NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2005 CA 1808

JEFFREY SCOTT VARNADO

VERSUS

TZENG H. CHENG d/b/a TEN FLAGS INN AND XYZ INSURANCE COMPANY

Judgment Rendered: SEP 2 0 2006

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge, State of Louisiana
Trial Court No. 510,397, Section "27"

Honorable Mary Terrell Joseph, Judge Pro Tempore Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

This is an appeal by a hotel and its insurer from a judgment in favor of a hotel patron who sustained personal injuries when he stepped into a hole adjacent to a sidewalk. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On April 12, 2003, Jeffrey Scott Varnado stepped in a hole adjacent to a sidewalk at the Ten Flags Inn, where he stayed periodically over a period of many years. Mr. Varnado brought suit on August 4, 2003 against the owner of the hotel, Tzeng H. Cheng d/b/a Ten Flags Inn, and also named as a defendant XYZ Insurance Company. Plaintiff alleged that as a result of tripping in the hole he fell and fractured his right knee,[1] and sustained injury to his elbow, neck, and right arm. An answer to the suit was filed on September 12, 2003 by "Defendants, Ten Flags Inn and Alea London, Ltd.," contending the accident was caused solely by or contributed to by the actions or inactions of the plaintiff.

Following a trial held on January 26, 2005, the jury rendered a verdict finding Tzeng Cheng and Ten Flags Inn 60% at fault and the plaintiff 40% at fault. The jury found plaintiff had suffered damages totaling $5,388.00, which consisted of past medical expenses in the amount of $4,888.00 and past lost wages in the amount of $500.00. Judgment was signed in favor of plaintiff on February 15, 2005, decreeing "Tzeng H. Cheng d/b/a Ten Flags Inn and 'XYZ' Insurance Company" 60% at fault and plaintiff 40% at fault for the damages sustained in the amounts of $4,888.00 and $500.00.

Thereafter, defendants filed a motion for new trial alleging the discovery of new evidence; this motion was denied by the trial court.

[1] Plaintiff's knee injury was diagnosed as an avulsion fracture of the tibial spine region involving the insertion site of the posterior cruciate ligament.

Plaintiff also filed a motion for judgment notwithstanding the verdict and/or for new trial. The trial court granted plaintiff's motion and awarded plaintiff $10,300.00 in general damages; a judgment so holding was signed on April 20, 2005.

Defendants appeal and assert the following assignments of error: (1) the trial court erred in failing to grant defendants' motion for new trial when the law and evidence presented at trial clearly demonstrated that the plaintiff was solely at fault for that accident complained of by failing to utilize a defect-free sidewalk in front of his residence and striking out across the grassy "yard" in front of his lodgings, and (2) the trial court erred in failing to grant the defendants' motion for new trial when the law clearly prohibits the jury from being exposed to "purchased or perjured testimony" that would prejudice the defendants' case.

LAW AND ANALYSIS

In this appeal, defendants contend exclusively that the trial court erred in denying their motion for new trial, asserting that the jury was prejudiced by the introduction of the allegedly perjured testimony of Norman Fisk, and asserting that the verdict of the jury was contrary to the law and evidence in assigning fault to them for an alleged defect in the "yard" of their business premises.

Motion for New Trial

A new trial may be granted, upon contradictory motion of any party or by the court on its own motion, to all or any of the parties and on all or part of the issues, or for re-argument only. If a new trial is granted as to less than all parties or issues, the judgment may be held in abeyance as to all parties and issues. LSA-C.C.P. art. 1971. A new trial shall be granted, upon contradictory motion of any party, in the following cases: (1) when the

verdict or judgment appears clearly contrary to the law and the evidence; (2) when the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial; (3) when the jury was bribed or has behaved improperly so that impartial justice has not been done. LSA-C.C.P. art. 1972. A new trial may be granted in any case if there is good ground therefor, except as otherwise provided by law. LSA-C.C.P. art. 1973.

As stated by the supreme court in **Campbell v. Tork, Inc.**, 2003-1341, p. 3 (La. 2/20/04), 870 So.2d 968, 970-71, a trial judge may order a new trial if a jury's verdict cannot be supported by "any fair interpretation of the evidence" (quoting **Martin v. Heritage Manor South Nursing Home**, 2000-1023, p. 3 (La. 4/3/01), 784 So.2d 627, 631-32). In considering a motion for new trial under LSA-C.C.P. art. 1972, the trial court may evaluate the evidence without favoring either party, it may draw its own inferences and conclusions, and evaluate witness credibility to determine whether the jury had erred in giving too much credence to an unreliable witness. However, this does not mean that the trial judge can usurp the jury's fact-finding role. **Martin v. Heritage Manor South Nursing Home**, 2000-1023 at p. 4, 784 So.2d at 631.

The fact that a determination on a motion for new trial involves judicial discretion does not imply that the trial court can freely interfere with any verdict with which it disagrees. The discretionary power to grant a new trial must be exercised with considerable caution, for a successful litigant is entitled to the benefits of a favorable jury verdict. Fact finding is the province of the jury, and the trial court must not overstep its duty in overseeing the administration of justice. The trial court is not free to

interfere with any verdict with which it simply disagrees. **Davis v. Wal-Mart Stores, Inc.**, 2000-0445, p. 10 (La. 11/28/00), 774 So.2d 84, 93.

The applicable standard of review for an appellate court regarding a ruling on a motion for new trial is whether the trial court abused its discretion. In order to apply this standard, an appellate court is faced with the balancing of two very important concepts: the great deference given to the jury in its fact finding role and the great discretion given to the trial court in deciding whether to grant a new trial. Though the trial court has much discretion in determining whether to grant a new trial, an appellate court should not hesitate to set aside the ruling of the trial judge in a case of manifest abuse. Thus, although the scales are clearly tilted in favor of the survival of the jury's verdict, the trial court is left with a breadth of discretion that varies with the facts and events of each case. **Campbell v. Tork, Inc.**, 2003-1341 at p. 4, 870 So.2d at 971 (citing **Davis v. Wal-Mart Stores, Inc.**, 774 So.2d. at 93-94, and **Lamb v. Lamb**, 430 So.2d 51 (1983)).

With these precepts in mind, we turn now to an examination of defendants' two bases for contending their motion for new trial should have been granted by the trial court.

The Jury Verdict Against Defendants was Contrary to the Law and Evidence

Defendants first contend that the jury verdict was against the law and evidence in that the jury erred in finding that the minor irregularities and obstacles of the Ten Flags Inn "yard" constituted defects that presented an unreasonable risk of injury to the tenants. Defendants assert that the evidence showed that plaintiff had available to him a defect-free sidewalk on which to walk around the premises of the Ten Flags Inn yet because he was "intoxicated or otherwise impaired" he negligently failed to use the

sidewalk. Defendants further argue that because of Mr. Varnado's "chemically-altered mental state" he either "missed or fell off the sidewalk entirely" or chose to travel in an area not designed for travel, i.e., the "grassy yard-like area." Defendants contend that it was not forseeable that a tenant would abandon a safe walkway to travel over an area not designed or maintained for travel, and that the jury verdict imposing liability for a defect in that area is clearly contrary to the evidence presented at trial and jurisprudence regarding liability of landowners for pedestrian travel over lawns.

Prior to its revision and reenactment by 2004 La. Acts, No. 821, § 1, effective January 1, 2005, LSA-C.C. art. 2695 provided:[2]

> The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for same.

Former Article 2695 imposed strict liability on a landlord, which extended to the common areas of an apartment building, including grassy areas adjacent to walkways. See **Barnes v. Riverwood Apartments Partnership**, 38,331 (La. App. 2 Cir. 4/7/04), 870 So.2d 490, writ denied, 2004-1145 (La. 6/25/04), 876 So.2d 845.[3] In **Barnes**, a tenant stepped in a hole while walking through an apartment complex common area en route to a designated drop-off site for canned food donations; the trial court dismissed the tenant's action on motion for summary judgment. The

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[2] Because 2004 La. Acts, No. 821, § 1, replacing former LSA-C.C. art. 2695 with LSA-C.C. arts. 2696 and 2697, did not become effective until January 1, 2005 and plaintiff's accident occurred on April 12, 2003, the former LSA-C.C. art. 2695 is applicable to plaintiff's case.

[3] See also **Laborde v. St. James Place Apartments**, 2005-0007 (La. App. 1 Cir. 2/15/06), 928 So.2d 643, where liability was imposed for an injury caused to a tenant by hole with a protruding stump in an apartment common area.

appellate court reversed, finding genuine issues of fact remained as to the landlord's negligence. In so holding the appellate court specifically rejected a contention that former Article 2695 strict liability was implicitly repealed by the 1996 enactment of LSA-C.C. art. 2317.1, and further noted the jurisprudential prohibition against an LSA-R.S. 9:3221 contractual assumption of liability by a tenant for the common areas of an apartment complex.

Although not a landlord/tenant case, we find the defect at issue in the case of **Landry v. State**, 495 So.2d 1284 (La. 1986), similar in nature to that alleged herein. In **Landry**, the plaintiff's injury was caused by a hole partially obscured by grass and located immediately beside a public seawall in a spot where anyone stepping off the seawall would place their foot. The potential for harm by such a defect was found to be great because the area was heavily used at all hours by adults and children, and the defect was located in a spot where foot traffic would be frequent. Thus the supreme court determined that the defect presented an unreasonable risk of harm for which the landowner would be liable. **Landry v. State**, 495 So.2d at 1288.

In the instant case, evidence introduced at trial showed that the accident site consisted of a long row of hotel rooms, having exterior entrance doors that opened onto a long narrow covered sidewalk or porch. Adjacent to the covered sidewalk or porch was a narrow grassy area, approximately four feet in depth, running the length of the building. At intervals where hotel room doors were located, a small uncovered sidewalk connected the covered building sidewalk or porch with the parking lot that was on the other side of the grassy area. These small sidewalks were the width of the hotel room doors and perpendicularly traversed the approximately four-foot-deep

grassy area. Plaintiff's accident occurred when he stepped off of one of these sidewalks into a hole.

Photographs of the sidewalk in question, introduced into evidence by the plaintiff, showed that it had five potential defects, namely: a concrete parking block approximately five or six inches in height positioned across at least half of the width of the sidewalk entrance from the parking lot side; at that same point, grass was growing onto the sidewalk from the side opposite the concrete block obscuring another five or so inches of the sidewalk entrance from the parking lot side; also at that entrance, the sidewalk was lower than the parking lot by some two to three inches requiring a pedestrian to step down onto the sidewalk from the parking lot; along one edge of the sidewalk, approximately a foot and a half down from the grass obstruction at its entrance, was a clearly visible hole appearing to be at least the size of a person's foot; and along the opposite edge of the sidewalk from the first hole was another hole, obscured by grass, which plaintiff allegedly tripped in. Furthermore, it was demonstrated that the nearest light fixture to that sidewalk had no bulb, which would have contributed to the hazardous nature of the sidewalk after dark, when the accident occurred.

While any one of these potential defects alone might not have been sufficient to render the sidewalk unreasonably dangerous to hotel patrons, all of them together could easily have been found so by the jury. We find no error in this conclusion.[4]

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[4] There is some controversy over whether the question of a defect posing an unreasonable risk of harm is a legal determination, subject to de novo review, or whether the determination is factual, and subject to the manifest error or clearly wrong standard of review. We find that under either standard, the jury did not err in finding an unreasonable risk of harm existed in and around the walkway at issue, under the circumstances presented in this case. See **Lee v. Magnolia Garden Apartments**, 96-1328, p. 16-17 (La. App. 1 Cir. 5/9/97), 694 So.2d 1142, 1151, writ denied, 97-1544 (La. 9/26/97), 701 So.2d 990.

In support of their position that the sidewalk and/or the grassy area did not present an unreasonable risk of harm, defendants cite the cases of **Wood v. Cambridge Mutual Fire Insurance Company**, 486 So.2d 1129 (La. App. 2 Cir. 1986) and **Johnson v. City of Monroe**, 38,388 (La. App. 2 Cir. 4/7/04), 870 So.2d 1105, writ denied, 2004-1130 (La. 6/25/04), 876 So.2d 843. We find both cases to be distinguishable from the facts of the instant case.

In the **Wood** case, the plaintiff was living as a tenant in a home owned by his grandmother, when he stepped in a hole in the yard and injured his knee. The hole was described as being approximately one and one-half to two feet in diameter and five to eight inches deep, with some grass growing in the hole and some leaves inside of it, and surrounded in part by a tree root. The hole was located near the sidewalk and the front door of the home, which was used as the primary access to the residence. Testimony and photographs introduced into evidence in that case showed that the hole was obvious and could be seen from quite a distance. **Wood v. Cambridge Mutual Fire Insurance Company**, 486 So.2d at 1131. In that case, although the appellate court recognized that former LSA-C.C. art. 2695 imposed strict liability on a landlord for a tenant's damages resulting from hazardous conditions on the leased premises, yards can and usually do have irregularities and minor obstacles such as depressions, drains, faucets, trees, shrubs, and tree roots and are not intended or designed for use as a walkway without observation and care as are sidewalks and designated walkways. The **Wood** court further stated that such conditions do not amount to defects that present an unreasonable risk of injury to tenants, concluding that the relatively shallow depression at issue in that case would not be expected to cause a tenant of the property to stumble and fall, as a tenant could walk

around the hole or even walk through it with reasonable caution. **Wood v. Cambridge Mutual Fire Insurance Company**, 486 So.2d at 1132-33.

We do not find **Wood** controlling or persuasive in the instant case because of the numerous defects existing in the sidewalk on which Mr. Varnado tripped. Moreover, in the instant case, the defects were not clearly visible from a distance as evidenced by the photographs introduced into evidence by defendants. The defense photographs appear to have been taken from a distance of five to ten feet, and with the exception of the concrete block obstruction, show no obvious defects. Another important distinguishing fact between the instant case and the **Wood** case is that the home leased in **Wood** was a private, detached residence on a fifty-foot wide lot, while the Ten Flags Inn premises at issue herein is a commercial establishment with a much greater amount of pedestrian traffic. Furthermore, an innkeeper owes a high degree of care and protection to its guests. **Gray v. Holiday Inns, Inc.**, 99-1292, p. 4 (La. App. 1 Cir. 6/23/00), 762 So.2d 1172, 1175.

In the case of **Johnson v. City of Monroe**, the plaintiff fell in a grassy area in front of Monroe City Court after allegedly stepping into a "hole," while leaving the annual ArkLaMiss Fair. At the time of the accident, Ms. Johnson had attended the fair with family and friends for several hours, and at approximately 10:15 p.m., she took a short cut back to the car through the grassy area. Ms. Johnson did not prevail in her suit against the city for her injuries because the court found she did not meet her burden to prevail on a claim against a public entity. The requisite elements were enumerated as follows: (1) the entity's custody or ownership of the defective thing; (2) the defect created an unreasonable risk of harm; (3) the entity's actual or constructive notice of the defect and failure to take corrective action within a

reasonable time; and, (4) causation. **Johnson v. City of Monroe**, 38,388 at p. 4, 870 So.2d at 1108.

We find **Johnson v. City of Monroe** distinguishable from the instant case, for several reasons: actual or constructive knowledge is not an element of proof under former LSA-C.C. art. 2695; multiple defects were not present in **Johnson**; and the "hole" at issue in **Johnson** was not immediately adjacent to a walkway. Further, the **Johnson** court determined the "hole" was more of a "sloping indentation" rather than a defective hole, and that this indentation did not present an unreasonable risk of harm. **Johnson v. City of Monroe**, 38,388 at p. 8, 870 So.2d at 1111.

Nor do we find persuasive defendants' argument that the accident was caused solely by the plaintiff's intoxication or chemically-altered mental state. Although both plaintiff and Norman Fisk testified at trial that plaintiff may have had several beers on the night of the accident, both stated that he was not intoxicated. No other evidence was introduced on this point, and there was simply *no* evidence introduced at trial that plaintiff suffered at the time of the accident, or at any other time, from a "chemically-altered mental state."

Perjured Testimony of Witness

We also reject defendants' contention that "perjured" testimony at trial by Norman Fisk, a maintenance employee at the Ten Flags Inn at the time of plaintiff's accident, "tainted" the jury and may have "cast an unseemly image" of the defendants in the minds of the jurors.

At trial, Norman Fisk's testimony consisted of: a description of his employment responsibilities at the Ten Flags Inn; testimony that although he did not see plaintiff trip, he saw him hit the ground; that he thereafter helped plaintiff to his own nearby room, where plaintiff had been en route to return

some video tapes; and that he called plaintiff's mother on the phone to come attend to plaintiff. Mr. Fisk also made several unsolicited remarks to the effect that the hotel management did not care about repair issues at the hotel.

Defendants assert on appeal that if a new trial were granted, defense witnesses could be called to "demonstrate that the testimony adduced from Mr. Fisk at trial was, in fact, perjury." However, defendants offer no explanation as to why these witnesses were not called at the trial of this matter. Nevertheless, we find that Mr. Fisk's credibility was successfully challenged by defense cross-examination during the jury trial, when Mr. Fisk admitted to having lied to defense investigators during pre-trial questioning and to testifying differently on the stand from his pre-trial statements. Mr. Fisk also admitted that he may have asked either the plaintiff or the defendants for some remuneration in exchange for his assistance with their respective cases, though he contended he was just "cutting up." Furthermore, Mr. Fisk testified that he was no longer employed by Ten Flags Inn; therefore, we are unpersuaded that any character flaws displayed by Mr. Fisk reflected adversely on his former employer.

Defendants have failed to cite to this court any statute or jurisprudence mandating a new trial merely because a witness has been impeached on the stand. We further find that even without Norman Fisk's testimony, plaintiff proved his case through his own testimony and the exhibits introduced into evidence.

Accordingly, we find the trial court did not abuse its discretion in refusing to grant defendants' motion for new trial.

CONCLUSION

For the reasons assigned herein, the judgment of the trial court is affirmed at defendants/appellants' cost.

AFFIRMED.