NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 0529

LORI MERCER HAMMONDS

VERSUS

RELIANCE INSURANCE COMPANY, SOUTHEASTERN LOUISIANA WATER & SEWER CO., INC., SOUTHEASTERN LOUISIANA WATER & SEWER CO., L.L.C. AND EDGAR J. DILLARD, JR.

Judgment Rendered: December 28, 2006.

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On Appeal from the
22nd Judicial District Court,
In and for the Parish of St. Tammany,
State of Louisiana
Trial Court No. 2000-14533

Honorable Larry J. Green, Judge Presiding

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Wayne M. LeBlanc Metairie, LA	Attorney for Plaintiff-Appellant, Lori Mercer Hammonds
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BEFORE: CARTER, C.J., WHIPPLE, AND MCDONALD, JJ.

CARTER, C. J.

This is a trip and fall personal injury case involving a water meter at the Bon Temps Properties apartment complex in Mandeville, Louisiana. A tenant of the apartment complex, Lori Mercer Hammonds (Ms. Hammonds), sued Southeastern Louisiana Water & Sewer Co., Inc. (the water company), and its insurer, Louisiana Insurance Guaranty Association (LIGA) as statutory successor in interest to Reliance Insurance Company in Liquidation (Reliance), as well as the owner of the leased premises, Edgar J. Dillard, Jr. (Mr. Dillard), and his insurer, Allstate Insurance Company (Allstate), under strict liability and negligence theories.[1] Ms. Hammonds alleged that the water company, Mr. Dillard and their insurers were responsible for injuries she sustained when she tripped and fell in a sunken water meter case located on the leased premises, less than a foot from the driveway where Ms. Hammonds and her guests parked their vehicles. The water company, Mr. Dillard, and their insurers denied liability and, in defense of the action, asserted that Ms. Hammonds' injuries were caused solely through her own fault.

FACTUAL AND PROCEDURAL BACKGROUND

On March 13, 2000 at around 8:30 p.m., Ms. Hammonds walked with her son, Clayton Wayne Hammonds, from her apartment to Clayton's car that was parked in the apartment complex driveway. She hugged Clayton goodbye, and as he opened the driver's-side door to enter his car, Ms. Hammonds stepped aside, without looking, onto the ground next to the driveway. When she stepped down, her right foot slipped into a hole near

[1] The water company and Reliance were dismissed as defendants prior to trial; however, Ms. Hammonds maintained her cause of action against the water company's insurer, LIGA, Mr. Dillard, and his insurer, Allstate.

the sunken water meter case that was located approximately six inches away from the driveway. As Ms. Hammonds' foot slipped into the hole and onto the lid of the water meter case, she fell and hit her chest against a post that was buried in the ground nearby. Clayton did not witness his mother's slip, but he did observe her fall and he assisted her into her apartment. Ms. Hammonds allegedly injured her right leg and sacroiliac joint, low back, neck and chest in the fall. The injury to Ms. Hammond's right sacroiliac joint has allegedly become chronic, rendering her unable to continue to work as a licensed practical nurse (LPN).

Ms. Hammonds filed suit on October 5, 2000, against the water company and the owner of the leased premises, Mr. Dillard, and their insurers. Ms. Hammonds alleged that the sunken water meter case and its lid, along with the hole in the surrounding ground, constituted a defective condition that was unreasonably dangerous, and that both the water company and Mr. Dillard were aware of the hazard, but did nothing to rectify the situation. The water company's representative and CEO, Jared John Caruso Riecke (Mr. Riecke), did not dispute that the water company had complete care, custody, control and maintenance of the water meter case and lid, but denied responsibility for the condition of the ground surrounding the water meter case and for the posts in the ground. Both Mr. Dillard and the water company denied that the water meter case, lid, and the surrounding property, including the lighting, were unreasonably dangerous. They further alleged that Ms. Hammonds' injury was caused by her own negligence in failing to see what she should have seen.

After a five-day jury trial, the jury returned a verdict in favor of the water company's insurer, LIGA, Mr. Dillard, and his insurer, Allstate,

finding no defect that amounted to an unreasonably dangerous condition, and further finding that Ms. Hammonds was 100% at fault for her injuries. The trial court rendered judgment in accordance with the jury verdict, dismissing Ms. Hammonds' action at her cost. Ms. Hammonds filed a motion for judgment notwithstanding the verdict (JNOV) and alternatively, a new trial, which was denied by the trial court.

Ms. Hammonds appealed, alleging seventeen assignments of error[2] regarding manifest error as to the jury's determination of no defect and assignment of 100% fault to her, and legal errors made by the trial court in evidentiary rulings, jury instructions, and denial of motions for mistrial. For the following reasons, we affirm the trial court's judgment denying Ms. Hammonds' JNOV and motion for new trial, effectively upholding the trial court's judgment rendered in accordance with the jury verdict.

LAW AND ANALYSIS

Unreasonable Risk of Harm – (*Assignment of Error Number 1*)

The manifest error standard of review applies to the jury's finding of whether a defect creates an unreasonable risk of harm. **Williams v. City of Baton Rouge**, 02-0682 (La. App. 1 Cir. 3/28/03), 844 So.2d 360, 366; **Reed v. Wal-Mart Stores, Inc.**, 97-1174 (La. 3/4/98), 708 So.2d 362, 365. In evaluating whether a defect creates an unreasonable risk of harm, a risk-utility balancing test must be employed. The trier-of-fact must decide whether the social value and utility of the hazard outweigh, and thus justify, its potential harm to others. **Id.**; **Boyle v. Board of Sup'rs, Louisiana State University**, 96-1158 (La. 1/14/97), 685 So.2d 1080, 1083. Under the

[2] All seventeen assignments of error have been addressed in this opinion, although some have been considered in a summary context in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.2.

manifest error standard, the jury's findings are reversible only when there is no reasonable factual basis for the conclusions, or if the record reveals those conclusions are clearly wrong. **Williams**, 844 So.2d at 366. Where two permissible views of the evidence exist, the fact-finder's choice between them cannot be manifestly erroneous or clearly wrong. **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 883 (La. 1993).

The evidence and testimony at trial established that the sunken water meter case was below the grade of the surrounding ground, was placed less than a foot away from the driveway with posts near it, and was open and obvious to everyone. When a risk is open and obvious, the probability of injury is low and the risk of injury is outweighed by the utility of the water meter case, which in this instance served as protection for the meter inside the case that monitored water usage for the apartment complex.

Ms. Hammonds testified that she had lived at the apartment complex for approximately seven months prior to her fall. She testified that she was well aware of the sunken water meter case, the propensity for the water meter lid to float out of place in heavy rains (although it was not raining on the night of her fall), the hole in the ground, and the short posts that were placed around the water meter, presumably to prevent cars from rolling onto the water meter case. Ms. Hammonds readily admitted that she was simply not paying attention when she stepped aside without looking while her son was entering his car. Ms. Hammonds testified that her attention was completely focused on her son at the moment of the fall. Ms. Hammonds further admitted that she had never notified the water company or Mr. Dillard that there was a problem with the water meter case, its lid, or the

surrounding property, including the lighting in the area, although she may have mentioned to Mr. Dillard that the water meter was an eyesore and that the lid floated when it rained. Mr. Dillard acknowledged that he had repositioned the water meter lid after heavy rains, but he had never considered the water meter area a hazard. He explained that the water meter, the surrounding property, the posts, and the lighting were basically the same as when he purchased the property ten years earlier. He also testified that he never thought to remove the posts because they protected the water meter from being run over by vehicles. Mr. Dillard testified that he had never received any complaints from anyone, including Ms. Hammonds or the water company, about any defective or dangerous condition on his property, and that no one had ever before been injured on his property. Mr. Reicke confirmed that the water company had never notified Mr. Dillard about any problem with the area surrounding the water meter on the property.

Mr. Reicke and other water company employees testified that the maintenance policy for the water company was to replace damaged water meter cases and lids during routine monthly water meter readings or when someone complained about a broken water meter case or lid. There was no evidence introduced regarding any complaints filed with the water company about floating lids or sunken water meter cases at the Bon Temps properties. There was no evidence introduced regarding any other trip and fall incidents in any other area serviced by the water company. Mr. Reicke further testified that this was the first time anyone had reported a fall or injury of this nature to the water company. The water company replaced the water meter lid a few hours after Ms. Hammonds reported the problem the day after her fall. Mr. Reicke explained that the water company inherited the

existing equipment when it went into business in 1990. He explained that at new water meter construction sites, the meter cases and lids are installed as close to the surrounding property grade as possible. This testimony was consistent with both experts' opinions that water meter cases should be installed at the same grade as the surrounding property to avoid a tripping hazard. However, it was undisputed that this was not a new installation situation. Furthermore, it was undisputed that the soil in Louisiana subsides and erodes over time. Ms. Hammonds' expert could not give an opinion that Mr. Dillard had done anything to create the situation on the property.

Obviously the jury chose to believe the testimony of Mr. Dillard and the water company's employees, representatives, and expert instead of Ms. Hammonds. We cannot say that the jury's credibility determinations and factual findings were manifestly erroneous. If a dangerous condition is patently obvious and easily avoidable, it cannot be considered to present a condition creating an unreasonable risk of harm. **Williams**, 844 So.2d at 366. Not every minor imperfection, obstacle, or irregularity will give rise to liability. **Crucia v. State Farm Ins. Co.**, 98-1929 (La. App. 1 Cir. 9/24/99), 754 So.2d 270, 272-273. The vice or defect must be of such a nature as to constitute a dangerous condition that would be reasonably expected to cause injury to a prudent person using ordinary care under the circumstances. **Williams**, 844 So.2d at 365. Under these circumstances, Ms. Hammonds did not use ordinary care when she blindly stepped into an area that she admittedly knew had a sunken water meter case, hole and posts. The evidence supports the jury's findings, and we find no manifest error in its conclusion that there was no defect presenting an unreasonable risk of danger to the ordinary, prudent person.

Allocation of Fault – (*Assignment of Error Numbers 3 and 9*)

As for the jury's determination that Ms. Hammonds was 100% at fault, this is a factual finding that cannot be overturned in the absence of manifest error. **Id.**, 844 So.2d at 371. The issue to be resolved by this court is not whether the jury was right or wrong, but whether its conclusion was a reasonable one. **Id.** Given Ms. Hammonds' admission that she was simply not paying attention when she stepped aside for her son to enter his car, and her acknowledgement that she knew she must be careful when she was walking in the area around the water meter, we cannot say that the jury's conclusion was unreasonable. Therefore, we find no manifest error in the jury's allocation of 100% fault to Ms. Hammonds.

Other Legal Errors – (*Assignment of Error Numbers 2, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, and 17*)

Ms. Hammonds alleges numerous other legal errors on the part of the trial court that somehow tainted the jury verdict. We have thoroughly reviewed each alleged error regarding the admittance or denial of evidence, the rulings on several motions for mistrial, and the inclusion or exclusion of specific jury interrogatories and instructions. Appellate courts must exercise great restraint before overturning a jury verdict based on erroneous jury instructions, evidentiary rulings, or rulings on motions for mistrials. All of the rulings that Ms. Hammonds now complains about lie within the trial court's vast discretion, and will be reversed only if the trial court has abused that discretion. **Beaumont v. Exxon Corp.**, 02-2322 (La. App. 4 Cir. 3/10/04), 868 So.2d 976, 985, writ denied, 04-1174 (La. 9/3/04), 882 So.2d 609; **Libersat v. J & K Trucking, Inc.**, 00-0192 (La. App. 3 Cir. 10/11/00), 772 So.2d 173, 179, writ denied, 01-458 (La. 4/12/01), 789 So.2d 598; **Our**

Lady of the Lake Regional Medical Center v. Helms, 98-1931 (La. App. 1 Cir. 9/24/99), 754 So.2d 1049, 1055, writ denied, 99-3057 (La. 1/7/00), 752 So.2d 863; **Ford v. Beam Radiator, Inc.**, 96-2787 (La. App. 1 Cir. 2/20/98), 708 So.2d 1158, 1160. Our review of the record reveals that the trial court exercised reasonable discretion in each of the complained of rulings. The jury instructions, taken as a whole, did not preclude the jury from reaching a verdict based on the relevant law and facts. Furthermore, the jury's verdict was in no way tainted by erroneous evidentiary rulings or motions for mistrial rulings. Therefore, in accordance with Uniform Rules – Courts of Appeal, Rule 2-16.2A(2), (6), and (7), we find no reversible legal error on the part of the trial court. These assignments of error have no merit.

JNOV and Motion for New Trial

Louisiana Code of Civil Procedure article 1811 provides the procedural guidelines for those parties wanting to obtain a JNOV. In **Lawson v. Mitsubishi Motor Sales of America, Inc.**, 05-0257 (La. 9/6/06), 938 So.2d 35, 52, the supreme court recently reiterated the standard to be used in determining whether a JNOV should be granted or denied, as follows (quoting from **Davis v. Wal-Mart Stores, Inc.**, 00-0445 (La. 11/28/00), 774 So.2d 84, 89):

> A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. In making this determination, the court should not evaluate the credibility of

the witnesses and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.

After a thorough review of the record, we cannot say that the trial court's refusal to grant Ms. Hammonds' JNOV constitutes reversible error. A refusal to render a JNOV can only be overturned if it is manifestly erroneous. **Peterson v. Gibralter Sav. And Loan**, 98-1601 (La. 5/18/99), 733 So.2d 1198, 1203; **Delaney v. Whitney National Bank**, 96-2144 (La. App. 4 Cir. 11/12/97), 703 So.2d 709, 717, writ denied, 98-0123 (La. 3/20/98), 715 So.2d 1211. A denial of a motion for a new trial will be reversed only if there has been an abuse of discretion. **Lawson**, 938 So.2d at 54; **Belle Pass Terminal, Inc. v. Jolin, Inc.**, 92-1544 (La. App. 1 Cir. 3/11/94), 634 So.2d 466, 493, writ denied, 94-0906 (La. 6/17/94), 638 So.2d 1094. Ms. Hammonds' support for her motions basically consists of a reiteration of the case presented at trial. As we have already reviewed each of the jury's findings and found no manifest error, we cannot say that the jury's verdict as finally rendered was unreasonable or clearly contrary to the law and the evidence. We also find no abuse of discretion in the trial court's denial of Ms. Hammonds' alternative motion for new trial. Therefore, Ms. Hammonds' motions for JNOV and, alternatively, new trial were properly denied.

CONCLUSION

For the stated reasons, we affirm the trial court's judgment rendered in accordance with the jury verdict in favor of LIGA, Mr. Dillard, and Allstate, and against Ms. Hammonds, as well as the trial court's denial of Ms. Hammonds' JNOV and alternative motion for new trial. Costs of this appeal are assessed to plaintiff-appellant, Ms. Lori Mercer Hammonds.

AFFIRMED.