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

TRAYLOR, Justice[*]

This case arises from a September 16, 1986 single-car accident which left plaintiff paralyzed from the waist down. We granted the defendant's writ in this case to examine the lower courts' finding that the defendant had made negligent misrepresentations which were a substantial factor in causing plaintiff's injuries.[1] The defendant, General Motors Corporation (GM), was found 25% responsible for plaintiffs injuries for negligent misrepresentation in advertising its 1986 Corvette. The jury found plaintiff, Samuel Goodwin (Samuel), 75% responsible for his injuries for failure to maintain control of his vehicle in the accident. We reverse the findings of the lower courts because we find plaintiff to be 100% responsible for the injuries he sustained which resulted solely from his own negligence and failure to maintain control of his vehicle.

FACTS

In the summer and fall of 1984, Samuel, a long-time Corvette enthusiast, asked his parents for a 1985 Corvette for his fifteenth birthday. Samuel's father, John, decided not to buy Samuel the Corvette because, among other reasons, he felt Samuel needed more driving experience.

Later that year, Chevrolet introduced the 1986 model year Corvette equipped with Bosch II ABS anti-lock braking system (ABS), a then revolutionary, state-of-the-art braking system developed exclusively for Corvette. The 1986 Corvette was the first passenger vehicle

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[*]Victory, J., not on panel, recused. See Rule IV, Part 2, § 3. Justice Victory, who was originally assigned to this panel, recused himself after oral arguments upon discovering that he, while serving as a trial judge, signed an order allowing an attorney to withdraw from this case. Justice Johnson, who was not assigned to the original panel, was substituted in Justice Victory's place and has, before voting, had the benefit of audio tape recordings of the oral arguments, the parties' briefs, the record, and conference discussions.

[1]97-C-1653. Plaintiff's writ application was denied. 97-C-1641.

manufactured in this country with anti-lock brakes. GM introduced the 1986 model by launching a promotional campaign using television, magazines, and other promotional media such as brochures, pamphlets, and catalogs. The gist of the campaign was to inform consumers that the 1986 Corvette was equipped with ABS brakes which would never "lock up" in emergency braking maneuvers and that because the wheels continued to roll, the driver would maintain steering control in certain situations: previously not possible with the regular, hydraulic brakes available in other vehicles.

In the fall of 1985, armed with the Corvette promotional information, sixteen-year-old Samuel persuaded his father to buy the 1986 Corvette. Purchased as a surprise gift, the vehicle fulfilled Samuel's five-year longing to own a Corvette and heightened his preoccupation with the vehicle. Samuel testified that for years he had been collecting and reading all materials he could attain regarding Corvettes. Despite this testimony, Samuel later admitted that he read none of the information on the braking system or handling of the Corvette contained in the owner's manual. GM furnished Samuel with an owner's manual which contained a section regarding the function and proper use of ABS brakes. It read:

> The anti-lock brake system is designed to prevent lock-up of the wheels during braking by automatically releasing and reapplying each front wheel brake independently, and both rear wheel brakes as a pair. This occurs only during a brake application, which would have caused one or more wheels to skid. When this happens, it causes the brake pedal to pulsate, and it may push back against your foot. This is normal. A pulsating brake pedal may be an indication of a slippery road. Adjust your driving accordingly. When a brake application is not enough to cause a wheel to lock up, the brakes are operating in the same way as conventional brakes, and the pedal will not pulsate. Remember, even though the car has anti-lock brakes, following too closely behind another vehicle still might not allow enough time to avoid a collision if the other vehicle slows suddenly, Maintain a safe distance from the vehicle ahead . . . *During a brake application that would cause one or more wheels to skid, the anti-lock feature is designed to help you maintain . . . steering control, but there still could be some loss of directional control under these conditions. Driving too fast around curves, or turns, especially on slippery pavement may also result in loss . . . of directional control. Drive only as fast as conditions permit. Remember, loss of directional control can cause an accident . . . Driving too fast around curves, or turns, especially on slippery pavement, might also result in loss of directional control. Even with a functioning anti-lock brake system, drive steering and braking traction are reduced on slippery surfaces. Slow down and adjust your driving to such conditions.*[2] (Emphasis added)

Disregarding the warnings set forth in the owner's manual and despite numerous warnings

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[2] This excerpt of the 1986 Corvette owner's manual was read into the record at trial by an expert witness for the defense.

from both his mother and father, Samuel admitted that he routinely disregarded speed limits and regularly drove the Corvette at excessive speeds. Samuel testified that he drove the Corvette as fast as 140 miles per hour and believed this was not an excessive speed and that he "did not think it was possible to drive the Corvette too fast." He testified that, at that time, he felt the ABS would prevent his Corvette from slipping or skidding "in any way whatsoever" and that ABS would allow him, a young and inexperienced driver, to perform like a seasoned race car driver.

As of September 12, 1986, Samuel had driven the Corvette for approximately eleven months and logged some 27,000 miles on the vehicle. That night, he and three of his classmates met at a friend's hunting camp on Louisiana Highway 3049, the "Old Dixie Highway," a two-lane country road which borders the Red River. They planned to spend the night at the camp, drink beer,[3] play cards, and dove hunt the next morning. At approximately eleven p.m., members of the group became hungry and Samuel agreed to drive the eighteen miles into Shreveport to pick up some hamburgers at Burger King, his third trip to Burger King that night. En route, Samuel traveled on the Old Dixie Highway, which had a posted speed limit of fifty-five miles per hour, at speeds exceeding one hundred miles per hour in the straightaways.

As Samuel approached a portion of the road known locally as "dead man's curve," he claims to have slowed to approximately twenty-five miles per hour, safely negotiated the curve, and then resumed speeding to approximately eighty-five miles per hour. As he approached the curve where he was to have the accident, Samuel passed two signs: one reducing the speed limit to 45 miles per hour, and a second warning sign which read, "Drive carefully, a substandard roadway." Although Samuel testified at trial that he did not look at his speedometer, he stated at various times that he entered the curve traveling between sixty-five and eighty miles per hour. He testified that he applied the brakes in this curve because it was nighttime and he wanted to slow down as he was approaching Shreveport. Yet, he testified in his deposition that he braked because he was driving "too fast for the curve" and needed to slow down to safely negotiate the curve. Although he testified that he had driven through this curve at the same speed innumerable occasions - twice on that very night - and never before felt the need to use his brakes, he felt the

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[3] Plaintiff admitted to partially drinking one beer. Jeffrey Lynn, a witness for the plaintiff, testified that he saw plaintiff have a beer. However, there is no allegation that plaintiff was under the influence of alcohol at the time of the accident. No testimony was adduced at trial which showed that plaintiff had tested positive for alcohol the night of the accident.

need to slow down at this particular time. He adamantly maintains that the brakes did not respond the first time he pressed the pedal and that he "mashed" the brake pedal a second time and simultaneously lost control of the vehicle.

At trial, all experts agreed that there was no malfunction of either the ABS or back-up hydraulic braking systems. Furthermore, the experts agreed that plaintiff erroneously applied the brakes in the curve so that the added braking load on the tires, combined with the side load from centrifugal force against the vehicle in the curve, forced the vehicle from the road.

At trial, expert testimony from various accident reconstructionists and engineers revealed the following sequence of events. After Samuel applied the brakes, the "high lateral acceleration," combined with the vehicle's capacity to hold the road and the skill level of the driver in handling and controlling the vehicle, caused the tail end of the car to slide to the left as the car yawed clockwise. The vehicle traveled across the oncoming lane of traffic, crossed the shoulder, and exited the highway to the left. At some point in the course of these events, Samuel ducked his head below the dashboard, doing nothing further to maintain control of the vehicle. It plunged through roadside underbrush, spun three-quarters of a revolution and collided passenger-side first into a barbed wire fence. The vehicle stopped sliding when the tires caught on the fence, whereupon the car "tripped" and became airborne. It flipped over twice and came to rest on its roof, having dropped approximately fifteen feet off a bluff.

Neither Samuel nor the passenger were wearing their seatbelts. Samuel suffered a severe spinal injury and is a paraplegic. The passenger suffered minor lacerations.

PROCEDURAL HISTORY

In 1987, Peter Daye, as provisional tutor of the minor, Samuel Goodwin, brought suit against GM; United Services Automobile Association (USAA), John Goodwin's automobile liability insurer; Travelers Indemnity Insurance Company (Travelers), John Goodwin's comprehensive liability insurer pursuant to a homeowners policy; and Courtesy Chevrolet. In the original petition, Samuel alleged his father, John, was negligent in purchasing the Corvette for Samuel, a sixteen year-old with a propensity to speed. The plaintiff further alleged GM and Courtesy Chevrolet were liable for marketing and placing an attractive nuisance in retail trade and commerce.

The trial court granted a motion for summary judgment in favor of Travelers and

dismissed Travelers from the suit. The court also granted a motion for summary judgment in favor of USAA. In 1993, plaintiff's claim against GM evolved when he amended the pleadings to focus on representations alleged to have been made by GM in its promotional campaign regarding the driving capabilities, safety features, and ABS braking system distinct to the 1986 Corvette. In May of 1993, Samuel had reached the age of majority and amended his petition to add the State, through the Department of Transportation and Development (DOTD), as a defendant. John Goodwin, enrolled as co-counsel for the plaintiff.[4] In his final amended petition filed on March 15, 1994, plaintiff claimed that his father bought the Corvette based upon representations of its safety by GM and the dealer, Courtesy Chevrolet.

A trial against the remaining defendants, DOTD, Courtesy Chevrolet, and GM, was held from September 11, 1995 through September 23, 1995. The jury returned a verdict finding both GM and plaintiff at fault. The jury assigned liability to GM based on its finding that GM had made negligent misrepresentations which were a substantial factor in causing Samuel's injuries. The jury assigned 75% of the fault to Samuel, 25% to GM, 0% to the DOTD, and 0% to Courtesy Chevrolet, Inc. The jury awarded Samuel, before any reduction for his fault, $1,425,00.00 in general damages, $175,000.00 in past medical expenses, $400,000.00 in future medical expenses, but made no award for past or future lost earnings.

Upon plaintiff's motion for JNOV, the trial judge reversed the jury's allocation of fault, assigning 75% of the fault to GM and 25% to Samuel. The court of appeal reversed the trial court's grant of the JNOV and reinstated the jury's allocation of fault. This Court granted certiorari to consider GM's liability under the circumstances of this case.

STANDARD OF REVIEW

A trial court's findings of fact will not be disturbed unless the record establishes that a factual, reasonable basis does not exist and the finding is clearly wrong or manifestly erroneous. *Syrie v. Schilhab*, 96-1027 (La. 5/20/97); 693 So.2d 1173, 1176; *Ferrell v. Fireman's Fund Ins. Co.*, 94-1252 (La. 2/20/95), 650 So.2d 742, 745; *Stobard v. State, through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La. 1993); *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989); *Arceneaux v. Dominigue*, 365 So.2d 1330 (La. 1978). Where two reasonable views of the

[4] John Goodwin enrolled as counsel of record with the understanding that he would not participate in bringing the case to trial.

evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Stobart*, 617 So.2d at 882-83. Although deference should be accorded to the factfinder, the court of appeal and this court have a constitutional duty to review facts. *Stroik*, 699 So.2d at 1079; *Ambrose v. New Orleans Police Department Ambulance Service*, 93-3099 (La. 7/5/94), 639 So.2d 216, 221. Therefore, it is improper to assert that a trial court's factual determinations "cannot ever, or hardly ever, be upset." *Ambrose*, 639 So.2d at 221.

The issue to be resolved by the reviewing court is not whether the trier of fact is right or wrong, but whether the factfinder's conclusion was a reasonable one. *Syrie*, 693 So.2d at 1176; *Stroik*, 699 So.2d at 1079. After a thorough review of the record, we find that it was manifest error to assign any percentage of fault in plaintiff's injuries to GM under the theory of negligent misrepresentation.

NEGLIGENT MISREPRESENTATION

In order for a cause of action based on negligent misrepresentation to stand, the alleged representations made by GM to the plaintiff must be classified as negligent misrepresentations. *Barrie v. V.P, Exterminators, Inc.*, 97-0679 (La. 1993), 625 So.2d 1007, 1011 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 107, at 745-746 (5th ed. 1984)). In general, the courts of this state have recognized that La. Civ. Code arts. 2315 and 2316, the code articles defining tort law, encompass an action for negligent misrepresentation. *Devore v. Hobart Mfg. Co.*, 367 So.2d 836, 839 (La. 1979). However, our jurisprudence has also limited negligent misrepresentation tort theory to cases wherein contract or fiduciary relationship exists. *Barrie*, 625 So.2d at 1014; *Ernestine v. Baker*, 515 So.2d 826, 827-28 (La.App. 5th Cir. 1987); *Dousson v. South Central Bell*, 429 So.2d 466, 468 (La.App. 4th Cir. 1983), *writ denied*, 437 So.2d 1135 (La. 1983); *Beal v. Lomas and Nettleton Co.*, 410 So.2d 318, 321 (La.App. 4th Cir. 1982); *Josephs v. Austin*, 420 So.2d 1181, 1185 (La.App. 5th Cir. 1982), *writ denied*, 427 So.2d 870 (La. 1983).

We find no Louisiana case which allows a plaintiff to sue a defendant manufacturer for damages arising out of the negligent misrepresentations about its product. Nevertheless, we find that the broad language of Civil Code articles 2315 and 2316 affords protection for persons damaged by the negligent acts of others sufficient to encompass a cause of action for negligent misrepresentation. Louisiana negligent misrepresentation cases are evaluated using the duty-risk

analysis. *Barrie*, 625 So.2d at 1015; *Syrie*, 693 So.2d at 1176. We therefore turn to this analysis.

The Duty-Risk Analysis

The duty-risk analysis is employed on a case by case basis. *Harris v. Pizza Hut of Louisiana, Inc.*, 455 So.2d 1364, 1369 (La. 1984). Plaintiff must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant and the risk of harm was within the scope of protection afforded by the duty breached. *Id*; *Berry v. State, through Dept. Of Health and Human Resources*, 93-2748 (La. 5/23/94), 637 So.2d 412, 414; *Mundy v. Dept. of Health and Human Resources*, 92-3251 (La. 6/17/93), 620 So.2d 811, 813.

Cause-in-Fact

Generally, the outset determination in the duty-risk analysis is cause-in-fact. *Boykin v. Louisiana Transit Co., Inc.*, 96-1932 (La. 3/4/98), 707 So.2d 1225; *Pierre v. Allstate Ins. Co.*, 242 So.2d 821 (1970). The inquiry to be made is whether the accident would have occurred but for the defendant's alleged substandard conduct or, when concurrent causes are involved, whether defendant's conduct was a substantial factor in bringing about the accident. *Breithaupt v. Sellers*, 390 So.2d 870, 873 (La. 1980)*; LeJeune v. Allstate Ins. Co.*, 365 So.2d 471, 475 (La. 1978); *Dixie Drive It Yourself System New Orleans Co. v. American Beverage Co.*, 137 So.2d 298, 302 (La. 1962).

In the present case, the inquiry is whether the plaintiff's accident would have been prevented had defendant not advertised that the 1986 Corvette's ABS brakes could be applied in the middle of a curve. The jury found that "General Motors made negligent misrepresentations that were a substantial factor in causing injuries to the plaintiff." Although the jury's finding regarding cause-in-fact is a factual finding entitled to great deference, after a thorough review of the record, we find the conclusion that the promotional information caused plaintiff's injuries manifestly erroneous.

Plaintiff's own testimony refutes his assertions that the cumulative effect of these advertisements caused him to vigorously apply his brakes in the curve when the vehicle could not sustain such a maneuver. He was driving approximately eighty-five miles per hour, then released the accelerator to slow the car down gradually so that when he reached the curve at issue, he was traveling approximately sixty-eight miles per hour. He testified that he wanted to slow down

because he was nearing town after dark. However, this contradicted his previous testimony wherein he stated that he "braked to slow down because [he] felt [he] needed to in order to safely negotiate the curve."

Samuel stated that he believed with ABS, "[t]he tires would not lock, they would not skid, they would not lose traction . . . you maintain directional control and you wouldn't skid off out of your lane." This, however, is not what GM represented to Samuel. The owner's manual warned that ABS would not prevent loss of directional control which could be caused by "driving too fast around curves." In fact, the manual warned that the possibility of slipping was very real during hard braking and while braking in curves, which could result in an accident. The manual warned that drivers should adjust their driving according to road conditions and drive only as fast as conditions permit to avoid accidents. The promotional information merely asserted that ABS would "improve" a driver's ability to stop in emergency braking situations and that the wheels would not lock up, thereby making it possible for the driver to maintain steering control, even in a curve. GM did not guarantee that the car would not slide or lose its footing on the road under extreme driving applications. In fact, it explicitly warned that the opposite could occur.

Samuel testified that any car could be driven at such a speed that the driver could lose control and slip off of the road. However, he testified that at the time of the accident he believed that ABS brakes would prevent the Corvette from slipping or skidding "in any way whatsoever" and that he "did not think that it was possible to drive the Corvette too fast" and because "it was the best handling car in the world, a person with a sound mind behind the wheel was not going to get hurt." If his testimony is to be believed, he felt he could accomplish the physically impossible in his Corvette because it had ABS. He stated that he felt it was impossible for his Corvette to slide or for him to lose control because of these brakes. This is an unreasonable belief upon any reading of GM's promotional information regarding the 1986 Corvette and ABS.

In reality, plaintiff's vigorous application of the brakes while driving through a blind curve on a substandard two-lane country road at a breakneck speed - and not his reliance on the promotional information - was the cause of the accident. Plaintiff conceded that he felt he could not negotiate the curve at the speed in which he was traveling and braked to slow the vehicle to a more reasonable speed.

Upon a thorough review of the record on this issue, we find that the jury's decision

assigning any liability to GM is manifestly erroneous. We find that the sole cause of Samuel's accident was his own negligence due to his excessive speed and his imprudent application of his brakes, not his reliance on GM's promotional information. A reasonable juror could not find that GM's promotional information could be the cause-in-fact of the instant accident. Therefore, we find that the accident would not have been prevented had GM not published the allegedly misleading promotional information.

CONCLUSION

A negligence case is properly examined under the duty-risk analysis. *Boykin v. Louisiana Transit Co.*, 96-1932 (La. 3/4/98), 707 So.2d 1225. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. *Stroik*, 699 So.2d at 1081. Because we find that plaintiff has failed the first prong of the duty-risk analysis, we need not examine the remaining elements and find no liability on the part of the defendant under the theory of negligent misrepresentation.

For the foregoing reasons, we find the jury's conclusions are not a reasonable view of the evidence. We find the jury's determinations were manifestly erroneous. Therefore, we reverse the decisions of the trial court and court of appeal and find for the defendant.

REVERSED AND RENDERED.