NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0460

FLORENCE SCOTT AND OLLIE SCOTT

VERSUS

**EDDIE MARSHALL HOPPER, SR.,
E & E FARMS PRODUCE, LLC, AND
ABC INSURANCE COMPANY**

**On Appeal from the 20th Judicial District Court
Parish of East Feliciana, Louisiana
Docket No. 37,560, Division "B"
Honorable William G. Carmichael, Judge Presiding**

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Plaintiffs-Appellants
Florence Scott and Ollie Scott**

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**Attorney for
Defendants-Appellees
Eddie Marshall Hopper, Sr.,
and E & E Farms Produce, LLC**

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered November 9, 2011

PARRO, J.

The plaintiffs, Florence Scott and Ollie Scott, have appealed the judgment of the trial court, dismissing their claims against the defendants in this trip and fall case. For the reasons that follow, we affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Florence Scott was allegedly injured in a trip and fall accident that occurred at a wholesale produce warehouse in Clinton, Louisiana, which was owned by E & E Farms Produce, LLC (E & E) and operated by Eddie Hopper, Sr. At the time of the alleged accident, E & E was a wholesale distributor of fruits and vegetables to retail stores; however, E & E sometimes sold produce to individual retail customers who came into the warehouse.

On April 2, 2005, Ms. Scott went to E & E to purchase a watermelon, which, according to her testimony, she had done many times prior to this date. After selecting a watermelon from a bin just inside the door of the warehouse, Ms. Scott turned around to look at some onions, which she claimed were brought to her attention by Mr. Hopper. As she turned, Ms. Scott tripped over a forklift owned by E & E that was parked near the watermelon bin. According to Ms. Scott, she was unable to see the forklift because the lighting in the warehouse was insufficient. In addition, she contended that the forks on the forklift had not been lowered all the way to the floor.

Ms. Scott testified that, after she fell, she collected her belongings from the floor and walked back out to her car. According to her, Mr. Hopper then brought the watermelon to her car, where she paid him, and she then drove home. Although she testified that she was in immediate pain as a result of the fall, Ms. Scott did not seek medical attention until two days later, when her husband took her to the emergency room at Our Lake of the Lake Hospital after work.

Thereafter, Ms. Scott filed a petition against E & E and Mr. Hopper, seeking

damages for the injuries she allegedly sustained in the trip and fall in the warehouse.[1] Ms. Scott's husband, Ollie Scott, was also named as a plaintiff in the petition, and he testified at trial concerning the damages he allegedly suffered for loss of consortium as a result of his wife's accident.[2]

After a trial on the merits, the trial court found that the plaintiffs failed to carry their burden of proof on the threshold issue of whether the situation that confronted Ms. Scott in the warehouse presented an unreasonable risk of harm. Specifically finding that there was no unreasonable risk of harm, the trial court dismissed the plaintiffs' petition at their cost. The plaintiffs filed a motion for new trial, which was denied. Thereafter, the plaintiffs appealed.[3]

STANDARD OF REVIEW

A court of appeal may not overturn a judgment of a trial court absent an error of law or a factual finding that is manifestly erroneous or clearly wrong. Morris v. Safeway Ins. Co. of Louisiana, 03-1361 (La. App. 1st Cir. 9/17/04), 897 So.2d 616, 617, writ denied, 04-2572 (La. 12/17/04), 888 So.2d 872. In order to affirm the factual findings of the trier of fact, the supreme court posited a two-part test for the appellate review of facts: (1) the appellate court must find from the record that there is a reasonable factual basis for the finding of the trier of fact; and (2) the appellate court must further determine that the record establishes that the finding is not clearly wrong (manifestly erroneous). Mart v. Hill, 505 So.2d 1120, 1127 (La. 1987). Thus, if there is no reasonable factual basis in the record for the trier of fact's finding, no additional inquiry

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[1] The petition also named the fictional ABC Insurance Company as a defendant; however, no actual insurance company was ever substituted as a defendant, because E & E had apparently allowed its insurance coverage to lapse just prior to this incident.

[2] Mr. Scott testified at trial regarding a claim for loss of consortium, despite the fact that the petition does not state a claim for loss of consortium on behalf of Mr. Scott. However, Mr. Scott testified without objection by the defendants, and the pleadings were apparently enlarged or amended by this testimony. See LSA-C.C.P. art. 1154.

[3] The plaintiffs filed a request for findings of fact and written reasons for judgment pursuant to LSA-C.C.P. art. 1917; however, there is nothing in the record to indicate that the trial court provided the findings of fact or written reasons as requested. Nevertheless, the plaintiffs have not filed a supervisory writ or a motion for remand, seeking to have the reasons provided or to have the matter remanded to the trial court; therefore, this court will review this matter as in other cases where no written reasons have been provided. See Yuma Petroleum Co. v. Thompson, 96-1840 (La. App. 1st Cir. 2/20/98), 709 So.2d 824, 827, affirmed in part and reversed in part on other grounds, 98-1399 (La. 3/2/99), 731 So.2d 190.

is necessary to conclude there was manifest error. However, if a reasonable factual basis exists, an appellate court may set aside a factual finding only if, after reviewing the record in its entirety, it determines the factual finding was clearly wrong. See Stobart v. State, through Dep't of Transp. and Dev., 617 So.2d 880, 882 (La. 1993); Moss v. State, 07-1686 (La. App. 1st Cir. 8/8/08), 993 So.2d 687, 693, writ denied, 08-2166 (La. 11/14/08), 996 So.2d 1092.

If the trial court's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse those findings even though convinced that, had it been sitting as the trier of fact, it would have weighed the evidence differently. Hulsey v. Sears, Roebuck & Co., 96-2704 (La. App. 1st Cir. 12/29/97), 705 So.2d 1173, 1176-77. However, an appellate court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination, where 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. Id. at 1177.

DISCUSSION

In their petition, the plaintiffs alleged that the defendants were liable for placing a forklift in an area where they knew or should have known it would constitute a "fall hazard." In order to recover against a merchant for such a "fall hazard," a plaintiff must prove that (1) the condition that caused the injury created a foreseeable and unreasonable risk of harm; (2) the merchant had actual or constructive notice that the condition existed for a period of time prior to the accident; and (3) the merchant failed to exercise reasonable care. White v. Wal-Mart Stores, Inc., 97-0393 (La. 9/9/97), 699 So.2d 1081, 1083-84; see LSA-R.S. 9:2800.6(B).

Ms. Scott testified that she stopped by the warehouse on the date of the accident to purchase a watermelon. She acknowledged that she had been in the warehouse many times, as she had gone to the warehouse on two or three occasions every year since she and her husband had moved to the Clinton area in 1980. Ms.

Scott testified that she remembers one of the doors to the warehouse being open and that there was enough light in the warehouse for her to select a watermelon; however, she did not remember there being any overhead lighting, windows, or skylights in the warehouse. According to Ms. Scott, she was unable to see the forklift before she tripped over it. She further contended that the forks on the forklift were not lowered to the floor, thus making it more likely that she would trip.

Mr. Hopper testified that the warehouse had a ten-foot door and a twelve-foot door, which were both open at the time of Ms. Scott's fall. In addition, Mr. Hopper testified that the warehouse had four windows and skylights in the roof, as well as eight-foot fluorescent lights, which were turned on. Although no specific time was established for the accident, the testimony of the witnesses, including that of Mr. Hopper's daughter, Cynthia Smith, indicated that the accident occurred during the daylight hours.[4] Mr. Hopper further testified that he believed that the forklift had last been driven by his son, who was not present at the time of the accident, and that the forks on the forklift had been lowered to the floor when it was parked. Ms. Smith confirmed that it was the normal practice to lower the forks to the floor when parking the forklift.

After a trial on the merits, the trial court provided oral reasons for judgment, finding that the plaintiffs had failed to meet their burden of proving the threshold issue of whether the situation that confronted Ms. Scott in the warehouse presented an unreasonable risk of harm. Specifically, the trial court determined that the evidence demonstrated that the incident had occurred during daylight hours and that there was at least one large door open to the warehouse. In addition, the trial court noted that the warehouse had windows and skylights and that, therefore, the lighting was adequate for her to select a watermelon and to retrieve her belongings after they had fallen on the floor. The trial court further noted that it was uncontroverted that Ms. Scott had been to the warehouse several times over the years before this incident.

[4] Ms. Smith testified that she went to her father's house in the afternoon on the date of the accident and that the accident had already occurred.

Finally, the trial court noted that the forklift, which was required for use in the wholesale warehouse to move pallets of produce, had not moved from the time Ms. Scott entered the warehouse until she tripped and fell over it. Based on these findings, the trial court concluded that the condition of the warehouse, established by the evidence, did not present an unreasonable risk of harm to Ms. Scott.[5] After a thorough review of the record, we find no manifest error in the factual findings of the trial court, nor do we find any legal error.[6]

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court, dismissing the claims of the plaintiffs, Florence Scott and Ollie Scott, with prejudice. All costs of this appeal are assessed to the plaintiffs.

AFFIRMED.

[5] Although additional evidence was presented concerning the extent of the plaintiff's injuries, that evidence was irrelevant to the threshold issue of whether the situation in the warehouse presented an unreasonable risk of harm to Ms. Scott.

[6] The plaintiffs have also challenged the trial court's denial of their motion for new trial on discretionary grounds pursuant to LSA-C.C.P. art. 1973. However, the granting or denying of such a motion lies within the wide discretion of the trial court, and its determination shall not be disturbed absent an abuse of that discretion. Burke v. Baton Rouge Metro Airport, 97-0947 (La. App. 1st Cir. 5/15/98), 712 So.2d 1028, 1031. The plaintiffs have failed to offer any evidence to suggest that the trial court abused its discretion in denying the plaintiffs' motion for new trial. Accordingly, we find no error in the trial court's denial of the motion.