NOT DESIGNATED FOR PUBLICATION

JUANITA A. GREENUP AND DAVID M. GREENUP	*	**NO. 2000-CA-0678**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
CITY OF NEW ORLEANS, DEPARTMENT OF SAFETY AND PERMITS, NEW ORLEANS ALCOHOLIC BEVERAGE CONTROL BOARD, FINANCE DEPARTMENT, CAMILLE BOURGEOIS, AND GREG MULVANEY	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 86-19943, DIVISION "L-15"
Honorable Max N. Tobias, Judge

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Judge David S. Gorbaty

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(Court composed of Judge Miriam G. Waltzer, Judge Terri F. Love, Judge David S. Gorbaty)

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AFFIRMED

In this appeal, the City of New Orleans, Department of Safety and Permits, and the New Orleans Alcoholic Beverage Control Board and Finance Department ("the City") contend that the trial court erred in rendering judgment in favor of Juanita and David Greenup and awarding them damages in the amount of $75,000. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

From October 1983 to October 1985, the Greenups operated an alcoholic beverage outlet ("ABO"), The 3G's Lounge, located at 5324 Franklin Avenue. In February 1983, prior to opening the establishment, plaintiffs obtained a building permit from the City of New Orleans that allowed them to renovate the facility. Plaintiffs also applied for a permit to operate an ABO. Initially, the City denied the license, indicating that the

business was too close to a school. An investigation was then conducted, and measurements were taken that determined the business was not too close to a school, church, or restaurant. Finally, in October 1983, the City of New Orleans issued the Greenups a permit that allowed them to operate an ABO, but prohibited live entertainment. This permit was subsequently renewed in 1984 and 1985.

In June 1985, the City commenced proceedings before the City's Alcoholic Beverage Control Board ("ABC Board"), complaining that the lounge was operating too close to a residential neighborhood, in violation of zoning laws. The plaintiffs were notified of, and attended, a hearing of the matter before the ABC Board on August 13, 1985. The Board took the case under advisement at that time. Another hearing was held on September 10, 1985, when the matter was again taken under advisement. A third hearing took place on October 8, 1985, at which time the Board issued a judgment suspending the liquor permits indefinitely. The plaintiffs were not present at or properly notified of the September and October hearings. They did not receive a copy of the judgment, which was mailed to 1836 St. Bernard Avenue, Mr. Greenup's former real estate office.

On October 16, 1985, an amended judgment was issued that revoked the liquor permits permanently. Ms. Crutchfield, custodian of records for the Clerk of Court, testified that her records indicate that this judgment was hand delivered to Tequilla Greenup at Mr. Greenup's office at 1836 St. Bernard Avenue. However, at trial, Tequilla, Mr. Greenup's secretary and daughter-in-law, stated that the St. Bernard Avenue office was closed at that time, and denied ever receiving such a document. Mr. Greenup also testified that he had vacated the St. Bernard office sometime in late 1982. He averred that other than the notices for the July 22 hearing, which was subsequently continued to August 13, he never received any other order, notice, or summons. Shortly after the issuance of the October 16 judgment, police officers came and picked up the liquor permits from The 3G's Lounge while a party was being held.

The plaintiffs did not appeal the ABC Board's ruling, and as a result of the closing of the lounge, they eventually filed for bankruptcy. On October 31, 1986, the Greenups filed the instant suit seeking damages for "wrongful revocation, lack of notice, [and] wrongful prosecution." A trial was held on December 7, 1998, and on December 11, the court rendered

judgment in favor of the plaintiffs and awarded damages for their economic loss. The trial court specifically noted that "[t]he plaintiffs had no notice of the 8 October 1985 hearing that resulted in the 16 October 1985 judgment." Defendants subsequently filed this appeal.

DISCUSSION

The City avers that the trial court erred in finding that the Greenups had no notice of the ABC Board judgment of October 16, 1985.

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." *Rosell v. ESCO*, 549 So.2d 840 (La. 1989). In *Mart v. Hill*, 505 So.2d 1120 (La. 1987), the Louisiana Supreme Court posited a two-part test for the reversal of a factfinder's determinations:

1) The appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and
2) The appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). *Id*. at 1127 (quoting *Arceneaux v. Domingue*, 365 So.2d at 1333 (La. 1978)).

This test dictates that the appellate court must do more than simply review the record for some evidence that supports or controverts the trial

court's finding. *Id.* The appellate court must review the record in its entirety to determine whether the trial court's finding was clearly wrong or manifestly erroneous.

Nevertheless, the issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. See generally, *Cosse v. Allen-Bradley Co.*, 601 So.2d 1349, 1351 (La.1992); *Housley v. Cerise,* 579 So.2d 973, 976 (La.1991); *Sistler v. Liberty Mutual Ins. Co.,* 558 So.2d 1106, 1112 (La.1990). Even though an appellate court may feel its own evaluations and inferences are more reasonable than those of the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. *Arceneaux v. Domingue,* 365 So.2d 1330 (La.1978). However, 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 factfinder would not credit the witness's story, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. *Rosell*, 549 So.2d at 844-45. Nonetheless, this court has emphasized that "the reviewing court must always keep in mind that 'if the trial court or jury's findings are reasonable in light of the record

reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.' " *Housley v. Cerise,* 579 So.2d 973, 976 (La. 1991), (quoting *Sistler v. Liberty Mutual Ins. Co*., 558 So.2d 1106, 1112 (La.1990)).

Courts have recognized that "[t]he reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts." *Canter v. Koehring Co*., 283 So.2d 716, 724 (La.1973). Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Id.*

The City argues that the Greenups had a full hearing before the ABC Board, and received actual notice of the judgment revoking the liquor permit. After considering the evidence, we disagree. Although the Greenups were present at the August hearing, they were not notified of, nor did they attend, the subsequent hearings because the notices were apparently sent to the wrong address. Mr. Greenup and Tequilla testified that they closed the 1836 St. Bernard Avenue office before opening The 3G's.

However, the City continued to send notices there, some of which were sent back marked "Returned to Sender." The City also erroneously mailed a notice to 5327 Franklin Avenue, which is across the street from The 3G's. The Greenups' home address and the address of The 3G's Lounge appear on many of the permit documents; the City could properly have sent notices to these places, or any other location where the plaintiffs could be found.

Employing the foregoing appellate standards, we cannot say that, in light of the entire record, the ruling of the trial court was manifestly erroneous. The testimony of David Greenup and Tequilla Greenup, as well as the copies of the notices marked "Returned to Sender," provided a reasonable factual basis for the trial court to conclude that the plaintiffs had not received notice of the October 16 judgment.

The City next argues that because the Greenups did not appeal the judgment of the ABC Board, any cause of action they may have had against the Board or the City has prescribed. However, the City failed to raise the issue of prescription by any means other than its appellate brief. Although an exception of prescription may be filed for the first time in an appellate court, it must be presented in a formal pleading prior to the submission of the case for a decision. The peremptory exception of prescription cannot be injected as an issue in the case solely by brief or oral argument. La. C.C.P.

arts. 927, 2163; *Sowers v. Dixie Shell Homes of America,* 33,390 (La.App. 2 Cir. 5/15/00), 762 So.2d 186, *writ denied,* 2000-1770 (La. 9/22/00), 768 So.2d 1286; *Steed v. St. Paul's UMC,* 31,521 (La.App. 2 Cir 2/24/99), 728 So.2d 931; *Hayes v. Hayes,* 607 So.2d 3 (La.App. 2 Cir. 1992); *Tucker v. Louisiana, Dept. of Revenue and Taxation,* 96-2740 (La.App. 1 Cir. 2/20/98), 708 So.2d 782. Since the City filed no formal pleading raising the exception at either the trial or the appellate court, this argument is not before the court at this time. Thus, we consider the Greenups' claims as not prescribed.

Accordingly, for the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED