

NOT DESIGNATED FOR PUBLICATION

**TIMOTHY RAGAS AND
DUANE RAGAS**

VERSUS

IVO BILLICH

*

NO. 2004-CA-1594

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COURT OF APPEAL

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

APPEAL FROM
25TH JDC, PARISH OF PLAQUEMINES
NO. 45-99, DIVISION "B"
HONORABLE WILLIAM A. ROE, JUDGE

JUDGE MAX N. TOBIAS, JR.

(COURT COMPOSED OF JUDGE JAMES F. MCKAY, III, JUDGE MAX
N. TOBIAS, JR., AND JUDGE DAVID S. GORBATY)

LES A. MARTIN
NEIL F. NAZARETH
LAW OFFICES OF LES A. MARTIN
525 HUEY P. LONG AVENUE
GRETNA, LA 70053
COUNSEL FOR PLAINTIFF/APPELLANT

KATHRYN T. WIEDORN
CLAUDETTE L. BIENVENU
PELLETERI, WIEDORN & COOPER, L.L.C.
400 POYDRAS STREET
SUITE 1980
NEW ORLEANS, LA 70130

COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED.

MARCH 2, 2005

This case arises from an alleged battery on the plaintiffs by the defendant while the plaintiffs were harvesting oysters in Plaquemines Parish. Following a trial on the merits, the trial court found in favor of the defendant, and the plaintiffs appealed.

On the morning of 11 December 1998, Duane Ragas (“Duane”) and Timothy Ragas (“Timothy”) (collectively, “plaintiffs” or “appellants”) were harvesting oysters from their aluminum flat boat on an oyster lease in Scofield Bay on or near an oyster lease owned by Ivo Billich (“Billich” or “defendant”). Appellants claim that Billich rammed their boat with his own boat, causing them both neck and back injuries. Billich contends, however, that although the two boats may have bumped when he confronted them on his lease, appellants were not injured and even continued to harvest oysters from an adjacent lease after the confrontation.

Appellants filed suit on 9 September 1999, claiming damages for personal injuries and lost wages due to the negligence of Billich. A bench

trial was held on 17 September 2003. The court received deposition testimony from treating physicians of appellants as well as documentary evidence, and entertained live testimony from appellants and Billich. On 17 May 2004, the trial court rendered judgment in favor of Billich. In its reasons for judgment, the trial court found that because the accounts of the events of 11 December 1998 differed so greatly, its judgment was necessarily based on a credibility determination. In its reasons for judgment, the trial court noted that it had observed the “mannerisms and demeanor” of the testifying witnesses and ultimately determined that Billich’s testimony was more credible than that of appellants. The trial court stated that it

[could] not find by a preponderance of the evidence that this incident took place as the Plaintiffs describe it; that the Defendant committed a tort on the Plaintiffs; or that any action on the part of the Defendant caused injury to the Plaintiffs.

Appellants’ case was dismissed with prejudice.

Appellants filed this appeal, asserting that the trial court was manifestly erroneous in finding that the evidence presented at trial failed to establish that Billich committed a tort on appellants, insofar as appellants’ version of the events was supported by the objective evidence at trial and insofar as Billich himself admitted that his boat struck appellants’ boat. We disagree and affirm the judgment of the trial court.

At trial, Duane testified that he and his brother were fishing on an oyster lease owned by Austin Barrios that morning, when at approximately 9:00 a.m., he saw an aluminum boat driven by Billich heading straight for their boat at approximately 35 to 40 miles per hour. At the time, appellants' boat was traveling at approximately 2 miles per hour in a circular path and Duane testified that he did not notice the approaching boat until it was very close to their boat. Duane testified that he tried to warn his brother, but Billich's boat rammed their boat, becoming lodged on top of their boat, striking Timothy and knocking him on his back. Duane testified that the force of the impact also knocked him down. According to Duane, immediately after the impact, Billich accused them of stealing his oysters, and reportedly punched Duane in the head. Duane testified that following the confrontation, Timothy pushed Billich's boat off of theirs, while Billich attempted to move the boat by putting the engine in reverse. According to Duane, after his boat was dislodged, Billich began placing poles to mark his oyster lease.

Duane testified that after the confrontation, he and Timothy cleaned up the boat and immediately went to the Buras harbor and filed a report with the Plaquemines Parish Sheriff's Office. They then went to sell the oysters they had harvested. He and Timothy unloaded the oyster sacks themselves,

each one weighing approximately one hundred pounds.

Timothy's testimony regarding the accident corroborated his brother's. He testified that Billich's boat struck him and that he had not seen the boat coming. He testified that Billich yelled at Duane and swung at him. He also testified that they had taken their oysters to sell and had lifted the oyster sacks themselves. He testified that although he had been struck by Billich's boat, he had no abrasions or contusions on his front or to his hands following the accident.

Billich paints a much different picture. He testified that on the morning of 11 December 1998, he headed out to a portion of his oyster lease to investigate a report he had received that fishermen were stealing oysters from his lease. He approached appellants' boat, which he testified was traveling slowly in a circular motion. He testified that he slowed his boat as he approached appellants' boat and cut his engine. He placed his boat in the path of appellants' boat, and theirs bounced against his and came to a stop. Billich testified that neither Duane nor Timothy fell down and that neither boat sustained any damage. He testified that appellants were fishing on his lease, which is clearly marked by poles with two red bands at the top, although the appellants told him they were fishing Barrois' lease with permission. After being confronted by Billich, appellants reportedly moved

to the adjoining lease to continue fishing. Billich denies ever striking either Duane or Timothy.

The report filed with the Plaquemines Parish Sheriff's Office indicates that the incident was reported as occurring at 9:00 a.m. and that Billich had run his boat into appellants' boat, striking Timothy. The report further notes that Billich punched Duane in the head. The report states that appellants were to file criminal charges with the justice of the peace, but the box labeled "Criminal Activity" on the report was marked "not applicable." Duane testified that he was instructed by the sheriff's department to report the incident to the Coast Guard, because the incident occurred on navigable waters within their jurisdiction. He stated that he and Timothy completed a report for the Coast Guard, but did not have a copy and could not produce the report at trial.

Following the accident, neither Duane nor Timothy went to the emergency room or sought immediate medical attention. However, Duane testified that he experienced neck and lower back pain following the accident, and presented to Kenneth Adatto, M.D., on 5 January 1999. Dr. Adatto reported that he had treated Duane for cervical and lumbar syndrome in 1993, and noted a history of dislocated shoulders. According to Dr. Adatto's report, Duane went to "1st Med" for treatment immediately

following the accident. Dr. Adatto opined that Duane suffered from cervical, dorsal, and lumbar syndrome that was “relatively fresh” and that he suffered from pre-existing arthritis in his shoulders. After the first visit on 5 January 1999, Duane did not return to see Dr. Adatto.

In fact, Duane did not seek any further treatment for his injuries until 26 October 1999, when he saw Dr. Volek. According to Dr. Volek’s notes, Duane did not relate any history of injury to the “areas of present involvement.” Dr. Volek opined that Duane suffered from cervicodorsal, lumbosacral, and left hip sprain/strain and recommended that he consult a neurosurgeon. Duane treated with Dr. Volek for the next few months, for a total of 16 visits.

Duane was evaluated by Kenneth Vogel, M.D., a neurosurgeon, on 26 June 2000. Dr. Vogel noted that Duane was experiencing pain in his neck, left arm, and left leg. Dr. Vogel ordered an MRI, which revealed no obvious disc protrusion or disc abnormality in the lumbar spine, and a disc protrusion at the C3-4 and C6-7 levels with no nerve root compression. Following the MRI, Duane did not return to Dr. Vogel until February 2003, more than two years later. Duane went on to treat with a number of physicians, including Brij M. Mitruka, M.D., Ph.D., a family practitioner. However, as of trial, Duane had not undergone surgery for his injuries.

Duane was examined by Robert Applebaum, M.D., a neurosurgeon, who was retained to perform an independent medical examination (“IME”) on 12 December 2000. Dr. Applebaum did not find any objective signs of injury or illness, but opined that, based upon the history related by Duane, he had sustained a sprain and strain of the cervical spine as a result of the incident. Dr. Applebaum did not recommend further evaluation or treatment for his injuries.

With regard to Timothy’s injuries, the records reflect that Dr. Adatto also evaluated him on 5 January 1999, and that he went on to treat with William Powell, a chiropractor, in April 1999. Dr. Powell opined on 6 August 1999 that Timothy had reached maximum medical improvement.

Timothy presented to Dr. Vogel on 15 November 1999, complaining of neck, back, and hip pain. Dr. Vogel recommended hospital admission for further testing to determine if he needed surgery. Timothy did not return to Dr. Vogel following the initial visit until 23 January 2001, more than one year later. Timothy underwent cervical and lumbar MRIs, which were normal with no evidence of disc herniation. However, Dr. Vogel recommended cervical and lumbar neurotomies, which were performed on 24 January 2003.

Dr. Applebaum, who performed an IME of Timothy in January 2003,

opined that he was not a candidate for any surgical procedures and that he was not suffering from any spinal damage or nerve root impingement. Dr. Applebaum further testified that any injuries Timothy might have suffered as a result of the alleged accident had resolved. Thus, although Dr. Applebaum could not rule out any injuries, he did not find any objective signs of injury that necessitated surgery.

Credibility determinations are the province of the fact finder. An appellate court may not disturb a trial court's finding(s), especially those based upon credibility determinations, unless the court is manifestly erroneous or clearly wrong in its findings. *Rosell v. ESCO*, 549 So. 2d 840, 844 (La. 1989). Further, *Rosell* lends guidance as to when an appellate court may reverse a trial court's findings based upon credibility determinations:

Where documents or objective evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable fact finder would not credit the witness's story, the court of appeal may well find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. But where such factors are not present, and a factfinder's finding is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong.

Id. at 844-845. [Internal citations omitted.]

Thus, in order to find the trial court's judgment in favor of Billich

manifestly erroneous or clearly wrong, we must find that a reasonable fact finder would not have credited Billich's account of the events of 11 December 1998. We cannot do so. Appellants could not produce any evidence of damage to their boat to corroborate their version of events, and further, their medical evidence confirms a spotty treatment history, and does not preponderate to establish the damages claimed by them. Because the objective evidence does not fully support the testimony of appellants, and because no other witnesses to the incident exist, the trial court's determination of the merits of appellants' case hinged on an evaluation and determination of the credibility of the parties. When the testimony of the parties is examined in light of the entire record and evidence presented at trial, we do not find that the trial court's determination that Billich was more credible than appellants was an unreasonable or manifestly erroneous view of the evidence.

For the foregoing reasons, we affirm the judgment of the trial court.

AFFIRMED.