

CHRISTOPHER BRUNO

*

NO. 2000-CA-1456

VERSUS

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COURT OF APPEAL

CHRISTIAN J. NICKLAUS

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 93-6857, DIVISION "I-7"
HONORABLE TERRI F. LOVE, JUDGE

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Judge Patricia Rivet Murray

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(Court composed of Judge Steven R. Plotkin, Judge Miriam G. Waltzer,
Judge Patricia Rivet Murray)

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AFFIRMED

Defendant, Nicky L. Nichols, appeals the trial court's determination that he is legally liable for injuries suffered on May 2, 1992 by plaintiff, Christopher J. Bruno, despite the fact that Mr. Nichols was not made a defendant until July 2, 1996. We affirm for the reasons that follow.

This matter was previously before this court on Mr. Nichols' original appeal, which resulted in a remand to the trial court. The facts and prior proceedings were summarized in the unpublished opinion as follows:

On May 2, 1992, plaintiff Christopher Bruno and his brother Robert Bruno, as well as his cousin Teddy Ferrand were in City Lights when an altercation occurred near the dance floor. Plaintiff alleged that he was dancing with his brother and cousin when he was "cold cocked."

One of the two investigating officers, Randy Chestnut, took the statement from the alleged assailant, Nick Burrows. The officer confirmed this information from Mr. Burrows' identification at the time of the incident. He gave his address as 1620 Carol Sue and his date of birth was February 8, 1961. Mr. Burrows was issued a summons on a battery charge in municipal court. Mr. Burrows did not appear in municipal court, and plaintiff employed an investigator, Edward Mauri, to locate the alleged perpetrator. Mr. Mauri provided a picture of Christian Niklaus. Plaintiff and his brother Robert Bruno identified the picture as being the assailant who struck the

plaintiff. Niklaus resided at an apartment complex located at 1620 Carol Sue and was a professionally trained kick boxer. On April 29, 1993 plaintiff filed suit against Christian J. Nicklaus and Tchefuncte's Edge, Inc. d/b/a City Lights.

On November 5, 1996 Niklaus' attorney provided a statement to plaintiff's attorney made by Nicky Lane Nichols which was taken on May 15, 1996. Nichols admitted being friends with Christian J. Niklaus; being a member of the World Gym; and being present and involved in an incident where he hit someone who lost a tooth on May 2, 1992. Shortly before trial, the second investigating officer, Bruce Little, testified in his deposition that he knew Niklaus by name and by face, and that Niklaus was not at City Lights on the night of the incident.

On July 2, 1996, plaintiff amended his suit to substitute Nick Nichols in place of Christian J. Niklaus as the defendant. On June 9, 1997 the trial court denied Nichols' peremptory exception of prescription. Although Nichols filed a notice of intent to apply for supervisory writs, no writ application was filed.

Prior to trial the plaintiff voluntarily dismissed City Lights as a defendant. After a trial on July 21 and September 3, 1997, plaintiff filed a post-trial memorandum. Although the defendant was given extensions, he did not submit a post-trial memorandum. Before the judgment was rendered, Nichols filed a motion to reopen the record that was denied.

On February 3, 1998, the trial court rendered judgment in favor of the plaintiff. The trial court awarded plaintiff \$20,000 in general damages, in addition to \$4,003 in past medical expenses and \$4,000 in future medical expenses. Nick Nichols was assessed with all costs of the proceedings, including an expert witness fee of \$300 to Dr. Anne Uhry. Nichols' motion for new trial was submitted on briefs on March 2, 1998. On March 9, 1998 the motion for new trial was denied. Nichols' appeal followed.

* * * * *

Initially, this Court will review Nichols' claim for a new trial that has merit. Nichols asserts that on September 17, 1997, two weeks after trial, Ed Mauri, plaintiff's investigator, contacted Nichols' attorney and related that the plaintiff hid evidence and suggested that Mauri modify his testimony at his deposition. Mauri's affidavit was attached to Nichols' motion to reopen the record since judgment had not yet been rendered. The trial court denied Nichols' motion to reopen the record and then later denied Nichols' motion for new trial.

Mauri's affidavit was proffered. He stated that his investigatory file was purged by the plaintiff, and the plaintiff suggested that Mauri should avoid saying that the plaintiff had identified the assailant as wearing glasses. The plaintiff claimed that the investigatory file was part of the attorney's work product. However, Nichols argues that it was Mauri's file and did not contain the plaintiff's attorney's work product. Nichols asserts that photographs contained in the file could not constitute the attorney's work product. Plaintiff denied having possession of the original computer copy of the driver's license photograph of Christian Niklaus although plaintiff admits that Mauri had obtained it. In his affidavit, Mauri stated that his file contained the driver's license photographs but the plaintiff's attorney removed things from the file. In denying Nichols' motion for new trial, the trial court found that it would not have changed the outcome.

* * * * *

The trial court abused its discretion in denying Nichols' motion for new trial because the new evidence could affect the ruling on Nichols' exception of prescription based on the issue of the plaintiff's credibility. Nichols maintains that on the face of the July 1996 supplemental petition naming Nichols as a defendant, the action had prescribed because it was four years after the incident of May 2, 1992.

* * * * *

The information divulged by Mauri, that the plaintiff's attorney purged the file and told him to avoid saying that the

plaintiff had identified the assailant as wearing glasses, supports the fact that there were discrepancies in plaintiff's case. The plaintiff may have known about the identification of the real assailant and was not prevented from finding out his true identity. The plaintiff's credibility is questioned based on the new testimony of the partial destruction of his file and the fact that plaintiff told Mauri to modify his testimony. This may affect the defense that plaintiff was prevented from filing suit against the correct defendant under the doctrine of *contra non valentem* with respect to Nichols' exception of prescription.

Nichols' new evidence discovered after the trial could not have been discovered with due diligence, and may tend to change the result of the case. Accordingly, the June 9, 1997 judgment rejecting Nichols' exception of prescription is vacated. A new trial is granted on the issue of prescription, and the case is remanded for a new hearing on Nichols' exception of prescription.

Bruno v. Niklaus, 98-CA-1459 (La. App. 4th Cir. 2/24/99), 737 So.2d 977 (table) (footnote in original).

In accordance with this remand, an evidentiary hearing was held on December 14, 1999. Three days later, the judgment now at issue was rendered. The trial court explicitly stated that "the testimony of Mr. Mauri ... was biased and the Court did not find him to be a credible witness." Therefore, the court again held that the exception of prescription was overruled based upon *contra non valentem* because,

"it was the conduct of Nick Nichols in giving a false name, incomplete address and false date of birth that concealed his identity.... There was nothing revealed [at the hearing] that the plaintiff knew or should have known of the identity of Nick Nichols prior to having received a copy of his confession."

Mr. Nichols contends that because plaintiff's counsel admitted at the December 1999 hearing that documents were removed from the investigator's file, and particularly because both the documents and the "original" photo of Mr. Niklaus disappeared without explanation, the trial court was clearly wrong in rejecting his defense of prescription. He maintains that the only reason these items could be missing is because they would have proven "that it was virtually impossible to have misidentified Christian Nicklaus [sic] as the original assailant." Because the plaintiff did not produce the documents to disprove Mr. Nichols' allegations, he argues that the trial court should have found that the delay in naming him as the defendant resulted from an inadequate investigation and not because of his actions. Accordingly, Mr. Nichols asserts that this court should reverse the trial court judgment and dismiss the suit as untimely.

Before a factfinder's verdict may be reversed, the reviewing court must determine from the record whether a reasonable factual basis exists for the verdict and whether the verdict is manifestly erroneous or clearly wrong. *Touchard v. SLEMCO Electric Foundation*, 99-3577, p. 5 (La. 10/17/00), 769 So.2d 1200, 1204 (on rehearing). As our Supreme Court has often stated:

When 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. Therefore, the issue for the reviewing court is not whether the trier of fact was wrong, but whether the fact-finder's conclusions were reasonable under the evidence presented. When a factfinder's determination 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. (citations omitted). Moreover, unless "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 trial court's credibility determination cannot be overturned. *Sportsman Store of Lake Charles, Inc. v. Sonitrol Security Systems of Calcasieu, Inc.*, 99-0201, pp. 6-7 (La. 10/19/99) 748 So.2d 417, 421.

The record of this matter fully supports the trial court's determination that Mr. Mauri failed to discredit the plaintiff's claims with respect to the prescription issue, as stated in this court's prior remand order. At the hearing, Mr. Mauri testified that his spontaneous, *ex parte* contact with defense counsel in September 1997 was motivated solely by his discovery that plaintiff's attorney had concealed the fact that a deposition subpoena had been issued for his entire file; he was thus compelled to inform opposing counsel that his failure to comply with the subpoena was unintentional. He further reiterated the statements in his 1997 affidavits that he had been

"asked to avoid testimony ... that the individual that struck Chris Bruno had, or may have had, glasses."

However, these allegations were contradicted in several respects. For example, the record contains no deposition subpoena or subpoena duces tecum, but only defense counsel's deposition notices that were mailed to the opposing attorney but not served on anyone. Moreover, Christopher Bruno testified that the September 1997 disclosure occurred shortly after the investigator had become "livid" about Mr. Bruno's handling of a suit filed on Mr. Mauri's behalf, resulting in the termination of their professional relationships. Significantly, the transcript of Mr. Mauri's deposition establishes that plaintiff's counsel made no objection to the production of a December 1992 letter stating that Christopher Bruno "advised that the individual who attacked him wore glasses," nor was any attempt made to limit questioning regarding the letter. Finally, the trial court acknowledged at the hearing that the "missing" documents had been presented for *in camera* review in September 1997 and, therefore, "could be here at the courthouse." These facts amply support the trial court's rejection of Mr. Mauri's allegations of deception.

Furthermore, the defendant's arguments regarding the disappearance of the "original" photograph of Mr. Niklaus, as well as his emphasis on the

ways in which Mr. Bruno might have confirmed that he had originally sued the wrong man, have little relevance to the resolution of the prescription issue. Under the third category of *contra non valentem*, the plaintiff was required to show by a preponderance of the evidence that, despite reasonable diligence, he was unable to discover the true identity of his attacker due to the defendant's actions. *See Bruno v. Nicklaus, supra*, pp. 8-10. In this case, Mr. Bruno's inability to avail himself of his cause of action against Mr. Nichols resulted from the failure to provide correct identifying information to be recorded on the summons. Even if Mr. Bruno had determined at the outset that Christian "Nick" Niklaus was not the man who had assaulted him, the defendant has failed to suggest any methods that the plaintiff could have used, but did not, to locate the actual perpetrator. Thus, neither the fact that an "original" photo was misplaced nor the timing of its disappearance indicates "that the plaintiff knew or should have known of the identity of Nick Nichols" at an earlier point in time.

The evidence establishes, instead, that, given only the false and incomplete information on the summons, Mr. Bruno's efforts to track down his assailant were reasonable and diligent. After "Nick Burrows" failed to appear at municipal court, the investigator spoke to the officer who had issued the summons and confirmed that the man was known as "Nick" and

probably lived in one of the hundreds of apartments at 1620 Carol Sue Avenue in Terrytown, and that he was a kickboxer who sometimes worked out at World Gym in Algiers. This led to Mark A. Burrows, the owner of World Gym, who advised that the only member of his club known as "Nick" was Christian Niklaus. The investigator ultimately furnished Mr. Bruno with data from the Office of Motor Vehicles on both Mr. Burrows and Mr. Niklaus, but was unable to go further with the limited information available. Although suit was filed against Mr. Niklaus on April 29, 1993, the record establishes that plaintiff's counsel continued to investigate the leads furnished by Officer Chesnut, including the June 1993 issuance of a subpoena duces tecum for the names and addresses of World Gym's members during the relevant period. While Mr. Niklaus steadfastly denied any involvement in the incident, there is no evidence that either party to the suit had any indication that Mr. Bruno's assailant could be Nicky Lane Nichols until late Spring 1996. Therefore, the trial court did not err in concluding that the plaintiff exercised reasonable diligence in his efforts to discover the true identity of his attacker.

Finally, we find no merit to Mr. Nichols' argument that the exception of prescription must be sustained because there was no direct evidence that he gave Officer Chesnut the information appearing on the summons. Both

police officers testified that although the proper procedure is to copy the necessary data from a driver's license or local ID card, this is sometimes not done when they are familiar with the individual, as was the case here.

Moreover, the name "Nick" appears almost identical in the signatures on the summons and on Mr. Nichols' driver's license. Most significantly, Sgt. Little explicitly stated that the person he saw talking with Off. Chesnut that night was the same man sitting in the courtroom, identified as Nicky Lane Nichols. Thus, there is ample circumstantial evidence to support the trial court's determination that "it was the conduct of Nick Nichols in giving a false name, incomplete address and false date of birth" that effectually prevented Mr. Bruno from availing himself of his cause of action against the proper party. Accordingly, the exception of prescription was properly overruled based upon the application of the third category of *contra non valentem*.

Mr. Nichols next challenges the original judgment rendered against him, asserting first that the trial court was manifestly erroneous in finding him liable for Mr. Bruno's injuries. He argues that because the plaintiff and his witnesses insisted for years that Mr. Niklaus was the assailant, then blatantly changed their testimony, there is no credible evidence that he, in fact, was the individual involved in the incident with Mr. Bruno. The

defendant also contends that because the plaintiff's testimony was so inconsistent and unreliable, the trial court abused its discretion in rejecting his claim of provocation, which was supported by his family members who were present at the scene. Mr. Nichols thus maintains that the judgment against him should be reversed and the plaintiff's claims dismissed.

Contrary to the defendant's arguments, however, the determination that he was the man who struck Mr. Bruno does not rest solely upon the identifications by the plaintiff and his party. As previously noted, Sgt. Little testified unequivocally that Mr. Nichols was one of the two men involved in the altercation that night, and the signature on the summons appears to match the signature on Mr. Nichols' driver's license. Furthermore, given Mr. Nichols' admission that he knocked a man's tooth out at City Lights on a weekend night in early May 1992, and the testimony by the two police officers that, to their knowledge, there was only one such incident at the club, there is no manifest error in the determination that plaintiff had proven by a preponderance of the evidence that Mr. Nichols was his assailant.

Similarly, the rejection of Mr. Nichols' claim of provocation was not clearly wrong. The fact that the trial court obviously credited his admission of involvement does not necessitate acceptance of his version of events in its entirety. *Temple v. Schwegmann Giant Super Markets*, 95-2491, pp. 4-5

(La. App. 4th Cir. 7/10/96), 677 So.2d 1103, 1105-06 ("The trier of fact may choose to reject all of the testimony of any witness or may believe and accept any part or parts of a witness' testimony and refuse to accept any other part or parts thereof."). Moreover, two disinterested eyewitnesses, a club employee and another patron, testified that Mr. Bruno had done nothing to the perpetrator before he was struck in the face. Accordingly, the testimony and evidence in the record fully support the trial court's determination that Mr. Nichols is liable for Mr. Bruno's injuries.

The defendant's final assignment of error is that the general damage award of \$20,000 is excessive. However, after reviewing the testimony concerning the year-long course of treatment and the permanent dental modifications necessitated by this incident, we cannot say that this award is "beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances" of this case. *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257, 1261 (La. 1993). Therefore, the award cannot be modified.

For these reasons, the judgments rendered against Nicky Lane Nichols, overruling his exception of prescription and awarding damages and legal interest thereon to Christopher J. Bruno, together with the costs assessed by the trial court, are affirmed in their entirety.

AFFIRMED