NOT DESIGNATED FOR PUBLICATION

GERALD C. PFEIFFER

VERSUS

CITY OF KENNER AND JOHN DOE

NO. 05-CA-366

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 565-160, DIVISION "J"
HONORABLE STEPHEN J. WINDHORST, JUDGE PRESIDING

NOVEMBER 29, 2005

THOMAS F. DALEY
JUDGE

Panel composed of Judges Thomas F. Daley,
Marion F. Edwards, and Walter J. Rothschild

EDWARDS J. DISSENTS:

JOHN D. SILEO
ALLAN BERGER & ASSOCIATES
4173 Canal Street
New Orleans, Louisiana 70119
COUNSEL FOR PLAINTIFF/APPELLEE

EDMUND W. GOLDEN
JOHN A. KOPFINGER, JR.
GOLDEN & FONTE
One Galleria Boulevard
Suite 1822
Metairie, Louisiana 70001
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

T.D.

The defendant has appealed the trial court's judgment in favor of plaintiff. For the reasons that follow, we affirm.

WJR

FACTS:

The plaintiff, Gerald Pfeiffer, testified that he lived at 3721 East Louisiana State Drive in Kenner, Louisiana. On the night of October 1, 2000, he was putting his garbage can by the curb for pick up when he stumbled in a hole, fell, and struck his head on a barricade. He injured his head and neck in this incident. Plaintiff testified that the City of Kenner (hereinafter referred to as the City) had just "redone" a section of street in front of his house. There were barricades in the street initially, but shortly before the accident, the barricades were placed on the side of the street, parallel to the street. Plaintiff testified that the hole he stepped in was next to the curb, in the area between the street and the sidewalk, and was approximately one foot deep and one foot wide. He explained that he did not

know the hole was there because the barricades were moved from their original location so he thought it was safe to walk in this area.

On cross-examination, plaintiff testified that he pulled the garbage can out to the sidewalk then walked on the sidewalk to his car, which was parked in the driveway, to retrieve more garbage. He walked back to the garbage can in the grassy area between the street and the sidewalk because there was paper on the ground that he wanted to put in the garbage. Plaintiff testified that these barricades were not in the area of the hazard; therefore, there was nothing to prevent someone from walking in the area of the hole. When questioned by the Court, plaintiff testified that the hole was filled the day after this incident. Pictures taken on October 2, 2002 depicting the placement of the barricades were introduced into evidence. The pictures depict one barricade parallel to the street a few feet away from each side of the hole. Plaintiff testified that this was the location of the barricades at the time of his accident.

Andrew Ives testified that he had worked for the City for 10 years and in October 2000 he was an assistant foreman in the drainage department. He testified that he worked on a leaking pipe in front of plaintiff's house. Mr. Ives testified that barricades are left in place until a job is completed. According to the work order for this job, it was completed October 4, 2000. Mr. Ives testified that the barricades were moved to the curb because there was a hole behind the street from digging it out to form up for the pouring of the curb and street. On cross-examination, Mr. Ives testified that he had no knowledge of the placement of the barricades on October 1, 2000.

Joshua Martin testified that he was a foreman in the drainage department and had worked for the City for 21 years. Mr. Martin testified that he did not know when this job was started. He did not know the time the last work was performed

prior to the hole that plaintiff fell in being filled. He examined photographs of the accident scene and testified that on Exhibit 9, the barricade closest to the light pole should be where the garbage can is because of the hole. Mr. Martin did not know the location of the barricades on October 1, 2000.

Jessy James testified that he retired from the City after working there for 18 years. He was a foreman in the roads and bridges department. He testified that Exhibit 9 shows a hole behind the curbing of the street and the barricades were not in a position to alert the public to this hole. He did not know the location of the barricades on October 1, 2000.

Alfred White testified that he worked for the City for 23 years and was the Superintendent of roads and bridges for ten years. He testified that Exhibits 5, 6, and 9 show the work is ongoing because they have not "dressed out" the side of the street. In looking at Exhibit 9, he testified that the barricades are sufficient to alert the public because the barricades were on the shoulder where work needs to be done. Upon questioning by the Court, Mr. White testified that he had no idea where the barricades were before October 2, 2000.

Edward Breedin testified that in October 2000, he was employed by Creative Risk Controls, Inc. and was hired in loss control for the City. He explained that he had to perform an inspection when someone filed a complaint. Mr. Breedin testified that on the morning of October 2, 2000, he received a call that someone fell in a hole in front of 3721 East Louisiana State Street. He proceeded to the area and took all of the pictures that were introduced into evidence on behalf of the defendant. Mr. Breedin testified that barricades remain on a construction site until the job is finished. He testified that the barricades in this case were sufficient to alert the public to the depression depicted in Exhibits 5, 6, 7, 8, and 9.

At the conclusion of the testimony, the trial judge noted that all of the defendant's witnesses were still in the courtroom. He asked the witnesses collectively if they knew how long the barricades were in the position depicted in the photographs. He also asked the last time work was performed at this site prior to October 1, 2000. None of the defendant's witnesses knew the answer to these questions.

At the conclusion of trial, the trial judge took the matter under advisement. He then rendered judgment in favor of plaintiff, awarding $397.23 in special damages and $8,000.00 in general damages. The trial judge granted plaintiff's Motion to Amend the Judgment and increased the special damages to $2,989.13. The City has appealed this judgment.

LAW AND DISCUSSION:

In its first Assignment of Error, the City argues that the trial court erred in concluding that the construction site where the alleged incident occurred was not properly marked and created an unsafe condition. The City argues in the alternative that the trial court erred in finding it 100% at fault or in the alternative in not allocating any fault to plaintiff.

It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong;" where there is conflict in the testimony, 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) (citations omitted). On review, the issue to be resolved is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Lasyone v. Kan. City S. R.R., 00-2628 (La.4/3/01), 786

So.2d 682; Stobart v. State of Louisiana, Through Department of Transportation and Development, 617 So.2d 880. Further, where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. Rosell, supra.

In his Reasons for Judgment, the trial judge referring to defendant's Exhibits 4, 6, and 10 stated:

> Photographs clearly indicate an unsafe condition as the barricades were nowhere near the hole. One barricade was placed on the edge of the work on the left side while the other barricade is rather distal or removed from the work area. Additionally, the existence of several sandbags on one of the barricades indicate that it was intentionally placed far out of the way. Furthermore, no one can say when the last work was finished, and it is clear that the grass was grown up to the curb right into the hole, indicating that the hole had been left for some time and was filled immediately after the accident. The court finds that the barricades were not properly placed around the hole as to adequately warn the public about the existence of the hole which created an unsafe condition and caused injuries to the plaintiff.

These findings are supported by the record. Plaintiff testified that these barricades were previously in the street to block the hole where the street was being re-poured. When the barricades were moved to the grassy area between the sidewalk and the street, workers were cleaning the excess cement off of the newly poured section of street. The plaintiff testified that the barricades were in the position depicted in defendant's Exhibit 4 at the time of the accident. This photograph, as well as the other two, relied on by the trial judge clearly show the barricades several feet from the hole. Even two of defendant's witnesses testified that the barricades were not in the proper location to protect someone from the hole. Mr. Martin testified that the barricade located closest to the utility pole "could be" closer to the garbage can and that it should have been where the garbage can is. He further testified that the other barricade should have been behind the curb. After reviewing Exhibits 4 and 9, Mr. James testified that the barricades were not

in a position to alert the public there is a depression. He further testified that the barricade by the driveway should have been off of the street in the grassy area. Mr. James opined that these barricades were moved when the street was re-opened. Accordingly, we see no error in the trial court's finding that the construction site was not properly marked and created an unsafe condition.

We also find the City's argument that the trial court erred in not allocating any fault to the plaintiff to be without merit. As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. Duncan v. Kansas City Southern Railway Co., 2000-0066, (La. 10/30/00), 773 So.2d 670. Therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous. Plaintiff testified that he did not know the hole was there, explaining that he thought the construction was completed because the barricades were moved from their original location in the street to the side. Plaintiff denied moving the barricades. He testified that he knew of no reason why he could not walk in this location. Our review of the pictures and testimony indicates that the barricades did not block the hole into which plaintiff stumbled. Rather, the barricades were several feet on either side of the hole. Accordingly, we see no error in the trial court's finding that the City is 100% liable for this incident.

The City also argues that the trial judge erred in awarding the plaintiff $8,000.00 in general damages. Plaintiff testified that he stumbled into the hole, fell forward, and struck his head on the barricade. The medical records from the emergency room visit indicate that he had a four centimeter scalp laceration and 12 staples were used to close the wound. Plaintiff sought follow up treatment from Dr. Michael Howard. Dr. Howard examined plaintiff on October 20, 2000, at which time plaintiff complained of head and neck pain following a fall where he

struck his head on a barricade. The medical records indicate that plaintiff was having difficulty performing his normal activities because of this pain. He was prescribed pain medication and told to decrease his activities. He was diagnosed as having muscle strain and post traumatic cephalagia. He was started on a physiotherapy program of moist heat, electromuscular stimulation, and ultrasound to the affected regions of his neck. He underwent 14 of these treatments over a two month period, but plaintiff continued to experience pain. An office note dated November 22, 2000 indicates that plaintiff was still experiencing pain in his skull at the site of the laceration and pain in his neck. He continued to take pain and sleeping medication. An office note dated December 20, 2000 indicates that plaintiff continued to complain of neck pain and was taking pain medication and sleeping pills for these complaints. When plaintiff returned to the doctor in January 2001, it was felt that he had reached maximum medical improvement and he was discharged. At trial, plaintiff testified the he continued to have pain and stiffness in his neck. Given the nature and duration of treatment, as well as the continued complaints of pain, we do not find that the trial judge's award of $8,000.00 in general damages to be an abuse of discretion.

For the foregoing reasons, the judgment of the trial court is affirmed. Appellant is to bear all costs of this appeal.

AFFIRMED

GERALD C. PFEIFFER

VERSUS

CITY OF KENNER AND
JOHN DOE

NO. 05-CA-366

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

EDWARDS, J., DISSENTS

In my opinion, the evidence shows that the barricades had been present in the street for some time, and should have put the ordinary person on notice that there was a hazardous condition in the area between them. Further, the trial judge noted that the grass was grown up to the curb right into the hole, indicating the hole had been there for a while. The plaintiff who lived in the home had adequate time to observe the problem along the curb. Therefore, I would assess plaintiff to be 50 percent at fault in the accident.

FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **NOVEMBER 29, 2005** TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

PETER J. FITZGERALD, JR
CLERK OF COURT

05-CA-366

John D. Sileo
Attorney at Law
4173 Canal Street
New Orleans, LA 70119

Edmund W. Golden
John A. Kopfinger, Jr.
Attorneys at Law
One Galleria Boulevard
Suite 1822
Metairie, LA 70001