JERRY MOORE, JR., INDIVIDUALLY AND ON BEHALF OF MINOR, JERRY MOORE, III, AND ANITRA MOORE	*	**NO. 2018-CA-0603**
	*	**COURT OF APPEAL**
	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
CHOICE FOUNDATION D/B/A LAFAYETTE ACADEMY CHARTER SCHOOL, KAREN LEWIS, AND XYZ INSURANCE COMPANY	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-07717, DIVISION "B-1"
Honorable Rachael Johnson
* * * * * *
Judge Joy Cossich Lobrano
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(Court composed of Judge Terri F. Love, Judge Daniel L. Dysart, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins, Judge Dale N. Atkins)

JENKINS, J., DISSENTS WITH REASONS
ATKINS, J., DISSENTS AND ASSIGNS REASONS

Zara Zeringue
ZERINGUE & RICHARDSON
527 E. Boston Street, Suite 201
Covington, LA 70433

COUNSEL FOR PLAINTIFFS/APPELLEES

Edwin G. Preis, Jr.
Robert M. Kallam
Charmaine B. Borne
PREIS PLC
102 Versailles Boulevard, Suite 400
P. O. Box 94-C
Lafayette, LA 70509

COUNSEL FOR DEFENDANTS/APPELLANTS

DEFAULT JUDGMENT VACATED;
JUDGMENT DENYING NEW TRIAL REVERSED;
REMANDED
MAY 29, 2019

This is an appeal from a default judgment in a personal injury case. Defendants/appellants, Choice Foundation d/b/a Lafayette Academy Charter School (the "school") and Karen Lewis ("Lewis"), appeal the October 19, 2017 default judgment in favor of plaintiffs/appellees, Jerry Moore, Jr., individually and on behalf of the minor Jerry Moore, III, and Anitra Moore (collectively, the "Moores"), and the April 2, 2018 denial of a motion for new trial. For the reasons that follow, we vacate the default judgment, reverse the denial of the motion for new trial, and remand this matter to the district court for further proceedings.

On August 2, 2016, the Moores filed a petition for damages, alleging that Jerry Moore, III ("Little Jerry") was injured when he fell down the stairs at school on August 19, 2015. According to the petition, Little Jerry is the minor son of Jerry Moore, Jr. and Anitra Moore ("Mr. and Mrs. Moore"). Little Jerry is non-verbal, autistic, and requires constant monitoring and assistance while at school. The petition states that Lewis was a paraprofessional employed by the school and assigned to Little Jerry. The Moores allege Lewis was negligent in failing to

properly supervise Little Jerry, and the school was vicariously liable for Lewis' negligence. Also, according to the petition, the school was negligent for failing to remedy a hazardous condition of the stairs.

When none of the defendants filed an answer to the petition, the Moores filed motions for preliminary default on October 26, 2016. On November 4, 2016, the district court entered a preliminary default against Lewis and the school.

Nearly a year later, on October 19, 2017, the district court held a hearing at which the Moores moved to confirm the default judgment. On the same date, the district court confirmed the default judgment against Lewis and the school "in solido and under theory of respondeat superior" and awarded the Moores damages in the amount of $417,249.32, together with interest from the date of judicial demand until paid and all costs of the proceedings. On October 31, 2017, Lewis and the school filed a motion for new trial. Following a hearing on March 9, 2018, the district court denied a new trial in its judgment dated April 2, 2018. This appeal followed.

The primary issue before this Court is whether the Moores proved a prima facie case of negligence with competent, admissible evidence.[1]

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[1] Lewis and the school set forth four assignments of error on appeal, as follows:

> 1. The trial court abused its discretion denying Defendants' Motion for a New Trial by not reviewing and considering, in a proper manner, all circumstances which contributed to Defendants' responsive pleadings not being filed prior to the confirmation of default judgment, and especially in light of general policy considerations weighing in Appellants' favor to allow them their day in court;
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> 2. The trial court erred, as a matter of law, in confirming a default judgment where Plaintiffs did not make a prima facie case entitling Plaintiffs to judgment in their favor;

The district court has "broad discretion in [] granting or denying a motion for new trial, and we review a denial under an abuse of discretion standard." *Bonnette v. Bonnette*, 2015-0239, pp. 22-23 (La. App. 4 Cir. 2/17/16), 185 So.3d 321, 334.[2] Article 1972(1) of the Louisiana Code of Civil Procedure provides that "[a] new trial shall be granted, upon contradictory motion of any party ... when the verdict or judgment appears clearly contrary to the law and the evidence."

"In reviewing default judgments, the appellate court is restricted to determining the sufficiency of the evidence offered in support of the judgment." *Arias v. Stolthaven New Orleans, L.L.C.*, 2008-1111, p. 5 (La. 5/5/09), 9 So.3d 815, 818. "This determination is a factual one governed by the manifest error standard of review." *Id.*

"Confirmation of a default judgment is similar to a trial and requires, with admissible evidence, 'proof of the demand sufficient to establish a prima facie case.'" *Id.*, 2008-1111, p. 7, 9 So.3d at 820 (quoting La. C.C.P. art. 1702(A))(other citations omitted). "The elements of a prima facie case are established with competent evidence, as fully as though each of the allegations in the petition were

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3. The trial court committed manifest error in rendering a default judgment that was contrary to the law and evidence presented; and

4. The trial court erred, as a matter of law, when it denied the motion for a new trial, as the judgment clearly did not apportion fault between the parties.

[2] A motion for new trial is a non-appealable interlocutory judgment, which an appellate court may review as part of an unrestricted appeal from a final judgment. *State ex rel. Dep't of Soc. Servs. v. Whittington*, 2015-1118, p. 11 (La. App. 4 Cir. 5/18/16), 193 So. 3d 1234, 1241. A default judgment is generally a final, appealable judgment. *See Habitat, Inc. v. Commons Condominiums, LLC*, 2011-1384, p. 6 (La. App. 4 Cir. 7/11/12), 97 So.3d 1126, 1131. *See also* La. C.C.P. art. 2083(A)("[a] final judgment is appealable in all causes in which appeals are given by law, whether rendered after hearing, by default, or by reformation under Article 1814").

denied by the defendant." *Id.* (citing *Sessions & Fishman v. Liquid Air Corp.*, 616 So.2d 1254, 1258 (La. 1993); *Thibodeaux v. Burton*, 538 So.2d 1001, 1004 (La. 1989)).

The Louisiana Supreme Court has made clear that inadmissible evidence "may not support a default judgment even though it was not objected to because the defendant was not present." *Arias*, 2008-1111, p. 7, 9 So.3d at 820 (citations omitted). Rather, the rules of evidence apply at a hearing to confirm a default judgment, subject to certain legislative exceptions. La. C.E. art. 1101(A); *see also* La. C.C.P. art. 1702(B)(2).

Louisiana Code of Evidence article 801(C) defines hearsay as a "statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Generally, hearsay evidence is not admissible evidence. La. C.E. art. 802. Moreover, "[h]earsay evidence does not sustain the burden of proving the *prima facie* case necessary for confirmation of default." *Cameron v. Roberts*, 47,789, p. 7 (La. App. 2 Cir. 2/27/13), 111 So.3d 438, 443; *see Cunningham v. M & S Marine, Inc.*, 2005-0805, p. 4 (La. App. 4 Cir. 1/11/06), 923 So.2d 770, 773. "Hearsay is treated as unreliable because it is based on statements by individuals who are not before the court, have not been sworn and are not available for cross examination." *Ross v. City of New Orleans*, 2000-1879, p. 14 (La. App. 4 Cir. 11/21/01), 808 So.2d 751, 761; *Crescent City Const., Inc. v. Camper*, 2003-1727, p. 6 (La. App. 1 Cir. 12/30/04), 898 So.2d 408, 413.

The Moores' claims against Lewis and the school sound in negligence. The duty/risk analysis is the standard negligence analysis our Court employs in determining whether to impose liability under La. C.C. art. 2315.[3] *Lemann v. Essen Lane Daiquiris, Inc.*, 2005-1095, p. 7 (La. 3/10/06), 923 So.2d 627, 632-33. As stated by the Supreme Court:

> in order for liability to attach under a duty/risk analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard (the breach of duty element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and, (5) actual damages (the damages element).

Mathieu v. Imperial Toy Corp., 94-0952, pp. 4-5 (La. 11/30/94), 646 So.2d 318, 322. "A negative answer to any of the inquiries of the duty/risk analysis results in a determination of no liability." *Id.*, 94-0952, p. 11, 646 So.2d at 326.

Reviewing the record before us, we find that the default judgment was contrary to the law and the evidence because the Moores failed to prove a prima facie case of negligence. Specifically, no competent, admissible evidence of breach of duty or causation was presented.

No eyewitness to Little Jerry's accident testified. No one testified who had any personal knowledge of how Little Jerry's accident occurred. The only evidence in the record of how the accident occurred is hearsay, which is inadmissible. To establish how the accident happened, the Moores rely on an accident report

[3] Pursuant to La. C.C. art. 2315(A), "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

purportedly signed by Lewis, which is hearsay. Likewise, Mr. and Mrs. Moore testified, both in court and via affidavit, to what other people (Lewis and unidentified individuals associated with the school) told them happened to Little Jerry on the day of his injury at school. This is also hearsay and further demonstrates a lack of personal knowledge of the facts of the accident.

The Moores fail to identify any exception to the hearsay rules, and we find none, that applies here. Louisiana courts have found witness statements that are not in affidavit form and unauthenticated accident reports insufficient to establish a prima facie case on a default judgment. *Triple S Marine, L.L.C., v. Daigle Towing Serv., L.L.C.*, unpub., 2009-1506, p. 3 (La. App. 1 Cir. 7/29/10), 2010 WL 2964267. *Martin v. Sanders*, 35,575, p. 4 (La. App. 2 Cir. 1/23/02), 805 So.2d 1209, 1212. Similarly, courts of this state have found that affidavits or testimony, not based on firsthand knowledge of an accident, likewise fail to establish a prima facie case. *See, e.g., Jackson v. Reed*, 47,293, pp. 5-6 (La. App. 2 Cir. 5/29/13), 116 So.3d 977, 981; *Triple S Marine, L.L.C.*, 2009-1506, p. 3, 2010 WL 2964267; *Crescent City Const., Inc.*, 2003-1727, p. 9, 898 So.2d at 415. *See also Parker v. Schneider*, 2014-0232, p. 4 (La. App. 4 Cir. 10/1/14), 151 So.3d 679, 682 (citing La. C.E. art. 602 and stating "[a]ffidavits must be based upon the personal knowledge of the affiant").[4]

[4] This Court explained the personal knowledge requirement for affidavits as follows:

> The affiant must affirmatively establish that he is competent to testify to the matters stated by a factual averment showing how he came by such knowledge. *Barnes v. Sun Oil Co.*, 362 So.2d 761, 763 (La. 1978). Personal knowledge means something the witness actually saw or heard, as distinguished from what he learned from some other person or source. *Hibernia Nat. Bank v. Rivera*, 07-962, pp. 8-9 (La. App. 5 Cir. 9/30/08), 996 So.2d 534, 539. The purpose of the

Purged of hearsay, the record evidences that (1) Little Jerry's special needs warrant a high level of supervision at school; and (2) Little Jerry sustained a serious injury while at school. This evidence does not prove negligence. If a plaintiff fails to prove any element of the duty/risk analysis, a defendant can have no liability for negligence. *Lemann*, 2005-1095, p. 7, 923 So.2d at 633. Even if the record evidence supports that a duty existed and the Moores sustained damages, the Moores have failed to show that Lewis or the school breached any duty owed them or that such a breach of duty caused their damages. They have not shown that Lewis did anything wrong with respect to Little Jerry's descent on the stairs or even that the accident occurred on the stairs in question. In the absence of competent evidence, they also have not shown that either Lewis' actions or any condition of the stairs caused Little Jerry's injuries. We find no law permitting an inference that, because a duty may exist for a special needs child and because the child fell, that duty was breached, or such a purported breach of duty caused the damages in question. Without any eyewitness testimony to the accident, or any other competent, admissible evidence of how the accident occurred, the Moores have not proven a prima facie case of negligence.

We further recognize that the Moores could have called Lewis as an eyewitness to the accident, but did not. Lewis was served with the petition, and no evidence in the record shows that she could not be located or is otherwise unavailable. This Court has held that the "unexplained failure of a party to call a witness who possesses peculiar knowledge of material facts pertinent to the

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> requirement of "personal knowledge" is to limit the affidavit to facts which the affiant saw, heard, or perceived with his own senses. *Id.*

Parker, 2014-0232, p. 4, 151 So.3d at 682 (quoting *Foundation Materials, Inc. v. Carrollton Mid-City Investors, L.L.C.*, 2010-0542, p. 7 (La. App. 4 Cir. 5/25/11), 66 So.3d 1230, 1234-35).

resolution of the case entitles the opposing party to a presumption that the witness's testimony would be unfavorable." *Goldfinch v. United Cabs, Inc.*, 2008-1447, p. 9 (La. App. 4 Cir. 5/13/09), 13 So.3d 1173, 1180 (citations omitted). Because of the Moores' unexplained failure to introduce Lewis' testimony substantiating the circumstances of Little Jerry's accident, we presume that Lewis' testimony would have been unfavorable to the Moores' case.

For these reasons, we find that the district court was manifestly erroneous in concluding that the Moores proved a prima facie case to support the judgment by default. Because the default judgment was confirmed in the absence of competent, admissible evidence supporting a prima facie case of negligence, the judgment is contrary to the law and the evidence, and a new trial should have been granted by the district court. *See Goldfinch*, 2008-1447, p. 11, 13 So.3d at 1181; *Cameron*, 47,789, p. 12, 111 So.3d at 445; La. C.C.P. art. 1972(1).[5]

Accordingly, for the reasons set forth in this opinion, we vacate the default judgment, reverse the judgment denying the motion for new trial, and remand this case to the district court for further proceedings.

DEFAULT JUDGMENT VACATED;
JUDGMENT DENYING NEW TRIAL REVERSED;
REMANDED

[5] Because we have decided this appeal on the basis that the evidence was insufficient to support the judgment, we do not reach Lewis' and the school's remaining arguments regarding the insurance carrier's inaction in appointing counsel to represent them or the lack of language in the judgment regarding apportionment of fault.