NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 0522

BARBARA ALEX AND RONALD ALEX

VERSUS

VAUGHN ROBERTSON AND XYZ INSURANCE COMPANY

Judgment Rendered: October 29, 2010

* * * * * * * * * *

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 107367

The Honorable Jerome J. Barbera, III, Judge Presiding

* * * * * * * * * *

Richard A. Thalheim, Jr. **Thibodaux, LA**	**Counsel for Plaintiffs/Appellants,** **Barbara Alex and Ronald Alex**
Damon D. Brown **Craig H. Stewart** **Houma, LA**	**Counsel for Defendant/Appellee,** **Vaughn Robertson**

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

WHIPPLE, J.

This matter is before us on appeal by plaintiffs, Barbara and Ronald Alex, from a judgment of the trial court finding in favor of plaintiffs and against defendant, Vaughn Robertson, for injuries sustained by Barbara Alex in an accident on rented premises, but assessing 50% fault to plaintiffs. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On December 6, 2004, Barbara Alex entered into a "rental agreement" with Vaughn Robertson, whereby she rented a home owned by Robertson at 1031-B Narrow Street in Thibodaux, Louisiana, for $550.00 per month. Thereafter, Barbara, her husband, Ronald, and her two teenage daughters began residing in the home, which contained one bathroom and toilet.

On September 14, 2006, Barbara went to use the bathroom and after she sat on the toilet, the toilet allegedly began to tilt to the left. According to Barbara, although she was aware that the toilet was "wobbly," she was unable to "catch her balance" and, as the toilet continued to lean to the left, she slipped off of the toilet and fell onto the floor. Barbara claimed that she tried to get up, but that her feet kept slipping in the water, so she called out for her daughter to call an ambulance. Acadian Ambulance transported her to the emergency room at Thibodaux Regional Medical Center, where she presented with complaints of neck and back ache. After she was examined and x-rays were taken, she was given prescriptions for Flexeril and Relafen and was released with instructions to use a heating pad for pain relief.

On September 11, 2007, Barbara and Ronald Alex filed the instant suit against Robertson, seeking damages for injuries allegedly arising from the

accident.[1] The matter was heard before the trial court on October 20, 2009. At the conclusion of the trial, the court rendered oral reasons: (1) finding in favor of plaintiffs and against defendant on the issue of liability; (2) assessing fault 50% to plaintiffs and 50% to defendant; (3) assessing court costs 50% to plaintiffs and 50% to defendant; (4) fixing the expert witness fee of E. A. Angelloz as $350.00 and assessing 50% to plaintiffs and 50% to defendant; (5) awarding general damages in the amount of $2,000.00 to Barbara Alex; (6) awarding special damages in the amount of $1,636.67 to Barbara Alex; (7) awarding consortium damages in the amount of $250.00 to Ronald Alex; and (8) awarding judicial interest from the date of judicial demand on all amounts awarded. A written judgment was signed by the trial court on October 30, 2009.

Plaintiffs then filed the instant appeal, contending that the trial court erred in assessing 50% comparative fault to plaintiffs.

DISCUSSION

It is well settled that the assessment of comparative negligence is a factual matter within the sound discretion of the trial court, and such determination by the trier of fact will not be disturbed on appeal in the absence of manifest error. Gibson v. State, Department of Transportation and Development, 95-1418, 95-1419 (La. App. 1st Cir. 4/4/96), 674 So. 2d 996, 1004, writs denied, 96-1862, 96-1895, 96-1902 (La. 10/25/96), 681 So. 2d 373, 374. In assessing the nature of the conduct of the parties, including whether plaintiff should be apportioned comparative fault, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger; (2) how great a risk was created by the conduct; (3) the significance of what was sought by the conduct; (4) the capacities of the actor,

[1]Although the petition also named Robertson's insurer as a defendant, Robertson testified that he maintained property damage coverage on the property, but had not renewed his liability coverage on the premises.

whether superior or inferior; and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. Adam v. State, Department of Transportation and Development, 2008-1134, 2008-1135 (La. App. 1st Cir. 2/13/09), 5 So. 3d 941, 947-948, writ denied, 2009- 0558 (La. 5/15/09), 8 So. 3d 584. And, of course, as evidenced by concepts such as last clear chance in the context of a comparative fault analysis, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties. Gibson v. State, Department of Transportation and Development, 674 So. 2d 1004.

As noted above, a court of appeal may not set aside a trial court's finding of fact in the absence of "manifest error" or unless it is clearly wrong. Rosell v. ESCO, 549 So. 2d 840, 844 (La. 1989). The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Stobart v. State, Department of Transportation and Development, 617 So. 2d 880, 882 (La. 1993). Moreover, where there is conflict in the testimony, even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, the reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review. Stated succinctly, as an appellate court, we are mindful that our initial review function is not to decide such factual issues *de novo*. See Rosell v. ESCO, 549 So. 2d at 844.

The lessor's obligation to make repairs and the lessee's right to make repairs to leased premises are addressed in the Louisiana Civil Code. Pursuant to LSA-C.C. art. 2691:

> During the lease, the lessor is bound to make all repairs that become necessary to maintain the thing in a condition suitable for the purpose for which it was leased, except those for which the lessee is responsible.

Further, LSA-C.C. art. 2693 provides:

> If during the lease the thing requires a repair that cannot be postponed until the end of the lease, the lessor has the right to make that repair even if this causes the lessee to suffer inconvenience or loss of use of thing.
>
> In such a case, the lessee may obtain a reduction or abatement of the rent, or a dissolution of the lease, depending on all of the circumstances, including each party's fault or responsibility for the repair, the length of the repair period, and the extent of the loss of use.

With respect to the failure of a lessor to make repairs, LSA-C.C. art. 2694 provides:

> If the lessor fails to perform his obligation to make necessary repairs within a reasonable time after demand by the lessee, the lessee may cause them to be made. The lessee may demand immediate reimbursement of the amount expended for the repair or apply that amount to the payment of rent, but only to the extent that the repair was necessary and the expended amount was reasonable.

In the instant case, Robertson testified that on several prior occasions, he had been called because the toilet was "plugged up." He stated that when he could not go to perform the repairs, he hired Vincent Gleason to repair the toilet. Robertson testified that because of on-going problems, i.e., blockages caused by the tenants or other family members putting toys and other items in the toilet, Gleason had to repair the toilet on a monthly basis. Robertson testified that as a result, he had advised plaintiffs that they would have to pay for any future toilet repairs if the damage was shown to be caused by their neglect. Robertson testified that on at least two occasions, the toilet repairs were clearly necessitated by the plaintiffs' neglect. Robertson testified that plaintiffs never paid for these repairs, so he advised them that if it happened again, they were going to be evicted. Robertson further testified that during the course of their tenancy, the tenants kept the property in a state of disrepair and "total destruction," including broken windows, constant plumbing issues, and holes in the walls. He also noted that the yard was always a mess. Robertson testified that prior to the incident at

issue, he gave Barbara Alex a list of items that had to be repaired in the home that had been damaged due to their neglect. Robertson further testified that on September 1, 2006, after receiving several delinquent payments, he issued a notice to plaintiffs advising that if the rent for September was not paid by the 15th of the month, they would be evicted from the premises. The accident at issue occurred on September 14, 2006.

Vincent Gleason, a repairman hired by Robertson to perform repair work on the home, testified that he had been hired to repair the toilet in the home on four or five occasions while plaintiffs resided in the home. He testified that approximately every month to month-and-a-half, the toilet would be "stopped up" and would "back up" due to clothes, toys, and towels in the drain line. He had to use a rotor rooter to unclog the drain. Gleason explained that when the toilet "backed up," the floor would get wet, creating moisture under the linoleum after time. Although Gleason did not know if it was before or after the accident, at some point, he installed a flange under the toilet so it would not rock from side to side.

Ronald Alex testified that they complained to Robertson about the toilet being "loose" about eight weeks before Barbara's accident. He testified that prior to his wife's accident, Robertson came to the property to look at the toilet and took a loose screw from the base of the toilet and told them he would return to fix it. Ronald testified that after Robertson took the screw out, the unsteady condition of the toilet became worse. Nonetheless, they continued to use it. Ronald admitted that at no time did he ever attempt to repair the toilet or replace the screw.

Barbara Alex claimed that throughout the entire time she resided at Robertson's rental home, she had never complained about the toilet being congested or "backed up." She also denied that Robertson ever complained to her

about the condition of the home and property. Also, contrary to her husband's testimony, she claimed that they began having trouble with the toilet a couple of months after they moved in the home. She further testified that she complained for approximately three weeks about the toilet leaning to the side before Robertson came out to inspect it. Like her husband, she claimed that Robertson took a screw out of the toilet, stated he would return to fix it, and never did. Barbara testified that she "probably" called Robertson three or four times to come fix the toilet before her accident. However, she also acknowledged that she did not attempt to fix the toilet or get anyone else to fix the toilet because she felt "it was the landlord's job to fix the toilet." Moreover, she continued to use the toilet despite being aware of the toilet being unsteady.

Plaintiffs called Edward Angelloz, Jr., who was accepted by the trial court as an expert in architecture and construction, to testify. Angelloz testified that after inspecting the premises and toilet a couple of weeks after Barbara Alex's accident, the toilet appeared to be unstable and the floor appeared to be in need of repair due to the floor's softened wood and rotted condition. Angelloz further testified that he saw evidence of prior termite infestation around the floor and on the outside perimeter of the home. Angelloz testified that the appropriate construction assembly of a toilet would have to include a flange. Although Angelloz could not say for certain how long the toilet condition existed prior to his observation of it, he testified that the toilet and sub-floor presented an unsafe circumstance.

In assessing comparative fault herein, the trial court noted the expert testimony by Angelloz that the toilet had not been properly maintained and that the floor was rotten. The trial court further noted that Robertson failed to make the repairs necessary to maintain the toilet in a suitable working condition for the residents' use consistent with his responsibility as a lessor. However, the trial

court also stated that considering that the condition had existed for a "long time," plaintiffs clearly "should have taken some action to avoid putting themselves in a position of danger." The trial court further noted:

> [I]n this case, certainly, Mrs. Alex bears some, and Mr. Alex, have to bear some responsibility for what happened if they knew the toilet was in that condition. They can't just make phone calls to Mr. Robertson, and when he doesn't show up, continue to put themselves in a position where they continue to use it, and, yes, it is the only toilet in the house, but that still doesn't excuse them from putting themselves in a position of peril.

After thoroughly reviewing the testimony and evidence contained in the record herein and applying the above cited precepts, we agree. While the testimony is disputed as to the nature, frequency, and date of the complaints made to Robertson concerning the toilet, we find no error in the trial court's determination that Robertson was obligated to make necessary repairs to maintain the toilet in a suitable working condition, but failed to do so. Further, we find no error in the trial court's determination, which is amply supported by the record, that plaintiffs likewise were at fault because they were aware of the dangerous condition, yet continued to use the toilet, thus placing themselves in peril. Cf. Marcantel v. Karam, 601 So. 2d 1 (La. App. 3rd Cir. 1992) (where appellate court determined that comparative fault principles applied to reduce landlord's liability where tenant was aware of rotten boards in porch yet did not elect to make the repairs when landlord failed to do so before falling through rotten boards in porch) and Jones v. Proctor, 96-2750 (La. App. 4th Cir. 6/25/97), 697 So. 2d 304, 307 (where appellate court applied comparative fault factors and determined that tenant was comparatively at fault because he was aware of the dangerous condition of floor molding and failed to take any steps to remedy the problem before anyone was injured and landlord was also liable because he did not fulfill his obligation to protect tenants from vices and defects of the leased premises).

Accordingly, we find no error in the trial court's assessment of comparative fault to the plaintiffs herein. Thus, we find no merit to plaintiffs' assignment of error.

CONCLUSION

For the above and foregoing reasons, the October 30, 2009 judgment of the trial court is affirmed. Costs of this appeal are assessed against the plaintiffs/appellants, Barbara and Ronald Alex.

AFFIRMED.