NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

NO. 2013 CA 1590

CAROLYN A. WHITLEY

VERSUS

BATON ROUGE GENERAL MEDICAL CENTER
AND ABC INSURANCE COMPANY

Judgment Rendered: MAY 2 9 2014

On Appeal from the
19th Judicial District Court,
In and for the Parish of East Baton Rouge,
State of Louisiana
No. 531,632

The Honorable Todd W. Hernandez, Judge Presiding

* * * * *

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* * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.,

The plaintiff, Carolyn Whitley, appeals a judgment rendered in favor of defendant, Baton Rouge General Medical Center (BRG), following a jury trial, in which the jury found no fault on the part of BRG. For the following reasons, we affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Whitley filed suit against BRG, claiming that she was injured on April 24, 2004, while visiting her sister at the hospital and exiting an elevator. Whitley testified that she was on her way to the parking lot to retrieve her car so that her sister could leave the hospital. The floor of the elevator[1] in which Whitley was riding stopped about five inches below the first floor. She was exiting the elevator when she stumbled and was caught by Joyce Carr, who was standing outside the elevator. She would have fallen on her face, had Carr not caught her. Whitley was immediately put in a wheelchair and taken to the emergency room, because she complained of pain and said she could not walk. The emergency room notes indicated that Whitley twisted herself when she was exiting an uneven elevator. Whitley claimed that she injured her left leg and knee, because that is where she put her weight when trying to catch herself. She also complained of neck and arm pain from the tripping incident. On cross examination, Whitley admitted that five days before the accident, she saw a doctor for neck and low-back pain.

Dr. Jack Loupe, an orthopaedic surgeon, testified that Whitley had previously had two surgeries to her lower back and one to her upper back. After the elevator incident, her left knee exhibited mechanical symptoms, locking and popping, which led to surgery on her left knee in December 2005. Dr. Loupe explained that mechanical symptoms are different from pain associated with

[1] In the record, the witnesses refer to the elevator located in the front lobby as either elevator "A" or "1."

inflammation. Whitley's history indicated that the mechanical symptoms began with the accident at BRG in April 2004. The surgery corrected a left-medial meniscal tear. Dr. Loupe explained, after being called on direct by the defense, that the post-MRI did not show any abnormalities around the meniscus, indicating that the resection that had been done had not been very large. He did not know if a small meniscus tear gave rise to her symptoms or not. However, Dr. Loupe did testify that the tripping event could cause a medial meniscus tear. He also agreed that the medical records stated that Whitley had degenerative arthritis in her left knee before April 2004. Therefore, Dr. Loupe could not say more probably than not that Whitley's left knee pain was caused by the April 2004 accident, since he was unaware of her previous complaints of knee pain. However, upon re-direct, Dr. Loupe agreed that no surgical treatment was recommended for Whitley until after the April 2004 accident. He further testified that he could conclude that the April 2004 accident most likely caused her knee symptoms, taking into consideration the (1) history of a twisting-falling event, (2) development of mechanical symptoms immediately after, (3) no treatment on Whitley's knee prior to the elevator incident, and (4) proof of a torn meniscus.

The jury returned a verdict finding that BRG was not at fault for causing plaintiff's injury on April 24, 2004. Whitley filed a motion for JNOV, or alternatively, for a new trial. The trial court signed a judgment consistent with the verdict of the jury on December 12, 2012. On April 25, 2013, the trial court denied Whitley's motion for JNOV and new trial.

STANDARD OF REVIEW

A court of appeal may not overturn a judgment of a trial court unless there is 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. 1 Cir. 9/17/04), 897 So. 2d 616, 617, *writ denied*, 04-2572 (La. 12/17/04), 888 So. 2d 872. The

Louisiana Supreme Court has posited a two-part test for the appellate review of facts in order to affirm the factual findings of the trier of fact: (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). *See 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 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 Dept. of Transp. and Dev.*, 617 So. 2d 880, 882 (La. 1993); *Moss v. State*, 07-1686 (La. App. 1 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 factual 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. *Smegal v. Gettys*, 10-0648 (La. App. 1 Cir. 10/29/10), 48 So. 3d 431, 435.

With regard to questions of law, appellate review is simply a review of whether the trial court was legally correct or legally incorrect. *Hidalgo v. Wilson Certified Exp., Inc.*, 94-1322 (La. App. 1 Cir. 5/14/96), 676 So. 2d 114, 116. On legal issues, the appellate court gives no special weight to the findings of the trial court, but exercises its constitutional duty to review questions of law and render judgment on the record. *In re Mashburn Marital Trust*, 04-1678 (La. App. 1 Cir. 12/29/05), 924 So. 2d 242, 246, *writ denied*, 06-1034 (La. 9/22/06), 937 So. 2d 384.

DISCUSSION

Although Whitley assigns numerous errors, they can be summarized as claiming that the trial court erred in refusing to give a specific jury instruction proposed by Whitley, and that the jury erred in finding that BRG was not at fault for the injuries she incurred while exiting an elevator on the premises of BRG.

JNOV/New Trial

A JNOV may be granted on the issue of liability, damages, or both. La. C.C.P. art. 1811(F). The trial court must first determine whether the facts and inferences point so strongly and overwhelmingly in favor of the plaintiff that reasonable jurors could not arrive at a contrary verdict. In other words, if reasonable persons could have arrived at the same verdict, given the evidence presented to the jury, then a JNOV is improper. *Wood v. Humphries,* 11-2161 (La. App. 1 Cir. 10/9/12), 103 So. 3d 1105, 1110, *writ denied,* 12-2712 (La. 2/22/13), 108 So. 3d 769. The motion should be denied if there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. *Id.* The trial 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. *Id.* An appellate court reviewing a trial court's grant of a JNOV employs the same criteria used by the trial court in deciding whether to grant the motion. *Wood v. Humphries,* 11-1216 (La. App. 1 Cir. 10/9/12), 103 So. 3d 1105, 1110, *writ denied,* 12-2712 (La. 2/22/13), 108 So. 3d 769 (*citing Smith v. State, Dep't Transp. & Dev.*, 04-1317 (La. 3/11/05), 899 So. 2d 516, 525. In other words, the appellate court must determine whether the facts and inferences adduced at trial point so overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary finding of fact. *Id.* If the answer is in the affirmative, then the appellate court must affirm the grant of the JNOV. *Id.*

However, if the appellate court determines that reasonable minds could differ on that finding, then the trial court erred in granting the JNOV, and the jury verdict should be reinstated. *Id.*

Alternatively, Whitley moved for a new trial. The motion for a new trial requires a less stringent test than a motion for a JNOV, in that such a determination involves only a new trial and does not deprive the parties of their right to have all disputed issues resolved by a jury. *Marroy v. Hertzak,* 11-0403 (La. App. 1 Cir. 9/14/11), 77 So. 3d 307, 317. A new trial shall be granted if the jury verdict appears to be clearly contrary to the law and the evidence. La. C.C.P. art. 1972(1). Also, a trial court may grant a new trial if there is some good ground therefor. La. C.C.P. art. 1973. When considering a motion for a new trial, the trial court has wide discretion. *See* La. C.C.P. art. 1971.

However, it is well settled in this circuit that an appeal of a denial of a motion for new trial will be considered as an appeal of the judgment on the merits when it is clear from the appellant's brief that the appeal was intended to be on the merits. *Nelson v. Teachers' Retirement System of Louisiana,* 10-1190 (La. App. 1 Cir. 2/11/11), 57 So. 3d 587, 589 n. 2; *Carpenter v. Hannan,* 01-0467 (La. App. 1 Cir. 3/28/02), 818 So. 2d 226, 228-29, *writ denied,* 02-1707 (La. 10/25/02), 827 So. 2d 1153.

This court must first determine if the jury's verdict was a reasonable one or whether the verdict is contrary to the law and evidence. *See Wood,* 103 So. 3d at 1110; *see also* La. C.C.P. art. 1972(1).

Omitted Jury Charge

Whitley proposed numerous specific jury instructions, but particularly appeals the omission by the trial court of proposed jury instruction number 9, which stated "A drop, or step down, in the floor elevation, if it presents an unreasonable risk of harm, exposes the owner to liability to the persons injured by

the condition." To support her proposed jury instruction, Whitley cited *Tupper v. State Farm Fire & Cas. Co.*, 553 So. 2d 488 (La. App. 3 Cir. 1989) and *Johnson v. Acadian Medical Center, Inc.*, 524 So. 2d 811 (La. App. 3 Cir. 1988). BRG objected to the inclusion of proposed jury instruction number 9, and the trial court did not include it in the instructions which were ultimately given to the jury.

The trial court is required to instruct jurors on the law applicable to the cause submitted to them. La. C.C.P. art. 1792(B); *Abney v. Smith*, 09-0794 (La. App. 1 Cir. 2/8/10), 35 So. 3d 279, 285, *writ denied*, 10-0547 (La. 5/7/10), 34 So. 3d 864. The trial court is responsible for reducing the possibility of confusing the jury and may exercise the right to decide what law is applicable and what law the trial court deems inappropriate. *Id.* The charge must correctly state the law and be based on evidence adduced at trial. *Id.* Adequate jury instructions are those that fairly and reasonably point out the issues and provide correct principles of law for the jury to apply to those issues. *Adams v. Rhodia, Inc.*, 07-2110 (La. 5/21/08), 983 So. 2d 798, 804. The trial judge is under no obligation to give any specific jury instructions that may be submitted by either party; the judge must, however, correctly charge the jury. If the trial court omits an applicable, essential legal principle, its instruction does not adequately set forth the issues to be decided by the jury and may constitute reversible error. *Id.* Correlative to the judge's duty to charge the jury as to the law applicable in a case is a responsibility to require that the jury receives only the correct law. *Id.*

Louisiana jurisprudence is well established that an appellate court must exercise great restraint before it reverses a jury verdict because of erroneous jury instructions. Trial courts are given broad discretion in formulating jury instructions and a trial court judgment should not be reversed so long as the charge correctly states the substance of the law. *Id.*

In the assessment of an allegedly erroneous jury instruction, it is the duty of the reviewing court to assess such impropriety in light of the entire jury charge to determine if the charges adequately provide the correct principles of law as applied to the issues framed in the pleadings and the evidence and whether the charges adequately guided the jury in its deliberation. Ultimately, the determinative question is whether the jury instructions misled the jury to the extent that it was prevented from dispensing justice. *Id.*

Determining whether an erroneous jury instruction has been given requires a comparison of the degree of error with the jury instructions as a whole and the circumstances of the case. *Id.* Because the adequacy of jury instruction must be determined in the light of jury instructions as a whole, when small portions of the instructions are isolated from the context and are erroneous, error is not necessarily prejudicial. *Id.* Furthermore, the manifest error standard for appellate review may not be ignored unless the jury charges were so incorrect or so inadequate as to preclude the jury from reaching a verdict based on the law and facts. *Id.* Thus, on appellate review of a jury trial, the mere discovery of an error in the judge's instructions does not of itself justify the appellate court's conducting the equivalent of a trial *de novo,* without first measuring the gravity or degree of error and considering the instructions as a whole and the circumstances of the case. *Id.*

In the instant case, the jury was instructed regarding the applicable law and the duties of BRG to maintain and repair the elevator at issue. The trial court specifically stated:

> In order for the defendant, [BRG], to be liable in this case, the plaintiff must prove by a preponderance of the evidence that, number 1, [BRG] had custody of the elevator on which this accident occurred; two, the elevator was defective because it had a condition that created an unreasonable risk of harm; three, [BRG] knew or, in the exercise of reasonable care, should have known of a defect; and, four, the defect could have been prevented by the exercise of reasonable care and [BRG] failed to exercise such reasonable care.

> Custody of the thing means that [BRG] was the owner of the elevator in its hospital or was in a position to exercise supervision or control over the elevator and to draw a benefit from it. In determining whether the condition presented an unreasonable risk of harm, the defect must be of such a nature as to constitute a dangerous condition which would reasonably be expected to cause injury to a person using ordinary care under the same circumstances.
>
> In reaching a determination of this issue, you may consider any past history of the elevator, the degree to which any danger could be observed by a potential victim, or any other factors which you find are relevant, then you determine whether [BRG] knew or should have known the [vice or] the defect or knew that it either had [actual] knowledge of the defect or it had constructive knowledge of the defect.
>
> Constructive knowledge imposes a duty upon a person who owns or has custody of a thing to discover defects in the thing. One is presumed to have constructive knowledge of the defect when it has existed for such a long period of time that one should have had knowledge of the condition.
>
> Property owners are not the insurer[s] of the safety of [their visitors], but they do have a duty to keep their premises in a safe condition for use in a manner consistent with the purposes for which they are intended. The premises do not have to be kept in perfect condition. It is the duty of the owner of a thing presenting an unreasonable risk of harm to provide adequate and reasonable warning to the person using the area.

After reviewing the proposed jury instruction number 9 and the entirety of the actual jury instructions given by the trial court, we believe the jury was adequately instructed as to the law regarding premises liability. The trial court correctly instructed the jury that to find BRG liable, the jury had to find (1) BRG had custody of the elevator, (2) the elevator was defective because it had a condition which presented an unreasonable risk of harm, (3) BRG, with the exercise of reasonable care, knew or should have known of the defect, and (4) the defect could have been prevented with the exercise of reasonable care. The trial court was under no duty to give a specific jury instruction as to either a step up or a step down. The jury instruction offered by Whitley would have done nothing to aid the jury any more than the instructions given by the trial court. Therefore, the trial court did not commit error in omitting Whitley's proposed jury instruction number 9.

Premises Liability

Whitley's theory of liability is primarily based on Louisiana Civil Code articles 2317, 2317.1, and 2322. The pertinent articles provide liability for the owner or custodian of property, as follows:

> **Art. 2317. Acts of others and of things in custody**
>
> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody....
>
> **Art. 2317.1. Damage caused by ruin, vice, or defect in things**
>
> *The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.* Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. (Emphasis added).
>
> **Art. 2322. Damage caused by ruin of building**
>
> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. *However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.* Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. (Emphasis added).

Initially, we note that the parties on appeal argue as to whether BRG had custody of the elevator. BRG claims it had no custody of the elevator, because it had contracted the repair and maintenance of all its elevators to ThyssenKrupp. The Louisiana Supreme Court in *Broussard v. State through Office of State Buildings,* 12-1238 (La. 4/5/13), 113 So. 3d 175, 182, noted that even though elevators are not "buildings," as referred to in Louisiana Civil Code articles 2317

and 2322, they are component parts of a building. Whether a thing attached to a building, such as an elevator, is part of the building is dependent upon several factors: (1) how securely the thing is attached to the building, (2) the permanence of the attachment, and (3) whether the attachment would be considered permanent under the Civil Code articles regulating property rights. *Id.* As in *Broussard,* we find the elevator at issue was attached to the building and, under Louisiana Civil Code articles 465 and 466, was a component part of the building. Therefore, the elevator was in the custody of BRG.

Unreasonably Dangerous Condition

Under Article 2322, a plaintiff must prove the following elements to hold the owner of a building liable for the damages caused by the building's ruin or a defective component: (1) ownership of the building; (2) the owner knew or, in the exercise of reasonable care, should have known of the ruin or defect; (3) the damage could have been prevented by the exercise of reasonable care; (4) the defendant failed to exercise such reasonable care; and (5) causation. La. C.C. art. 2322; *Broussard,* 113 So. 3d at 182-83. The jurisprudence also requires that the ruinous building or its defective component part create an unreasonable risk of harm. *Broussard,* 113 So. 3d at 183.

The owner of a building is not responsible for all injuries resulting from any risk posed by his building. *Entrevia v. Hood,* 427 So. 2d 1146, 1149 (La. 1983). Rather, he is responsible only for those injuries caused by an unreasonable risk of harm to others. *Id.* It is the fact-finder's role to determine whether a defect is unreasonably dangerous in light of the facts and circumstances of each particular case. *Reed v. Wal-Mart Stores, Inc.,* 97-1174 (La. 3/4/98), 708 So. 2d 362, 364.

In *Broussard,* a delivery driver, who sustained a back injury while pulling a loaded dolly into a misaligned elevator, brought a premises liability action against the state, who owned the building. Following a jury trial, the trial court awarded

the driver damages based on the percentages of fault assigned by the jury. This court reversed, holding that the jury's determination that the misaligned elevator was an unreasonable risk of harm was manifestly erroneous. On review, the Louisiana Supreme Court noted that the primary issue was whether the defect in the building's elevators created an unreasonable risk of harm, thereby subjecting the state to liability under La. C.C. art. 2322. *Broussard,* 113 So. 3d at 183. The court explained that it is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. *Broussard,* 113 So. 3d at 185. Because the determination of whether a defect is unreasonably dangerous necessarily involves a myriad of factual considerations, varying from case to case, the court held that the cost-benefit analysis employed by the fact-finder in making this determination is more properly associated with the breach, rather than the duty, element of our duty-risk analysis. *Id.*

Applying those precepts, the court in *Broussard* concluded that the record contained a reasonable factual basis to support the jury's determination that the misalignment presented an unreasonable risk of harm to the delivery driver. *Broussard,* 113 So. 3d at 186. Moreover, the court found that the record supported a finding that the elevator's condition was not an open and obvious hazard, as the defect was not readily apparent to all who encountered it. *Broussard,* 113 So. 3d at 186. Although the driver testified that he was aware of the misalignment, there was ample testimony highlighting other instances of employees either tripping or falling on the elevators in the building after failing to notice they were misaligned. *Broussard,* 113 So. 3d at 189. Thus, the court concluded that the risk of harm created by the defect was significant when weighed against the elevator's social utility and the cost of preventing the harm. *Broussard,* 113 So. 3d at 186.

In *Broussard,* the state's expert safety consultant conceded on cross-examination that the public does not ordinarily anticipate offsets between the floors of elevators and buildings. *Broussard,* 113 So. 3d at 187. Furthermore, the evidence in *Broussard* was that the elevators in the building frequently failed to stop at a level flush with the building's floors, thereby, presenting a significant and likely risk of harm, which was exacerbated by the fact that pedestrians do not ordinarily anticipate an offset when entering and exiting elevators. *Broussard,* 113 So. 3d at 187.

The Louisiana Supreme Court has emphasized "that each case involving an unreasonable risk of harm analysis must be judged under its own unique set of facts and circumstances. There is no bright-line rule. The fact-intensive nature of our risk-utility analysis will inevitably lead to divergent results." *Broussard,* 113 So. 3d at 191 (citations omitted).

Although the facts of the present case appear very similar to *Broussard,* there are some important distinctions. Denise Burleigh, a BRG security employee, testified that although the A and B elevators were out of order sometimes, she had no idea of the reason they did not function properly at times. She did know that hospital maintenance personnel occasionally had to open the doors on the elevators. Burleigh also testified that the report she wrote the day of the incident indicated that Whitley was on numerous medications, including Zoloft, Ultram, Flexeril, and Neurontin.

Lori Parker, a ThyssenKrupp Elevator employee, went through the records of January 1, 2004, to April 30, 2004, on elevator 1. While Whitley pointed out that there were thirty-six maintenance or repair tickets in this time frame, many of those were for regular, preventative maintenance. Parker also testified that most of the repair records were for the doors being stuck. There were no records of

ThyssenKrupp performing any maintenance where elevator 1 stopped unlevel or below the level of the floor.

Alan Jochem, the BRG director of facility maintenance, testified that the hospital maintenance personnel did not repair the elevators. He did not agree that elevator 1 was problematic, and believed at the time of this accident, it was in good operating condition.

Sharee Dauenhaur worked at the desk of BRG at the time of the accident. She testified that elevator 1 had the most usage, so it broke down more. Most of the time the problem with elevator 1 was the opening or closing of the doors. Dauenhaur was the only witness who offered testimony that the problem of elevator 1 not stopping level with the floor "seems familiar." She further stated with regard to the misalignment, "There's times when that happened. It wasn't frequent, like when the doors don't open and close." She admitted that when she was in the elevator, she had experienced the doors not opening, but had never experienced the elevator stopping unlevel with the floor and had never tripped. Furthermore, she could not remember if she ever reported the elevator not being level with the floor.

Unlike *Broussard,* this case did not contain testimony as to repeated tripping incidents of people entering and exiting the elevator. Only Dauenhaur testified that she had ever seen the elevator stop unlevel with the floor, and she could not remember reporting it to anyone. The other witnesses who testified stated that they had no knowledge of elevator 1 stopping unlevel with the floor. Jochem even testified that elevator 1 was in good operative condition prior to the accident. The records of ThyssenKrupp contained no calls from BRG or repair trips for a misalignment of the elevator floor. Whitley makes much of the fact that BRG did not keep any hospital records as to the repair of any of the elevators. However, Whitley did not put on any evidence, such as other testimony, that elevator 1

repeatedly misaligned with the floor. The primary evidence was that the doors repeatedly became stuck, but there was no evidence that the doors were unreasonably dangerous or that the doors had any correlation to the elevator being misaligned with the lobby floor. Furthermore, there was no evidence that the amount of service provided by ThyssenKrupp was unusual or indicative of a defective condition. Whitley did not put on any expert evidence as to the elevator being defective. In *Broussard,* 113 So. 3d at 187, the state's safety expert admitted on cross-examination that the public does not ordinarily anticipate offsets between the floors of elevators and buildings. No such evidence was presented by Whitley to the jury in this case.

Under the manifest error doctrine, we hold a reasonable basis exists to support the jury's factual determination that the five-inch offset between the floor of the elevator and the floor of the hospital did not present an unreasonable risk of harm. Furthermore, the jury verdict is not clearly contrary to law and evidence. Therefore, the trial court properly denied the JNOV and the motion for new trial.

Causation

Additionally, this court notes that even had Whitley proven that elevator 1 was unreasonably dangerous, the jury in this case may have denied liability on the part of BRG for lack of causation. The jury found that BRG had no fault in Whitley's accident. One element of proving liability is causation. Whether an accident caused a person's injuries is a question of fact and should not be reversed absent manifest error. *Housley v. Cerise,* 579 So. 2d 973, 975 (La. 1991). Plaintiff must prove, by a preponderance of the evidence, the existence of the injuries and a causal connection between the injuries and the accident. *Grimes v. Maison Des Ami of Louisiana Inc.,* 12-1762 (La. App. 1 Cir. 7/24/13), ___ So. 3d ___ 2013 WL 5979326, *writ denied*, 13-2183 (La. 11/22/13), 126 So. 3d 491. The test to determine if that burden has been met is whether the plaintiff proved through

medical testimony that it is more probable than not that the injuries were caused by the accident. *Id.* Generally, the effect and weight to be given medical expert testimony is within the broad discretion of the fact finder. *Id.* The law is well settled that where the testimony of expert witnesses differs, the trier of fact has great, even vast, discretion in determining the credibility of the evidence, and a finding in this regard will not be overturned unless it is clearly wrong. *Cotton v. State Farm Mutual Automobile Insurance Company,* 10-1609 (La. App. 1 Cir. 5/6/11), 65 So. 3d 213, 220, *writ denied,* 11-1084 (La. 9/2/11), 68 So. 3d 522.

The jury in the present case may very well have found that Whitley did not prove that this incident caused her injuries. The evidence before the jury was that Whitley did not fall, but was caught by Joyce Carr. The jury may have found that the tripping incident did not cause the injuries complained of by Whitley. Whitley admitted she had seen a doctor for neck and back pain five days before the accident. She had undergone two previous surgeries to her lower back and one to her upper back. After surgery to her left knee, the medical records showed a small meniscus tear. Dr. Loupe admitted that he was unaware of Whitley having left knee complaints prior to the April 2004 accident, and therefore, could not say more probably than not that this accident caused her left knee pain. However, he did retract that statement on redirect examination. Furthermore, the medical records indicated that Whitley had degenerative arthritis in her left knee before April 2004. Dr. Loupe did not treat Whitley until May 2007.

It is well settled that a court of appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong," and where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. *Rosell v. Esco,* 549 So. 2d 840, 844 (La. 1989); *Stobart v. State,*

DOTD, 617 So. 2d 880, 882-83 (La. 1993); *Givens v. Givens*, 10-0680 (La. App. 1 Cir. 12/22/10), 53 So. 3d 720, 728. Thus, when the fact finder is presented with two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous or clearly wrong. *Stobart,* 617 So. 2d at 883; *Givens,* 53 So. 3d at 728-29. Additionally, where the fact finder's conclusions are based on determinations regarding the credibility of a witness, the manifest error standard demands great deference to the trier of fact, because only the trier of fact can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. *Rosell,* 549 So. 2d at 844; *Givens,* 53 So. 3d at 729.

Furthermore, the fact finder is not required to give any extra credence to the testimony of experts. *Harris v. State ex rel. Dept. of Transp. and Development,* 07-1566 (La. App. 1 Cir. 11/10/08), 997 So. 2d 849, 866, *writ denied,* 08-2886 (La. 2/6/09), 999 So. 2d 785. It is well settled in Louisiana that the fact finder is not bound by the testimony of an expert, but such testimony is to be weighed the same as any other evidence. *Id.* The fact finder may accept or reject in whole or in part the opinion expressed by an expert. *Id.* The effect and weight to be given expert testimony is within the trial court's broad discretion. *Morgan v. State Farm Fire and Cas. Co., Inc.*, 07-0334 (La. App. 1 Cir. 11/2/07), 978 So. 2d 941, 946.

On review of the record, we conclude that the jury's finding of no fault on the part of BRG is supported by the record and is not manifestly erroneous.

Res Ipsa Loquitor

Whitley claims that this case is governed by the doctrine of *res ipsa loquitur,* which permits a jury to infer negligence from the circumstances of the event causing injury. *Cangelosi v. Our Lady of the Lake Regional Medial Center*, 564 So. 2d 654, 665 (La. 1989). Whitely did submit a proposed jury instruction regarding the doctrine of *res ipsa loquitur.* The instructions actually given to the

jury did not contain that proposed instruction. We note that Whitley does not direct this court to any objection in the record to the lack of an instruction on *res ipsa loquitur,* nor can one be found from review of the record. *See Dardeau v. Ardoin,* 97-144 (La. App. 3 Cir. 11/5/97), 703 So. 2d 695, 697-98, *writ denied,* 98-0359 (La. 3/27/98), 716 So. 2d 889. Whitley cannot now complain of the trial court's omission of a jury instruction on the application of *res ipsa loquitur* on appeal. *See* La. C.C.P. art. 1793(C).

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. Costs of the appeal are assessed to the plaintiff, Carolyn A. Whitley.

AFFIRMED.