NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0330

LARRY M. COOPER

VERSUS

CASINO CRUISES, INC., TRADENAME HOLLYWOOD CASINO

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 565,489, Division "D"
Honorable Janice Clark, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

Judgment rendered JUN 18 2014

PARRO, J.

The plaintiff, Larry M. Cooper, appeals the judgment of the trial court, which rendered judgment in conformity with the verdict of the jury, in favor of the defendant, Louisiana Casino Cruises, Inc., d/b/a Hollywood Casino (Hollywood Casino), and dismissed Mr. Cooper's claim against Hollywood Casino, with prejudice. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2007, at approximately 2:30 a.m., Mr. Cooper was leaving Hollywood Casino, when he tripped and fell on an uneven portion of the casino's exterior walkway. Mr. Cooper testified that the only cause of his fall was a height difference of ¼" at the transition between the red, rubber carpet surface and the etched concrete surface, which formed the exterior walkway immediately outside the casino's entrance. Mr. Cooper acknowledged that there was no debris in that location that caused him to trip, nor was there any water or any other liquid on which he could have slipped. He further stated that the lighting in the area was good. Nevertheless, he contends that the ¼" height difference in the transition from the red, rubber carpet surface and the etched concrete surface presented an unreasonable risk of harm.

According to his petition, Mr. Cooper sustained injuries to his left knee, right elbow, and back as a result of the accident. He sought to recover damages for these injuries, as well as his lost wages, loss of earning capacity, and medical expenses.

Hollywood Casino answered the petition, generally denying the plaintiff's allegations and asserting certain affirmative defenses. Thereafter, Hollywood Casino filed a motion for summary judgment, in which it contended that there remained no genuine issues of material fact. Specifically, Hollywood Casino asserted that Mr. Cooper could not meet a necessary component of his claim because he could not demonstrate that his trip and fall was caused by a condition in the walkway presenting an unreasonable risk of harm. After a hearing, the trial court granted Hollywood Casino's motion for summary judgment, and Mr. Cooper appealed the matter to this court. On

appeal, this court determined that genuine issues of material fact remained as to whether the raised area constituted an unreasonable risk of harm or an unreasonably dangerous condition. Accordingly, this court reversed the judgment of the trial court and remanded the matter for further proceedings. Cooper v. Casino Cruises, Inc., d/b/a Hollywood Casino, 10-1116 (La. App. 1st Cir. 12/22/10) (unpublished opinion).

After a jury trial, the jury determined that Hollywood Casino was not negligent in maintaining the premises. The trial court then signed a judgment in accordance with the jury's verdict in favor of Hollywood Casino, dismissing Mr. Cooper's claims, with prejudice. Mr. Cooper filed a motion for judgment notwithstanding the verdict, or in the alternative, a motion for new trial.[1] The trial court denied this motion. Mr. Cooper has appealed.[2]

DISCUSSION

The general rule is that the owner or person having custody of property has a duty to keep such property in a reasonably safe condition. The owner or custodian must discover any unreasonably dangerous condition on the premises and either correct the condition or warn potential victims of its existence. Vinccinelli v. Musso, 01-0557 (La. App. 1st Cir. 2/27/02), 818 So.2d 163, 165, writ denied, 02-0961 (La. 6/7/02), 818 So.2d 767. This duty is the same under the strict liability theory of LSA-C.C. art. 2317, as modified by LSA-C.C. art. 2317.1, and the negligence liability theory of LSA-C.C. art. 2315. See Id. Under either theory, the plaintiff has the burden of proving that: (1) the property that caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the

[1] The motion was titled, "Motion for Judgment Notwithstanding the Verdict Alternatively, and Only in the Alternative, a Motion for New Trial."

[2] Hollywood Casino filed a motion to dismiss the appeal on the ground that Mr. Cooper had only appealed the judgment denying the motion for judgment notwithstanding the verdict or motion for new trial. Since such judgments are interlocutory and non-appealable, Hollywood Casino contended that this court had no jurisidiction to consider the appeal. See LSA-C.C.P. art. 2083. However, the supreme court has instructed this court to consider an appeal of the denial of a motion for new trial as an appeal of the judgment on the merits, when it is clear from the appellant's brief that the appeal was intended to be of the merits. See McKee v. Wal-Mart Stores, Inc., 06-1672 (La. App. 1st Cir. 6/8/07), 964 So.2d 1008, 1013, writ denied, 07-1655 (La. 10/26/07), 966 So.2d 583. In this matter, although his original brief appears only to appeal the judgment denying the motion for judgment notwithstanding the verdict or the motion for new trial, Mr. Cooper has filed a reply brief in which he makes it clear that his appeal is intended to cover the merits. Accordingly, we deny Hollywood Casino's motion to dismiss the appeal.

premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) defendant had actual or constructive knowledge of the risk. Smith v. The Runnels Schools, Inc., 04-1329 (La. App. 1st Cir. 3/24/05), 907 So.2d 109, 112; see also LSA-C.C. arts. 2315 and 2317.1.

Whether a condition of a thing is unreasonably dangerous requires consideration of: (1) the utility of the thing; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the complained-of condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activity in terms of the activity's social utility or whether the activity is dangerous by nature. Smith v. The Runnels Schools, Inc., 907 So.2d at 112.

In addition, a court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. Morris v. Safeway Ins. Co. of Louisiana, 03-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04-2572 (La. 12/17/04), 888 So.2d 872. In order to affirm the factual findings of the trier of fact, the supreme court posited a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092.

If the trier of fact's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings even though convinced

that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Hulsey v. Sears, Roebuck & Co., 96-2704 (La. App. 1st Cir. 12/29/97), 705 So.2d 1173, 1176-77. However, an appellate court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination, 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. Id. at 1177.

On appeal, Mr. Cooper contends that the jury verdict was manifestly erroneous, because the evidence demonstrated that the premises in question created an unreasonable risk of harm.[3] Specifically, Mr. Cooper argues that the ¼" difference in height where the etched concrete joined the red, rubber carpet surface created an unreasonable risk of harm. As noted previously, Mr. Cooper testified that the sole cause of his trip and fall was this ¼" difference in height in the Hollywood Casino exterior walkway. Mr. Cooper acknowledged that the lighting in the area was fine and that there was no debris or wet area on the walkway that could have caused the accident. Mr. Cooper's testimony and description of the premises were confirmed by his friend, Ms. Clemer Fisher, who accompanied him to the casino on the night of the accident and testified that she noticed the height difference as she exited the casino just prior to Mr. Cooper. However, Hollywood Casino never denied the existence of the height difference; rather, the casino contends that the mere existence of the height difference is not proof that the condition created an unreasonable risk of harm.

Jimmy Delk, the risk and safety manager for Hollywood Casino, testified that the red, rubber carpet surface on the exterior walkway is permanently installed just outside of the entrance doors to prevent slipping and to keep debris from getting inside the building. Mr. Delk further testified that he prefers this type of surface over the regular rubber mats, because the mats can often get bunched up when people hit them, while the surface that the casino currently uses does not bunch up or curl. However, Mr.

[3] As noted previously, Mr. Cooper's initial brief to this court appears only to address the trial court's denial of the motion for judgment notwithstanding the verdict and the alternative motion for new trial; however, the reply brief clarifies that he did intend to appeal the judgment based on the jury verdict as well.

Delk testified that, in order to use this red, rubber carpet surface, which is permanently attached to the walkway, there must be a transition or height difference between that surface and the concrete. Mr. Delk further testified that, despite the presence of this height difference and the fact that approximately ten to fifteen million people had traversed the area in the five years between 2007 and 2011,[4] the only person ever to trip there was Mr. Cooper. Based on this evidence, the utility of the red, rubber carpet surface to prevent slips and falls at the entrance of the casino clearly outweighs any minimal risk associated with the height difference necessary to permanently affix the rubber carpet surface to the concrete.

After a thorough review of the record, we find no legal error or manifest error in the jury verdict or in the trial court judgment based on this verdict. Accordingly, we affirm the trial court judgment.

DECREE

For the foregoing reasons, we affirm the judgment of the trial court. All costs of this appeal are assessed to the plaintiff, Larry M. Cooper.

AFFIRMED; MOTION DENIED.

[4] Mr. Cooper's accident occurred in 2007.