BBR asserts that it had no knowledge of any past representations by Judge Petrovich on behalf of BBR. In 1985, the law firm of Petrovich and Cossich represented BBR in which Mr. Cossich was the counsel of record. BBR argues that Judge Petrovich played no role in representing BBR. BBR further contends that these facts do not constitute a presumption of bias or prejudice on the part of Judge Petrovich, and that Judge Petrovich's Reasons for Judgment revealed a well thought out process wherein careful consideration was given to all circumstances surrounding the events at issue.

“A final judgment obtained by fraud or ill practices may be annulled.” La. C.C.P. art. 2004. However, “an action to annul a judgment must be brought in the trial court, even though the judgment sought to be annulled may have been affirmed on appeal, or even rendered by the appellate court.” La. C.C.P. art. 2006.

Although, we do not see any basis for support of this argument, we dismiss this issue for it is inappropriately before this Court.

### ***DECREE***

For the foregoing reasons, the judgment of the district court is hereby affirmed.

**AFFIRMED**