

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0071

DON YESSO AND DYLAN YESSO

VERSUS

**BENNY'S EXPRESS CAR WASH NUMBER THREE, LLC,
MANUEL SCOTT AND STATE FARM MUTUAL
AUTOMOBILE INSURANCE COMPANY**

CONSOLIDATED WITH

NO. 2015 CA 0072

**STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
AS SUBROGEE OF/AND MANUEL SCOTT**

VERSUS

BENNY'S EXPRESS CAR WASH NUMBER THREE, LLC

***Judgment Rendered:* SEP 18 2015**

**Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. 602917 c/w 603159**

The Honorable Kay Bates, Judge Presiding

**John A. Braymer
Baton Rouge, Louisiana**

**Counsel for Plaintiffs/Appellants
Don Yesso and Dylan Yesso**

**Aaron J. Chaisson, Jr.
Baton Rouge, Louisiana**

**Counsel for Defendants/Appellees
Manuel Scott and State Farm
Mutual Automobile Insurance
Company**

*MS
FM
JMM*

**Stephen H. Vogt
Baton Rouge, Louisiana**

**Counsel for Defendant/Appellee
Benny's Carwash, LLC**

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

THERIOT, J.

This suit arises from an automobile accident that occurred in an automatic car wash owned and operated by the defendant-appellee, Benny's Express Car Wash Number Three, LLC. The plaintiffs-appellants herein appeal the judgment of the Nineteenth Judicial District Court, finding in favor of the defendants-appellees, Benny's Express Car Wash Number Three, LLC ("Benny's"), Manuel Scott ("Scott"), and State Farm Mutual Automobile Insurance Company ("State Farm"), and dismissing the plaintiffs-appellants' suit with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 24, 2011, the plaintiffs-appellants, Don Yesso and his son, Dylan Yesso (collectively, "the Yessos"), initiated this personal injury suit against Benny's, Scott, and State Farm.¹ The Yessos alleged that, on July 8, 2010, they sustained personal injuries and property damage in an automobile accident that occurred in an automatic car wash owned and operated by Benny's. Specifically, the Yessos asserted that they suffered serious bodily injuries, including cervical and lumbar sprain injuries that necessitated significant medical treatment. Additionally, they asserted that their vehicle was damaged in the accident, requiring repair and resulting in a diminished value of the vehicle. The Yessos alleged the accident and resulting injuries and damages were sustained as a result of the negligence of Benny's and/or the Scotts.²

¹ The Yessos thereafter filed an amended petition for damages on July 7, 2011 to add Scott's wife, Sadie Scott (collectively, "the Scotts"), as a named defendant in this matter.

² The Scotts and State Farm, as subrogee of the Scotts, filed a separate suit against Benny's for the damages they allegedly sustained as a result of the car wash accident (Case No. 603159). The Scotts' suit was consolidated with the first-filed suit brought by the Yessos against Benny's, the Scotts, and State Farm (Case No. 602917). The trial court's judgment dismissing the Yessos' suit does not dispose of the Scotts' claims against Benny's, which remain pending before the trial court. The issue of Benny's liability to the Scotts is therefore not before this court on appeal.

Many of the basic facts were stipulated at trial and are not in dispute. On the date of the accident, the Yessos' vehicle entered an automated car wash owned by Benny's behind the Scotts' vehicle that was being driven by defendant Sadie Scott. While in the car wash, the Scotts' vehicle jumped the track and stopped at an angle blocking other cars from proceeding. In response to the stoppage, Dylan Yesso, who was driving the Yessos' vehicle, applied the brakes, causing the vehicle to come to a stop in the car wash. Their vehicle was thereafter repeatedly hit by an unmanned car from the rear. The car wash's automated propulsion system was stopped by Benny's employees after multiple rear-end collisions between the Yessos' vehicle and the unmanned car. When the propulsion system was reinitiated, the Scotts' vehicle jumped the tracks three more times, even though it was admitted that the driver did not turn the steering wheel. It was established at trial that the maximum speed at which the unmanned car following the Yessos' vehicle could have contacted their vehicle was .68 miles per hour, as that was the top possible conveyer belt speed on Benny's automated car wash.

Following a bench trial on the merits, the trial court issued judgment in favor of the defendants, dismissing the Yessos' suit with prejudice. The trial court did not issue written reasons for judgment and did not state oral reasons for judgment on the record. The Yessos filed a timely devolutive appeal from the trial court's judgment.

ASSIGNMENTS OF ERROR

The Yessos present two assignments of error on appeal:

1. The district court erred by finding that Manuel and Sadie Scott were not liable for the property damage and personal injuries sustained by Don and Dylan Yesso at Benny's Car Wash on July 8, 2010.

2. The district court erred by finding that Benny's Car Wash was not liable for the property damage and personal injuries sustained by Don and Dylan Yesso at Benny's Car Wash on July 8, 2010.

STANDARD OF REVIEW

The trial court's judgment is grounded in a factual finding that the Scotts and Benny's were not negligent and were not liable to the Yessos for the injuries they allegedly sustained. Louisiana jurisprudence recognizes that factual determinations made by a trial court are entitled to great deference on appeal. See e.g., Stobart v. State through Dep't of Trans. and Develop., 617 So.2d 880, 882 (La. 1993).

The trial court's findings of fact cannot be set aside in the absence of manifest error or unless the finding is clearly wrong. In order to set aside a trial court's finding of fact, the appellate court must find, from the entirety of the record, that no reasonable factual basis exists for the trial court's finding and that the record establishes that the finding is clearly wrong (manifestly erroneous). **Id.** The issue to be resolved by the appellate court on appeal is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was reasonable. **Id.** Thus, where there is a conflict in the testimony introduced at trial, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed on review, even if the appellate court feels that its own evaluations of the evidence are more reasonable. **Rosell v. ESCO**, 549 So.2d 840, 844 (La. 1989).

DISCUSSION

In the Yessos' first assignment of error, they assert that the trial court erred by finding that the Scotts were not liable to them for the damages they sustained. Because the trial court had a reasonable factual basis for concluding that the accident was not caused by the Scotts' negligent

operation or maintenance of their vehicle, the Yessos' first assignment of error lacks merit.

The Yessos' claims against the Scotts sound in negligence. On appeal, the Yessos suggest solely that the Scotts negligently maintained or operated their vehicle despite an existing steering or alignment defect. The Yessos note that the Scotts' vehicle jumped the tracks of the car wash's automated propulsion system a total of four times during its trip through the wash. They assert that multiple derailments are an exceptional occurrence and that the uniqueness of the derailments proves the existence of a "problem" unique to the Scotts' vehicle. Consequently, they argue, the Scotts created the condition in the car wash that caused the collisions, and are therefore liable to them for the personal injuries and property damage they sustained.

In order to fully consider the merits of the Yessos' first assignment of error, consideration of the general principles of Louisiana tort law are necessary. The fountainhead of Louisiana tort law is La. C.C. art. 2315, which provides, in pertinent part: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Louisiana courts employ the "duty/risk" analysis in determining whether to impose delictual liability upon a defendant under La. C.C. art. 2315. See Rando v. Anco Insulations Inc., 08-1163 (La. 5/22/09), 16 So.3d 1065, 1085-86. Under the duty/risk test, the plaintiff must prove the following five separate elements in order to recover damages for injuries sustained as a result of the defendant's purported negligence: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard (the breach of duty element); (3) the defendant's

substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and, (5) actual damages (the damages element). **Rando**, 16 So.3d at 1086.

In the instant case, there is no doubt that the Scotts owed a general duty to employ reasonable care to avoid injury to the Yessos, a duty that applied to the Scotts' maintenance and operation of their vehicle. However, the trial court was presented with conflicting evidence regarding whether the Scotts breached their duty of care by operating or maintaining their vehicle despite an existing steering or alignment defect.

Manuel Scott admitted at trial that his vehicle had an alignment performed on it after the accident. Additionally, a Benny's manager who investigated the accident, Jason Leblanc ("Leblanc"), testified that the Scotts' vehicle had an extreme steering problem, which he posited may have caused the vehicle's derailment. However, Leblanc admitted that he never drove the Scotts' vehicle himself, and that his testimony was rather based upon a report developed by another Benny's employee, an individual who was no longer employed by Benny's as of the date of trial and who did not testify on Benny's behalf. Moreover, Leblanc's testimony was controverted by Manuel Scott, who testified that there were no issues with his vehicle's alignment either before or after the accident. Scott stated that he drove the vehicle some 40-45 miles immediately after the accident and that during the entire drive, his vehicle "drove normal." Scott further denied that anyone from Benny's had driven his vehicle to investigate its steering after the accident. Finally, a mechanic who inspected the Scotts' vehicle before the alignment was performed agreed that there was no problem with the Scotts'

vehicle's steering, stating that he did not have to "fight" the vehicle in order to make it drive straight.

In sum, there was conflicting evidence regarding whether the Scotts breached their duty of care by negligently operating or maintaining their vehicle despite an existing steering or alignment defect during the event in question. Mindful of our obligation not to disturb the trial court's finding of fact where there is a conflict in the testimony, see Stobart, 617 So.2d at 882, we cannot say that the trial court erred by determining that the Scotts were not liable to the Yessos. It is immaterial whether we would have reached a different conclusion had we been sitting as the trier of fact. See Rosell, 549 So.2d at 844. The trial court had a reasonable factual basis upon which to conclude that the Scotts did not negligently maintain or operate their vehicle in a manner causing the derailments and collisions. Consequently, the trial court's judgment dismissing the Yessos' claims against the Scotts was not manifestly erroneous. The Yessos' first assignment of error lacks merit.

In the Yessos' second assignment of error, they assert that the trial court erred by concluding that Benny's was not liable to them for the damages they sustained as a result of the car wash accident. On appeal, the Yessos have abandoned one of their original arguments regarding Benny's alleged negligence; the Yessos now admit that there is "no evidence that the car wash malfunctioned or had a defect which caused the derailment." They contend that the trial court's judgment in favor of defendant Benny's was nevertheless erroneous, alleging that Benny's negligently failed to properly observe its operations and respond to the Scotts' vehicle's derailment within a reasonable time. Because the trial court could have reasonably determined, based upon the evidence, that Benny's timely responded to the derailment and that Benny's operations did not otherwise pose an

unreasonable risk of harm to the Yessos, their second assignment of error lacks merit.

Whether viewed under the general principles of negligence or under the merchant liability statute, La. R.S. § 9:2800.6, the trial court had a reasonable basis for concluding that Benny's complied with its duty of care regarding its observation of its car wash operations and its response to the derailment. Pursuant to the merchant liability statute, merchants owe a duty to patrons to exercise reasonable care in maintaining their premises in a reasonably safe condition. See La. R.S. § 9:2800.6(A). In a negligence claim brought against a merchant for damages resulting from a condition on its premises, the claimant needs to prove, in pertinent part, that the merchant "failed to exercise reasonable care" regarding a condition which presented an "unreasonable risk of harm." La. R.S. § 9:2800.6(B). Similarly, under the general principles of negligence, a defendant owes a claimant a duty to act as a reasonable, prudent person under the circumstances. As Benny's admits, this imposes upon a merchant a duty to provide a reasonably safe place of business, to exercise reasonable care for the safety of persons on its premises, and to not expose such persons to unreasonable risks of injury or harm. See **Peterson v. Gibraltar Savings & Loan**, 98-1601 (La. 5/18/99), 733 So.2d 1198, 1204.

In the instant case, the Yessos contend that Benny's negligence lies in its observation of the car wash and its untimely response to the derailment. The evidence introduced at trial established that Benny's had six cut-off buttons ("kill switches") located at the car wash to stop the automated propulsion system in the event of an emergency, such as a derailment. These kill switches can be activated and stop the automated wash within one second. It is undisputed that Benny's employees were present in the general

proximity of the Yessos' vehicle during the sequence of events leading up to the derailment and rear-end collisions, and that the wash was not stopped in time to prevent the collisions. The exact time frame of Benny's response to the derailment and collision, however, remains in dispute.

On appeal, the Yessos assert that Benny's employees failed to "kill the wash for 1-2 minutes." Nevertheless, a thorough review of the record reveals that the trial court was presented with conflicting, equivocal testimony regarding Benny's response. On the one hand, Don Yesso posited that Benny's failed to shut off the car wash for "a couple of minutes" after the derailment, but admitted his estimate was just the "best [he] c[ould] come up with." Dylan Yesso likewise estimated that Benny's did not shut off the car wash "at least a few minutes[,]" but admitted Benny's employees responded to the incident "pretty quick[ly][,]" and were at the scene of the derailment within "maybe 15, 20 seconds." Similarly, Manuel Scott testified that Benny's did not respond immediately to the incident, but admitted that he could not recall exactly how long it took for Benny's to respond, stating: "I do not know if it was five minutes or [ten] minutes or what, but it was time based [sic] someone had been there." On the other hand, Leblanc testified that Benny's employees were at the scene of the derailment within 10 to 30 seconds after the initial collision. In light of the conflicting testimony regarding Benny's response to the derailment, the trial court may have rejected assertions that Benny's failed to respond to the incident or shut off the car wash for one, two, or more minutes, and may have instead reasonably credited testimony establishing a more timely response.

Even if the delay herein was not otherwise untimely, it must still be considered whether Benny's observation procedures presented an unreasonable risk of harm to the Yessos. On cross-examination, a Benny's

general manager, Dean Ducoing (“Ducoing”), admitted that if an employee had been placed inside the building by a kill switch and instructed to watch the occurrences inside of the car wash, the car wash could have been shut off more quickly, possibly preventing one or more of the rear-end collisions that occurred here, depending upon the vantage point of the hypothetical employee. However, Ducoing further testified that the drive system used by Benny’s at its car wash is the standard drive system used around the world; he stated this system is “extremely reliable” and rarely exhibits problems. He testified that because of the rarity of incidences in which the wash needed to be stopped, it was “not even remotely necessary” to have someone assigned permanently to all of the kill switches in the event of an emergency. He agreed that Benny’s current observation procedures and safety precautions were sufficient to handle the rare occasions in which there was a need to stop the car wash. Based upon Ducoing’s testimony, the trial court may have reasonably concluded that Benny’s observation procedures did not pose an unreasonable risk of harm and that Benny’s had therefore not breached its duty of care owed to the Yessos.

We find the trial court had a reasonable factual basis for concluding that the Yessos did not bear their burden of proving Benny’s negligence. The trial court may have reasonably determined that a potential maximum 30-second delay in response to the derailment and subsequent collision was not untimely, and may have further reasonably concluded that Benny’s observation procedures did not pose an unreasonable risk of harm to the Yessos. Therefore, the trial court’s judgment was not manifestly erroneous. The Yessos’ second assignment of error lacks merit.

DECREE

For the foregoing reasons, the judgment of the Nineteenth Judicial District Court, dismissing the Yessos' suit with prejudice, is affirmed. All costs of this appeal are assessed to the plaintiffs-appellants, Don and Dylan Yesso.

AFFIRMED.