NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1218

EMILE AITES, HUSBAND OF/AND GLENN AITES

VERSUS

ANDRE NOEL, SR., D/B/A ANDRE'S UPHOLSTERY & CUSTOM INTERIORS, JOEL E. SANDERS, AND STATE FARM FIRE & CASUALTY COMPANY

Judgment Rendered: FEB 1 2 2010

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number 538,536

Honorable Wilson Fields, Judge Presiding

****

Randy B. Ligh Baton Rouge, LA and Victor R. Loraso, III Baton Rouge, LA	Counsel for Plaintiffs/Appellees, Emile and Glenn Aites
Alice Estill Baton Rouge, LA	Counsel for Defendants/Appellees, Andre Noel, Sr., and Andre's Upholstery & Custom Interiors
Craig D. Gremillion Baton Rouge, LA	Counsel for Defendant/Appellant, State Farm Fire & Casualty Company

****

BEFORE: WHIPPLE, HUGHES AND WELCH, JJ.

Welch J. concurs without reasons.

WHIPPLE, J.

State Farm Fire and Casualty Company ("State Farm") appeals the trial court's judgment awarding damages to plaintiffs, Emile and Glenn Aites, for injuries sustained by Mr. Aites when he slipped on a ramp while exiting the shop area of Andre's Upholstery and Custom Interiors (Andre's Upholstery"). For the following reasons, we amend the judgment to assign a percentage of fault to Mr. Aites and, as amended, affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On the drizzling, rainy morning of January 13, 2005, Mr. Emile Aites visited Andre's Upholstery in Baton Rouge, Louisiana, to obtain an estimate from Andre Noel, Sr., the owner of Andre's Upholstery, for the repair of the vinyl top of Mr. Aites's wife's vehicle. Mr. Aites entered the business premises, which were leased by Mr. Noel from premises owner Joel Sanders, by means of a stairway leading into the office area of the premises. After Mr. Aites and Mr. Noel spoke in the office area, both men proceeded through an interior door into the shop or garage area of the premises to view vinyl swatch samples. In addition to an interior doorway from the office area, the garage or shop area could also be accessed from outside through a garage door opening and adjoining ramp.

While the men were in the shop or garage area, Mr. Noel instructed Mr. Aites to drive the vehicle into the garage or shop area to match vinyl swatches to the vinyl top on the vehicle. When he instructed Mr. Aites to retrieve his vehicle, Mr. Noel motioned toward the vehicle, which was parked outside and visible through the open garage door. Mr. Aites, who was holding an umbrella, then began to descend the ramp leading outside from the garage or shop area, walking at a fast pace, to retrieve the vehicle

when he slipped on the ramp and fell, fracturing his ankle. As a result of the accident, Mr. Aites had to undergo surgery to repair the ankle.

Thereafter, Mr. Aites and his wife, Glenn Aites, filed suit against Mr. Noel, d/b/a Andre's Upholstery; Mr. Sanders, as owner of the property; and State Farm, the liability insurer of Mr. Sanders, seeking damages as a result of the fall. Following a bench trial, the trial court found Mr. Sanders and State Farm 100% at fault and further found that Mr. Aites was entitled to general and special damages totaling $40,297.94, subject to a $5,000.00 credit in favor of State Farm for medical payments previously made. The trial court also found that Mrs. Aites was entitled to loss-of- consortium damages in the amount of $7,500.00. By judgment dated March 4, 2009, the trial court rendered judgment in favor of Mr. and Mrs. Aites and against State Farm in the amounts set forth in its reasons for judgment.[1]

From this judgment, State Farm appeals, contending that: (1) the trial court erred as a matter of law in finding Mr. Sanders and State Farm liable for Mr. and Mrs. Aites's injuries without first determining whether the ramp in question contained a defect which created an unreasonable risk of harm; and (2) alternatively, the trial court erred in finding Mr. Aites free from fault where he chose to descend a metal ramp in the rain, at a pace faster than walking, while wearing rubber-soled tennis shoes and holding an umbrella. Mr. and Mrs. Aites answered the appeal, contending that their general damage awards were too low.

---

[1]Notably, State Farm, as Mr. Sanders's insurer, answered the Aiteses' petition herein, but no answer was filed on behalf of Mr. Sanders. Nonetheless, while no answer was ever filed on his behalf, Mr. Sanders appeared at trial, apparently represented by counsel for State Farm. Despite Mr. Sanders's appearance and the trial court's findings of fault, the judgment herein was rendered against State Farm only, and not against Mr. Sanders. Mr. and Mrs. Aites did not appeal the trial court's failure to render judgment against Mr. Sanders, and, while State Farm mentions in a footnote in its brief, that the "judgment should have included Joel E. Sanders," it likewise did not specifically assign this as error.

DEFECT IN THE RAMP
(Assignment of Error No. 1)

In its first assignment of error, State Farm contends that the trial court committed legal error in finding Mr. Sanders and State Farm at fault herein while failing to determine whether the ramp at issue contained a defect which created an unreasonable risk of harm and which caused Mr. Aites's injury. Thus, State Farm contends that this court should review the matter *de novo* and, upon *de novo* review, should conclude that the Aiteses failed to prove these elements of their claim.

The owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. He must discover any unreasonably dangerous condition on the premises and either correct the condition or warn potential victims of its existence. Dauzat v. Curnest Guillot Logging Inc., 2008-0528 (La. 12/2/08), 995 So. 2d 1184, 1186; Bozeman v. Scott Range Twelve Limited Partnership, 2003-0903 (La. App. 1st Cir. 4/2/04), 878 So. 2d 615, 619, writ not considered, 2004-1945 (La. 11/8/04), 885 So. 2d 1142. This duty is the same under the strict liability theory of LSA-C.C. art. 2317 and the negligence theory of LSA-C.C. art. 2315. Under either theory, the plaintiff has the burden of proving that: (1) the property that caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. Bozeman, 878 So. 2d at 619.

Through this assignment of error, State Farm complains that the trial court committed legal error because it failed to make specific findings as to the second and third elements.

At the conclusion of the bench trial herein, the trial court stated that it found "Mr. Sanders and State Farm at fault for the accident." While the trial court did not further expound on its finding of fault, specifically regarding its implicit underlying findings of a defect creating an unreasonable risk of harm or the cause-in-fact element, we disagree with State Farm's assertion that the failure to articulate the particular basis for the court's ruling constitutes legal error interdicting the ruling or affecting the standard of review. We further find no merit in State Farm's seeming implication that the trial court clearly failed to consider these underlying elements necessary to its ultimate finding of fault.

Louisiana Code of Civil Procedure article 1917(B) provides as follows:

> In nonjury cases to recover damages for injury, death, or loss, whether or not requested to do so by a party, the court shall make specific findings that shall include those matters to which reference is made in Paragraph C of Article 1812 of this Code. **These findings need not include reasons for judgment.**

(Emphasis added).

Further, Paragraph C of Code of Civil Procedure article 1812 pertains to jury trials and lists the issues, in cases to recover damages for injury, death, or loss, for which a trial court, at the request of any party, must submit to the jury special written interrogatories. These issues include: (1) whether a party from whom damages are claimed was at fault and, if so, whether such fault was a legal cause of the damages and the degree of such fault; (2) if appropriate under the facts, whether another party or non-party was at fault and, if so, whether such fault was a legal cause of the damages and the degree of such fault; (3) if appropriate, whether there was negligence

attributable to any party claiming damages; and (4) the total amount of special damages and general damages sustained.

In the instant case, the trial court clearly determined that Mr. Sanders and State Farm were at fault for the accident, thereby complying with LSA-C.C.P. art. 1917(B).[2] Moreover, based on our review of the record, and given that a large portion of the trial testimony centered around the alleged defective condition of the ramp, we likewise conclude that the trial court's finding of fault was clearly based on the necessary underlying factual findings of an unreasonably dangerous condition and cause-in-fact. Accordingly, we find no merit to State Farm's argument that the trial court committed legal error in failing to specifically state that the ramp contained a defect that created an unreasonable risk of harm and that the defect caused Mr. Aites's injury. Accordingly, *de novo* review is not warranted herein.

Additionally, we note that the evidence presented at trial established that the ramp was regularly used by pedestrians to enter and exit the shop or garage area of the premises, and there were no signs on the premises warning pedestrians not to use the ramp to enter the shop or garage area. Moreover, the trial court was presented with the opposing opinions of two expert witnesses with regard to whether the ramp presented an unreasonable risk of harm.

Wilfred Gallardo, the Aiteses' safety expert, testified that the metal ramp at issue had a raised diamond plate. He explained that, normally, the raised diamonds have rough ridges on top of them to provide traction, but that when the ridges wear off, all that is left is a "plain raised diamond plate" that is a "smooth surface." His inspection of the ramp revealed that there

---

[2]We further note that State Farm did not request reasons for judgment from the trial court, as it was entitled to do pursuant to LSA-C.C.P. art. 1917(A).

were no rough ridges on the raised pattern of this particular ramp. Rather, the ramp had a plain raised diamond plate, which he opined was "the same thing as stepping on a piece of metal," and which would be slippery when wet. Mr. Gallardo further stated that when he placed water on the ramp during his inspection, his foot slipped on the ramp despite the fact that he was wearing non-slip shoes. Moreover, while the ramp was designed as a vehicle ramp, Mr. Gallardo noted that it was being utilized as a pedestrian ramp, and it did not have a handrail for use as a pedestrian ramp. Thus, based on the foregoing, Mr. Gallardo opined that it was defective for that particular use. Additionally, Mr. Gallardo testified that, in his opinion, the rust on the ramp would make it "a little bit more slippery with water," noting that as a pedestrian walked on the rusted surface, some of the rust would come off.

Mr. Gallardo testified that the ramp should have been roped off with a sign warning pedestrians not to use it. He testified that alternatively, the ramp could have been painted with a non-skid paint at a mere cost of approximately $50.00.

On the other hand, Fred Vanderbrook, State Farm's expert mechanical engineer, opined that, while the ramp was intended primarily as a vehicle ramp, the raised design on the ramp, which he called a checker-plate design, provided a very good slip-resistant surface for either vehicles or for pedestrians.[3] Mr. Vanderbrook further testified that, in his opinion, the rust on the surface of the ramp also made it "relatively rough" and that rusted surfaces "are pretty slip resistant." Thus, Mr. Vanderbrook did not believe

---

[3]Mr. Vanderbrook was accepted by the court as an expert in the field of engineering, but not safety.

that this ramp presented an unreasonable risk of harm or that it was defective in the manner in which it was maintained.

Mr. Vanderbrook went on to testify that, "in all likelihood," as Mr. Aites was coming down the ramp at an increased rate of speed, Mr. Aites turned and "the motion he was exerting exceeded the coefficient of friction that was available to him," thereby causing him to slip. However, when questioned by the court as to how he determined that Mr. Aites had turned as he was walking down the ramp, Mr. Vanderbrook responded, "Well, that's when a lot of accidents occur in the rain." Mr. Vanderbrook then acknowledged that he did not know whether Mr. Aites had turned or walked straight down the ramp in this particular case.

A trial court may accept or reject in whole or in part the pinion expressed by an expert. The effect and weight to be given expert testimony is within the broad discretion of the trial court. Rao v. Rao, 2005-0059 (La. App. 1st Cir. 11/4/05), 927 So. 2d 356, 365, writ denied, 2005-2453 (La. 3/24/06), 925 So. 2d 1232. Moreover, where there is a difference in opinion between experts on a factual matter, it is within the trier of fact's discretion to favor one opinion over another. Guidroz v. State, through Department of Transportation and Development, 94-0253 (La. App. 1st Cir. 12/22/94), 648 So. 2d 1361, 1365. In the instant case, the trial court obviously chose to credit the testimony and opinions of Mr. Gallardo over those of Mr. Vanderbrook, and we cannot conclude that this choice was an abuse of discretion. Moreover, considering the record as a whole, we cannot conclude that the trial court manifestly erred in its determination that Mr.

Sanders and State Farm were at fault herein.[4]

COMPARATIVE FAULT OF MR. AITES
(Assignment of Error No. 2)

In this assignment of error, State Farm contends that the trial court erred in failing to find that Mr. Aites's negligence contributed to the accident and in failing to assign any fault to Mr. Aites. Specifically, State Farm avers that Mr. Aites's actions in choosing to exit the shop area of the premises by using the metal ramp at a fast pace while holding an umbrella and wearing tennis shoes rendered Mr. Aites wholly or significantly at fault for his own injuries.

A plaintiff's comparative fault must be determined objectively according to the standard of care expected of a reasonable man under like circumstances. Buckbee v. Aweco, Inc., 614 So. 2d 1233, 1237 (La. 1993). In the instant case, Mr. Aites, was sixty-eight years old at the time of trial. He testified that on the day of the accident, the weather was rainy, though it was drizzling and not raining hard. He acknowledged that the ground and the ramp were wet at the time, but stated that the ramp did not appear out of the ordinary.

The record further reveals that when Mr. Noel instructed Mr. Aites to pull his vehicle into the shop or garage area, Mr. Noel motioned toward the garage opening, indicating that Mr. Aites should exit the shop area through the garage opening and down the ramp. Moreover, there was no barrier or rope across the garage door opening to prevent him or any other customer from exiting in that manner. Indeed, Mr. Aites exited the shop by that route,

---

[4]State Farm has not challenged on appeal that Mr. Sanders was the owner of the property at issue or that he was responsible for the ramp on which Mr. Aites slipped. Moreover, the record before us amply supports the findings that Mr. Sanders had knowledge of the dangerous condition of the ramp prior to the accident in question and that the condition of the ramp caused Mr. Aites's injuries.

which was the quickest route to retrieve his vehicle.

Regarding the manner in which he proceeded down the ramp, Mr. Aites stated that he was not running, but acknowledged that he was walking down the ramp at a fast pace because it was raining. Mr. Aites was wearing tennis shoes at the time he slipped on the ramp. Despite the fact that he was walking at a fast pace, according to Mr. Aites, he was being careful.

Considering the foregoing and the record as a whole, we must conclude that the trial court committed manifest error in failing to find that Mr. Aites was comparatively at fault, albeit to a much lesser degree, in causing his accident. While a person may have an impulse to walk hurriedly in the rain to minimize getting wet, the rainy conditions on the morning of the accident dictated that Mr. Aites should have walked more slowly than normal, rather than more quickly, while descending a wet, metal ramp with no handrails. Accordingly, the trial court erred in failing to find that Mr. Aites was also at fault and in failing to apportion any fault to him.

After an appellate court finds a "clearly wrong" apportionment of fault, it should adjust the award, but only to the extent of lowering or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. Clement v. Frey, 95-1119 (La. 1/16/96), 666 So. 2d 607, 611. Considering the facts established herein in light of the factors set forth in Watson v. State Farm Fire and Casualty Insurance Co., 469 So. 2d 967, 974, which guides us in the apportionment of fault, we assess ten percent fault to Mr. Aites and ninety percent fault to Mr. Sanders and State Farm and amend the trial court's judgment accordingly. See Leonard v. Ryan's Family Steak Houses, Inc., 2005-0775 (La. App. 1st Cir. 6/21/06), 939 So. 2d 401, 411.

GENERAL DAMAGES
(Answer to Appeal)

In their answer to appeal, Mr. and Mrs. Aites complain that the trial court's awards of general damages were too low.[5] The trier of fact has much discretion in the assessment of damages. LSA-C.C. art. 2324.1. A reviewing court should not set aside an award of general damages unless an analysis of the facts and circumstances reveals an abuse of the factfinder's discretion in setting the award. Smith v. Roussel, 2000-1028 (La. App. 1st Cir. 6/22/01), 809 So. 2d 159, 167. The discretion vested in the trier of fact is great, and even vast, so that an appellate court should rarely disturb an award of general damages. It is only when the award is, in either direction, 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, that the appellate court should increase or reduce the award. Youn v. Maritime Overseas Corporation, 623 So. 2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 114, 114 S. Ct. 1059, 127 L. Ed. 2d 379 (1994).

Considering the specific facts in this case, we cannot say that the trial court abused its vast discretion in the $25,000.00 general damage award in favor of Mr. Aites or in the $7,500.00 loss of consortium award to Mrs. Aites herein. Accordingly, we find no merit to this argument.

CONCLUSION

For the above and foregoing reasons, the trial court's March 4, 2009 judgment is hereby amended to assess Mr. Aites with ten percent fault in causing the accident and to, correspondingly, reduce the percentage of fault

[5]State Farm counters that because the Aiteses limited their claim to an amount below $50,000.00, they are estopped from seeking additional damages, to the extent that such an amendment would exceed the stipulated value of their claims. In response, without directly addressing this argument, Mr. and Mrs. Aites contend that there is a "window" allowing some amendment to increase their awards. Because we find no increase is warranted, we pretermit further discussion.

attributable to State Farm to ninety percent. Accordingly, the judgment is further amended to reduce the awards in favor of Emile Aites and Glenn Aites each by ten percent. In all other respects, the judgment is affirmed. Costs of this appeal are assessed ten percent to Mr. and Mrs. Aites and ninety percent to State Farm.

AMENDED AND, AS AMENDED, AFFIRMED.