SUPREME COURT OF LOUISIANA

97-C-1653

PETER DAYE, AS PROVISIONAL TUTOR OF THE MINOR, SAMUEL GOODWIN

versus

GENERAL MOTORS CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND CIRCUIT, PARISH OF CADDO

KIMBALL, Justice, dissenting.

Although I agree with the majority's recognition of the tort of negligent misrepresentation under Civil Code article 2315, I dissent from its finding that the jury was manifestly erroneous in assessing fault to General Motors (GM). After a trial in this case, the jury found GM 25% at fault and found Sam 75% at fault. The plaintiff moved for a Judgment Notwithstanding the Verdict ("JNOV"), praying for a reversal of the jury's allocation of fault. The trial judge granted the JNOV and reversed the jury's allocation of fault to 75% and 25% respectively. A five judge panel of the Second Circuit Court of Appeal, by a vote of 4-1, reversed the trial judge's JNOV and reinstated the jury's allocation of fault.[1] Upon a thorough review of the record, I cannot say the findings of the jury were manifestly erroneous.

STANDARD OF REVIEW

Article V, Section 10 of the Louisiana Constitution provides the appellate jurisdiction of a court of appeal extends to the law and facts. However, the exercise of this power has been jurisprudentially limited by the rule that a trial court's findings of fact will not be disturbed unless they are clearly wrong or manifestly erroneous. *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252, p.

[1]The appellate panel concluded the trial court erred in granting the JNOV because there was evidence presented to the jury which supported its findings. Although the five member panel was divided on the issue of the JNOV, with one judge believing the trial court was correct in its granting of the JNOV, all the intermediate appellate judges, like the jury and trial judge before them, agreed GM should bear some liability for Sam's injuries.

3 (La. 2/20/95), 650 So.2d 742, 745. This standard does not mean the reviewing court may simply review the record for evidence which supports or controverts the trial court's position. In contrast, the reviewing court must examine the entire record to determine if the trial court's findings were clearly wrong or manifestly erroneous. *Stobart v. State through Dept. of Transp. And Development*, 617 So.2d 880, 882 (La. 1993). "[T]he 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." *Id.* The deference given the factfinder's determinations is great.

> Stated another way, the reviewing court must give great weight to the factual conclusions of the trier of fact; where 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. The 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.
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> *Canter v. Koehring Co.*, 283 So.2d 716, 724 (La. 1973).

As this court said in *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989), after a review of the entire record, the court of appeal may not reverse the trial court's findings, if those findings are reasonable, even though the court of appeal is convinced it would have weighed the evidence differently. Given the jury's verdict finding GM partially at fault, in conducting such a manifest error review in this case it is incumbent upon this court to decipher the facts in the light most favorable to the plaintiff in order to give proper deference to the jury's verdict.

After a thorough review of the record, I find no manifest error in the determination of liability on GM's part.

FIRST AMENDMENT AND NATURE OF THE ADVERTISEMENTS

As an initial matter, I feel I must first address what, if any, impact the First Amendment would have relative to GM's liability. GM argued that in order to regulate speech, the state must have a compelling interest and the means used to regulate the interest must be narrowly tailored to accomplish the state's purpose. GM further argued, absent a proven clear and present danger, its advertisements are protected by the First Amendment In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, 447 U.S. 557, 563, 100 S.Ct. 2343, 2359 (1980), the Court observed, "The First Amendment's concern for commercial speech is based on the informational function of advertising. (citation omitted) Consequently, there can be no constitutional objection to the

suppression of commercial messages that do not accurately inform the public about lawful activity." The Court went on to conclude, "[f]or commercial speech to come within the protection of the First Amendment, at a minimum it must at least concern a lawful activity and not be misleading." *Id.* at 566, 100 S.Ct.2343, 2351. Therefore, if a jury determines that an advertisement is misleading, that advertisement will not be shielded by the First Amendment as was argued by GM.

Upon a review of the record, I cannot say the jury's determination GM's advertisements were misleading was manifestly erroneous. During the lengthy trial, the jury was presented with the advertisements themselves and testimony which addressed the alleged misleading nature of those advertisements regarding the 1986 Corvette's safety, handling, and revolutionary new braking capabilities.

For example, in describing the 1986 Corvette's braking system, a feature story in the Corvette catalog described a hypothetical involving the fabled German autobahn:

> A light rain is falling. You come over the top of the hill, halfway through a long sweeping curve that keeps bending away out of sight ahead of you, when suddenly you come upon the grandmother of all traffic jams. What do you do? Nothing cute, that's for certain. You simply apply the brakes and hope for the best.
>
> Your Corvette will stop. In fact, it will stop so well that you'll be proud, pleased and perfectly amazed. You can express your gratitude to one of the best friends you'll ever have, a device called the Bosch ABS II anti-lock braking system.

In the "Corvette News," GM's articles featured stories which described how the ABS worked, how it was designed, and what its presence meant in terms of handling and braking. The articles described how, because of ABS technology, the 1986 Corvette was able to brake and steer at the same time. The articles proclaimed the ABS worked so well, if you were forced to brake on an icy surface, you may not know the road you were on was icy. Furthermore, "[b]ecause ABS provides the ability to always get a controlled stop in the shortest possible distance, Corvette race drivers will have to change their driving techniques . . . you can go quite a bit deeper into a corner, apply the brakes very hard and let the system prevent loss of control."

GM also advertised the 1986 Corvette and its revolutionary ABS in popular magazines such as "Road & Track," "Car and Driver," and "Motor Trend." These advertisements described the Corvette as "a machine of almost heroic capabilities," possessing a "new dimension to car

control" matching its suspension and tires "to its standard anti-lock brake system." Some of the advertisements featured photographs, graphs, diagrams, and text which also extolled the improved braking capability of the 1986 Corvette. In one of these advertisements, the headline read: "The 1986 Corvette incorporates technology that allows you to maintain steering control during hard braking-even on a rain slick curve." The advertisement went on to describe a test where the 1986 Corvette was matched against some of the world's finest sports cars. Describing the test and the results, the advertisement explained how on a rain-slick, 150 foot radius curve, at maximum braking in USAC-certified testing, only the 1986 Corvette was able to steer and brake simultaneously, safely negotiating the curve. In a similar advertisement, the headline read: "Anti-lock braking power you can grade on a curve." The photographs above the bold-face headline depicted four of the world's finest sports cars sliding out-of-control on a rain-slick curve, while the photograph below the bold-faced headline depicted the Corvette in control, apparently on the same rainy curve. Below the photograph was a graph which seemed to outline the test results. In the graph, the Corvette was shown as remaining in its lane while it negotiated the curve. In contrast the other vehicles were portrayed as continuing to go straight rather than remaining in their lanes as the curve began to sweep. The following text was found in the bottom third of the full page ad:

> You're driving 55 mph on a rain-slick curve. Suddenly the unexpected: You stand on the brake pedal and steer to stay in your lane. You might expect Europe's most exotic cars to handle such a crisis effortlessly. Yet for all its awesome straight-line braking ability, Ferrari 308 GTSi failed to negotiate a 150-foot radius curve at maximum braking in USAC-certified testing . . . Only the 1986 Corvette demonstrated the ability to steer and stop in these conditions at the same time. Only Corvette made the turn while coming to a controlled stop. When conditions turn foul, Corvette's new computerized Bosch ABS II anti-lock braking system is designed to help improve a driver's ability to simultaneously brake and steer out of trouble. Why does the Corvette feature the world's most advanced braking technology? Because a world-class champion should give you the edge in an emergency.

Full single-page and two-page variations of this advertisement appeared in the different popular magazines.

Engineering experts who testified for the plaintiff stated that, in their opinion, the advertisements suggested a 1986 Corvette could come to a controlled stop from 55 m.p.h., on a rain-slick surface, in a 150 foot radius curve. The plaintiff's engineers testified this was physically impossible. Engineering experts who testified for the defendant conceded this point. However,

the defense engineers felt the plaintiff's engineer's conclusion regarding the advertisement's message was in error. In the defense expert's view, the advertisement presented two sets of truthful facts, one set of facts established a hypothetical situation involving a rain-slick surface and a vehicle traveling at 55 m.p.h., while the second set of facts described an actual test which was successfully conducted involving a 150 foot radius curve at maximum braking, with no indication of speed. Although steadfastly adhering to his position each portion of the particular advertisement in question was truthful, one of the defense's experts admitted on cross-examination it was possible the advertisement could be "misread."[2]

As is often the case in a civil trial, experts who testified on the plaintiff's behalf consistently stated the advertisements produced by GM were misleading; conversely, with the exception of the two advertisements mentioned, defense experts consistently stated the advertisements were not misleading. In this case, the jury was clearly presented with two reasonable views. When a jury is presented with two reasonable views, their choice between the two cannot be manifestly erroneous. *Rosell v. ESCO, supra*. For this reason, I cannot say the jury's determination GM's advertisements were misleading was manifestly erroneous. A finding that the advertisements were misleading is the first step in the analysis and not the end of the inquiry into whether or not GM is liable for the injuries sustained by the plaintiff. In order to be held liable for the misrepresentations, the plaintiff must also prove, as in all civil cases, the defendant is liable under one of the theories of liability.

LIABILITY

The plaintiffs in this case allege, among other things, GM, through its advertisements, negligently misled Sam and his father regarding the 1986 Corvette's safe handling and braking capabilities. The cumulative effect of these advertisements was to instill in Sam a particular mindset regarding the 1986 Corvette's safe handling and braking capabilities. Upon a thorough review of the record on this issue, I cannot say the jury's determination on liability was manifestly

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[2]The same expert also admitted another one of GM's advertisements was confusing. The advertisement in question was found in the Corvette catalog, which according to GM's own disclaimer, was meant to be as comprehensive and factual as possible. In the advertisement, GM described the 1986 Corvette's handling capabilities in mathematical terms. *i.e.* The advertisement stated a Corvette could stay on the road even when the lateral force on a tight curve reached 3000 pounds, and when deceleration force during braking went above one g. On cross-examination, when the defense expert was asked if the statement was confusing and misleading, he responded that it was.

erroneous.

Civil Code articles 2315 and 2316 represent the fountainhead of responsibility. *Langlois v. Allied Chemical Corp.*, 249 So.2d 133, 137 (La. 1971). In determining whether liability exists for negligent conduct, this court has adopted the "duty/risk" analysis.

Cause-in-Fact

The first element in the "duty/risk" analysis is cause-in-fact. Cause-in fact is a factual question to be determined by the factfinder. *Theriot v. Lasseigne*, 93-2661 (La. 7/5/94), 640 So.2d 1305; *Cay v. DOTD*, 93-0887 (La. 1/14/94), 631 So.2d 393. The element of cause-in-fact establishes a causal relationship between the alleged negligent act and the injury sustained. Frank L. Maraist & Thomas C. Galligan, Louisiana Tort Law § 4-1 (1st ed. 1996). Cause-in-fact can be met by showing "but for" the defendant's conduct, the plaintiff would not have sustained an injury. Alternatively, the plaintiff can show the defendant's conduct was a "substantial factor" in the plaintiff's injury. *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*, 137 So.2d 298, 302 (La. 1962) (Negligent conduct is a cause-in-fact of harm to another if it was a substantial factor in bringing about that harm.") *See also LeJeune v. Allstate Ins.* Co, 365 So.2d 471, 475 (La. 1978); *Breithaupt v. Sellers*, 390 So.2d 870, 873 (La. 1980). *See generally* Maraist & Galligan, §§ 3-4, and 4-1,2, and 3. In this case, the jury specifically found GM's misleading advertisements were a "substantial factor" in causing Sam's injuries.[3] After reading the record in the instant case and considering the great deference to be given to factual findings made by a jury, I cannot say this conclusion is manifestly erroneous.

The record clearly reveals Sam was an avid Corvette enthusiast who read everything he could about Corvettes. Sam testified that prior to reading the 1986 Corvette catalog, he had never heard of anti-lock brakes. The information regarding the ABS in the catalog was unequivocal; in fact, the catalog specifically proclaimed the information in the catalog was as comprehensive and factual as possible. The information in the catalog was subsequently confirmed and reinforced by the other advertisements Sam read in popular magazines. The cumulative effect of the advertisements was to instill in Sam and his father a false sense of the safe

[3]Jury interrogatory number 1 stated, "Do you find that General Motors Corporation made negligent misrepresentations that were a substantial factor in causing injuries to Samuel Goodwin? Please answer yes or no." After this question, the "yes" blank was checked by the jury foreperson.

handling and braking capabilities of the 1986 Corvette.

The record also clearly indicates there was sufficient evidence upon which the jury could have based its decision the GM advertisements were a "substantial factor" in Sam's application of the brakes in the curve that fateful night. The curve in the roadway in which the accident took place has a radius of approximately 750 feet. The advertisements alleged to be misleading implied that one could safely negotiate a 150-foot radius rain-slick curve. Defense expert testimony established that a 150-foot radius curve would be sharper and more severe than the 750-foot radius curve in which the accident took place. This being the case, the jury could reasonably have concluded Sam was justified in believing he could safely negotiate the 750-foot radius curve when all of GM's own advertisements at least implied he could do so in a steeper curve. Given this information, then, it can be seen the jury's conclusion was not manifestly erroneous.

In any case, expert testimony established that, had he not applied the brakes, Sam could have traveled safely through the curve at a maximum speed of approximately 80 m.p.h. In fact, Sam testified that prior to the evening of the accident, he had driven his 1986 Corvette through the curve without incident at speeds of between 65 and 70 m.p.h. Furthermore, Mr. Sandy Samuels, who testified for the defense and who also regularly traveled the Old Dixie Highway, including the curve in question, stated he had driven through the same curve on a number of occasions at 75 m.p.h. In layman's terms, the reason Sam could have negotiated the curve safely the night of the accident had he not applied the brakes was because absent the added force of braking, the vehicle could have held the turn.

The record also reveals Sam was first introduced to the concept of anti-lock brakes when he read about the ABS found exclusively on the 1986 Corvette. He testified that after reading the GM advertisements about the ABS it was his understanding a driver could brake hard in high speed curves without losing control. Sam also testified had he known of the potential problem he would not have applied the brakes. On direct-examination, Sam was asked whether, at the time he applied the brakes, he thought it was safe to apply the brakes in the middle of the curve. He responded, "Yes, I did." When asked if he would have applied the anti-lock brakes in the curve had he been warned not to do so, he said that he would not have applied the brakes had they "been like regular hydraulic brakes." Sam went on to say he believed he could safely brake in the curve because, "That's what had been represented to me in everything I had ever read about the

brakes, that I can do this." However, as the majority notes, on cross-examination, defense counsel repeatedly asked Sam if he applied the brakes in the middle of the curve because of the misrepresentations. To each of the questions, Sam responded that he applied the brakes because he was coming into town, at night, going 65 m.p.h. and wanted to slow down. Defense counsel asserted that Sam's answer was non-responsive and the trial judge sent the jury out for a discussion on the record. During the discussion, out of the jury's presence, the trial judge stated: "I believe the jury clearly hears those responses. They are making inferences from those responses and making conclusions, and I think they are perhaps — well, I know they are smart and they understand what's going on, I believe." Obviously, the two sides were trying to establish what Sam's frame of mind was when he applied the brakes. Obviously, both sides were trying to establish the element of cause-in-fact, or a lack thereof. As a result the jury heard testimony from which they could have reasonably determined Sam hit the brakes because of his reliance on the advertisements.

In the ordinary circumstance, it may be unreasonable for an individual to rely so heavily on an advertisement regarding the safe operation of a vehicle. For example, had GM's only advertisement regarding the hard braking ability of the 1986 Corvette been the mention of ABS in the feature article and the hypothetical involving the autobahn, Sam's reliance may have been unjustified because these advertisement are not misleading in and of themselves. However, in addition to these two advertisements, GM also put forth what appeared to be objective, scientific information which was consistent with and supported all of the other advertisements. For example, the 1986 Corvette catalog specifically noted the factual and comprehensive nature of its information and described the 1986 Corvette's handling capabilities in mathematical terms. According to the plaintiff's experts and one of the defendant's own experts, this information was misleading. The advertisements which appeared in the popular magazines complemented what Sam had read in the GM publications. Again, as an example, one of the advertisements mentioned earlier was made to appear as if it was merely reporting the results of a hard braking test, conducted on a wet surface, wherein the 1986 Corvette outperformed some of the world's finest sports cars. These test results were in complete harmony with the "facts" presented in the 1986 Corvette catalog. Again, the plaintiff's experts testified this advertisement was misleading and the defendant's expert conceded the advertisement could have been "misread." The effect of

the individual advertisements which were most definitely misleading, when cumulated with all of the other general representations regarding the safety and handling of the 1986 Corvette, was to instill in Sam an incorrect mindset upon which it was objectively reasonable for him to rely

Furthermore, at the time the advertisements were being disseminated to the public, the concept of an anti-lock braking system was revolutionary. To the Corvette consumer of the mid-1980's, the advent of anti-lock brakes advances was rightly viewed as a panacea to the hazards of driving given GM's advertising campaign. GM exclusively equipped one of its premier vehicles with this revolutionary braking system and marketed the ABS as the only braking system that allowed you to brake hard, yet still maintain control in a curve. In retrospect, this overinflated view of the relative safety of ABS may be a bit naive, but when considered in its temporal context, it was certainly an objectively reasonable one.

The jury determined the GM advertisements were a "substantial factor" in causing Sam's injuries. After a review of the entire record, including the entirety of Sam's testimony, I cannot say the jury's conclusion was manifestly erroneous. As the trial judge pointed out, the jury heard the testimony and was able to draw its own conclusions. In my view, the jury's conclusions are reasonably supported by the record.

Duty

The second element in the "duty/risk" analysis is the determination of whether there is a duty. There is no general duty to speak, but if one does speak, he may be liable for any intentional misrepresentation (fraud) or any negligent misrepresentation. Maraist & Galligan, § 5-7(h). In *Devore v. Hobart Mfg. Co.*, 367 So.2d 836, 839 (La. 1979), citing with approval, *White v. Lamar Reality, Inc.*, 303 So.2d 598 (La. App. 2nd Cir. 1974), this court recognized "that Civil Code articles 2315 and 2316 . . . 'afford a broad ambit of protection for persons damaged by intentional and negligent acts of others . . .' sufficient to encompass a cause of action for negligent misrepresentation." However, on the facts of the case, the *Devore* court found the plaintiff had failed to state a cause of action. *Id.* at 839. Subsequently, in *Barrie v. V.P. Exterminators, Inc.*, 625 So.2d 1007 (La. 1993), this court again addressed the issue of negligent misrepresentation. In *Barrie*, we held a termite inspector could be held liable in tort, to the purchaser of the home with whom he had not contracted, for negligent misrepresentations the inspector had made in his termite infestation report. More precisely, we recognized that a termite inspector's duty to

exercise reasonable care in making his inspection and report extends to the parties with whom he had contracted and to the subsequent purchasers of the home with whom he had not contracted. The *Barrie* court further recognized that the cause of action for negligent misrepresentation has been integrated into the duty/risk, negligence analysis. Just as the *Barrie* court recognized a duty on the part of the termite inspector not to make negligent misrepresentations in his infestation report, similarly, a manufacturer or vendor has a duty not to make negligent misrepresentations in its advertising, representations which are consequently not protected by the First Amendment.

The protection afforded commercial speech by the First Amendment is indelibly linked to the concomitant duty not to mislead the public. As the Supreme Court pointed out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm.*, *supra*, commercial speech receives the protection of the First Amendment because of the informational function of advertising. Conversely, commercial speech loses the protection of the First Amendment when it is misleading.

Breach

The third step in the "duty/risk" analysis is breach. As noted, *supra*, the jury was presented with evidence, which was confirmed by the defendant's own experts, which supported its determination GM's advertisements were misleading. Consequently, GM breached its duty. Again, based on a thorough review of the record, I cannot say the jury's conclusion was manifestly erroneous.

Scope of the Risk

The fourth step in the "duty/risk" analysis is the determination of whether the risk of harm was within the scope of protection afforded by the duty breached. The scope of the risk analysis is fairly self-defining, did this plaintiff fall within the scope of the protection of the duty breached? In this case, the defendant disseminated information to the public which had the cumulative effect of suggesting that because of the presence of ABS, it was safe to brake hard while negotiating almost any curve. Here, the plaintiff did exactly what he was led to believe was safe. The plaintiff braked in a curve, when he otherwise would not have braked, because the advertisements reasonably led him to believe it was safe for him to do so.

CONCLUSION

Regarding the jury's role, the trial judge astutely noted, on the record and out of the jury's presence, that the jury could clearly hear the witnesses' responses and could come to their own

conclusions based on their evaluations of the witnesses and their testimony. In my view, given the evidence presented to the jury, the jury's determination was supported by the record. For the reasons espoused, the jury's determinations were not manifestly erroneous. Therefore, I would affirm the decision of the court of appeal.