NOT DESIGNATED FOR PUBLICATION

JOHN F. CARRERE, JR. AND SPOUSE, CLAIRE M. CARRERE	*	**NO. 2002-CA-0180**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
THE CITY OF NEW ORLEANS, PAUL MAY, IN HIS CAPACITY AS DIRECTOR OF SAFETY AND PERMITS, THE BOARD OF ZONING ADJUSTMENTS OF THE CITY OF NEW ORLEANS, CHARLES ALLEN, IN HIS CAPACITY AS CHAIRMAN OF THE BOARD OF ZONING ADJUSTMENTS	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-11399, DIVISION "C-6"
Honorable Roland L. Belsome, Judge
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Judge David S. Gorbaty
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(Court composed of Judge Michael E. Kirby, Judge Max N. Tobias, Jr., Judge David S. Gorbaty)

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AFFIRMED

In this appeal, plaintiffs contend that the trial court erred in denying their Writ of Certiorari. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Defendants Dan and Summer Rupley reside at 550 Walnut Street. Through their contractor, they applied for a permit to construct a one-story accessory building with an open-air rooftop that connects to a catwalk and to the existing second floor deck of the principal residence. The Department of Safety and Permits granted their request and issued Building Permit No. B01001881 on April 17, 2001. John and Claire Carrere, neighbors of the Rupleys, filed an appeal with the Board of Zoning Adjustments ("BZA") challenging the permit's issuance and requesting a stop work order. After a public hearing on July 9, 2001, the BZA found that the permit was properly issued. Plaintiffs then sought a Writ of Certiorari in Civil District Court of Orleans Parish, which was denied. Plaintiffs subsequently filed this appeal.

DISCUSSION

Plaintiffs argue that the trial court erred in sustaining the decision of the BZA and not finding their decision to be arbitrary and capricious.

Comprehensive Zoning Ordinance No. 4264 M.C.S. restricts the height of accessory buildings to fourteen feet. Plaintiffs aver that this limitation was set to preclude two-story accessory buildings. They contend that defendants sought by their roof design to circumvent this height restriction. Although the total height of the building is fourteen feet, the roof deck, which stands at eleven feet, effectively creates a second story with no ceiling height. Habitation activities will occur at a height greater than fourteen feet, allowing defendants to gaze directly into plaintiffs' yard. Plaintiffs argue that the habitation activities that will be possible on the roof deck are prohibited by the code for an accessory structure.

Article 2, Section 2.2(1) of the City of New Orleans Comprehensive Building Ordinance defines an accessory building as "a subordinate building, attached to or detached from the main building, the use of which is incidental to that of the main building and not used as a place of habitation except by domestic servants employed upon the premises." We find that the Rupleys' planned accessory building meets this definition exactly. The proposed building is a subordinate building. As designed, it is separated from the main building and attached to it by a catwalk. The testimony before the BZA clearly showed that this proposed accessory building is

being built to aid in the enjoyment of the backyard swimming pool and to act as an area where backyard equipment and pool supplies can be housed in an attractive setting. No one will be living in the cabana.

The Comprehensive Zoning Ordinance defines "story" in Article 2 Definitions, Section 2.2, No. 172, as follows:

> **Story**. That portion of a building (other than a cellar or a basement used for dwelling purposes), included between the surface of any floor and the surface of the floor next above it; or, if there be no floor next above it, then the space between such floor and the ceiling next above it. A cellar or basement being used for dwelling purposes shall be considered a story.

According to this definition, there must be an enclosed space in order to create another story. Such is not the case here. The rooftop deck that plaintiffs complain of is not enclosed by a ceiling or a "floor next above." As such, the rooftop deck is not a second story within the meaning of this definition. We also note that there is an existing open roof deck that is part of the Rupleys' original main house. From this deck, the Rupleys can see into all of the surrounding yards, including that of the Carreres. Therefore, the Carreres' privacy will not be further compromised by the construction of the rooftop deck at issue here.

Plaintiffs also contend that since the accessory building is built on the property line, a one-hour firewall is required to contain fire. They aver that the three-foot parapet surrounding the proposed roof deck cannot serve as a

firewall, and as such, this portion of the deck does not meet code requirements. However, the testimony before the BZA by all of the professionals, including the structural engineer involved with this project, indicated that there was no fire hazard here. The design of the building is completely within the requirements of the Code and contains a cinder block wall that more than meets the requirements of a one-hour firewall. Since the rooftop deck does not constitute a second story, no firewall is required for it.

Finally, plaintiffs argue that the trial court was erroneous in relying upon the testimony of Leslie Alley, the City of New Orleans Zoning Administrator, rather than that of Patricia Fretwell, their expert. Because of the small size of the cabana, only a plot plan and survey were required to be submitted to the Zoning Administrator. As such, Ms. Alley did not review full plans and specifications for the project, plaintiffs contend.

It is a well-settled principle that an appellate court may not set aside a trial court's finding of fact unless it is clearly wrong. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. ESCO,* 549 So.2d 840 (La.1989); *Arceneaux v. Domingue,* 365 So.2d 1330 (La.1978). Where two permissible views of the

evidence exist, the factfinder's choice between them cannot be manifestly wrong. *Rosell, supra* at 845; *Watson v. State Farm Fire & Casualty Ins. Co.,* 469 So.2d 967 (La.1985); *Arceneaux, supra* at 1333. Where the factfinder's conclusions are based on determinations regarding credibility of the witnesses, the manifest error standard demands great deference to the trier of fact, because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. *Rosell, supra* at 844. The reviewing court must always keep in mind that if a trier of fact's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse even if convinced that if it had been sitting as trier of fact, it would have weighed the evidence differently. *Housley v. Cerise,* 579 So.2d 973 (La.1991); *Sistler v. Liberty Mutual Ins. Co.,* 558 So.2d 1106 (La.1990).

For the reviewing court, the issue to be resolved is not whether the trier of fact was wrong but whether the factfinder's conclusions were reasonable. *Theriot v. Lasseigne,* 93-2661 (La. 7/5/94), 640 So.2d 1305. Moreover, where the testimony of expert witnesses differs, it is the responsibility of the trier of fact to determine which evidence is most credible. *Sistler, supra* at 1111; *Theriot,* at p.9, 640 So.2d 1313. Based upon the evidence presented, we find that it was reasonable for the trial court and

the BZA to rely upon the testimony of Leslie Alley rather than Patricia Fretwell.

CONCLUSION

We find that the rooftop deck at issue does not constitute a second story and has been constructed in compliance with all the codal requirements. Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed. Costs of this appeal are assessed to appellants.

AFFIRMED