NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1145

ADP PROPERTIES, LTD.

VERSUS

JOE MELVIN RICKS, SR. AND EVELYN RICKS

Judgment Rendered: FEB 1 8 2014

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Appealed from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
Docket Number 2006-2763

The Honorable Brenda Bedsole Ricks, Judge Presiding

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Joe Melvin Ricks, Sr. and Evelyn Ricks

BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

**WHIPPLE, C.J.**

This matter is before us on appeal by the plaintiff, ADP Properties, Ltd., from a judgment of the trial court dismissing plaintiff's claims against the defendants, Joe Melvin Ricks, Sr. and Evelyn Ricks.

For the reasons that follow, we affirm.

## FACTS AND PROCEDURAL HISTORY

Joe Melvin Ricks, Sr. and Evelyn Ricks owned property in Hammond, Louisiana, adjacent to Pine Creek University Apartments, which were owned by ADP Properties, Ltd. ("ADP"). During Hurricane Katrina, which made landfall on August 29, 2005, a tree near the southern property line of the Ricks' property was uprooted by Katrina's winds and fell over onto Pine Creek Building 9.[1]

A couple of weeks after the hurricane, Tina Ard, the Pine Creek Property Manager, accompanied by Steve Jackson, the Pine Creek Courtesy Officer, went to Mr. Ricks's home and informed him that the tree had fallen. Ms. Ard asked Mr. Ricks if he had insurance on the tree. Mr. Ricks told them that he had come from New Orleans, that he had lost everything, and that he had no insurance.[2] Ms. Ard told him that she was sorry to hear that and that she understood his predicament. She acknowledged that Pine Creek did not have insurance coverage either, and told him that any assistance he could provide to help remove the tree would be appreciated. About one week later, Mr. Jackson returned and again spoke to Mr. Ricks about the tree. Mr. Ricks again advised that he had no insurance and indicated that he would try to talk to someone about removing the tree.

[1]Building 9 contained four apartment units: two units on the first level and two units on the second level.

[2]At the time of Hurricane Katrina, the Ricks' property was merely an unimproved lot. Mr. Ricks testified that he subsequently began construction of a home on the property in December of 2005.

Shortly thereafter, Mr. Ricks hired a crew to remove the tree, who agreed to try to do so "for a couple of hundred dollars." The crew was able to remove limbs from the tree, but was unable to remove the tree from the building. Because they were unable to complete the job, Mr. Ricks did not pay them. Mr. Ricks next hired Sylvester Matthews to try to remove the tree. Mr. Matthews was able to cut through the trunk of the tree, which allowed the bottom portion of the uprooted trunk to stand upright on Mr. Ricks's property. However, when Mr. Matthews tried to lift the remaining portion of the tree from the building, he discovered that it was bound with power lines. Mr. Ricks and Mr. Matthews called Entergy, who sent a crew to assess the situation. Entergy representatives informed them that they could not remove the wires because the wires were on private property, and that it was the responsibility of the property owner, ADP, to remove the wires. Thus, Mr. Matthews was unable to remove the remaining portion of the tree from Building 9. Mr. Ricks thereafter made several attempts to contact an ADP employee at Pine Creek to advise of the problem, but was unable to reach anyone. ADP representatives made no other attempts to communicate with Mr. Ricks.

Mr. Ali Daneshian, the owner and operator of ADP Properties, testified that after Mr. Ricks's last attempt to have the tree removed in January of 2006, he hired someone to remove the tree and began reconstruction of Building 9 in March of 2006. Mr. Daneshian admitted he had no personal communications with Mr. Ricks. Instead, on July 6, 2006, Ms. Ard, on behalf of Mr. Daneshian, sent a demand letter to Mr. and Mrs. Ricks: (1) seeking payment in the amount of $208,640.00 for costs allegedly incurred in removing the tree and repairing the damage to Building 9 and (2) advising that legal action would commence if no response was received within fifteen days.

On August 24, 2006, ADP filed a petition for damages, naming Mr. Ricks and his wife Evelyn Ricks as defendants. ADP contended therein that the Rickses

"failed to take the appropriate removal action of the tree; and, [sic] that the damages sustained by the plaintiff could have been reduced or prevented by the exercise of reasonable care by the defendants." In its petition, ADP sought recovery for "all property damage/losses including . . . costs incurred in removing the tree . . . ; the market value of the building destroyed; the costs of repairs to the building; associated removal costs incurred; loss of rent revenues; [and] inconvenience."

The matter was tried on October 5, 2012. At the conclusion of trial, the trial court ruled in favor of the Rickses. Thus, a judgment dismissing ADP's claims was signed on October 17, 2012.

ADP then filed the instant appeal, contending that the trial court erred in: (1) failing to find that the Rickses voluntarily "assumed a duty," under the duty-risk analysis in tort, and consequently became legally indebted to ADP; (2) failing to find that their substandard conduct was a cause-in-fact of ADP's damages; and (3) failing to award damages for their substandard conduct; and (4) failing to award damages.

**DISCUSSION**

In its first assignment of error, ADP contends that Mr. and Mrs. Ricks were liable in tort for the damages caused by their tree under theories of general negligence, pursuant to LSA-C.C. art. 2315, and strict liability, pursuant to LSA-C.C. art. 2317.[3] ADP further contends that the Rickses "voluntarily assumed a duty" to remove the fallen tree by hiring individuals engaged in tree removal.

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[3]To the extent that ADP argues that the Mr. and Mrs. Ricks are strictly liable under LSA-C.C. art. 2317 as the owners of property having an unreasonably dangerous condition or defect, we note that the 1996 amendment enacting LSA-C.C. art. 2317.1, effective April 16, 1996, abolished the concept of "strict liability" for an "owner or custodian of a thing" governed by prior interpretation of LSA-C.C. art. 2317. A more appropriate term now for liability under LSA-C.C. arts. 2317 and 2317.1 is "custodial liability," but such liability is nevertheless predicated on a finding of negligence. Jackson v. Brumfield, 2009-2142 (La. App. 1st Cir. 6/11/10), 40 So. 3d 1242, 1243. See also Rogers v. City of Baton Rouge, 2004-1001 (La. App. 1st Cir. 6/29/05), 916 So. 2d 1099, 1102, writ denied, 2005-2022 (La. 2/3/06), 922 So. 2d 1187.

ADP contends that the damages sustained by Building 9 could have been reduced or significantly prevented had they exercised reasonable care in communicating their inability to proceed or complete the tree removal.

Contrariwise, Mr. and Mrs. Ricks contend that they owed no duty whatsoever to APD. They contend that Hurricane Katrina's winds caused the tree, which was otherwise perfectly healthy with no noticeable vices or defects, to be uprooted and fall over the fence line onto ADP's property. Mr. and Mrs. Ricks contend that this was an act of God, accomplished directly and exclusively by natural causes, without human intervention, and which could not have been prevented by the exercise of reasonable care. Alternatively, they contend that if the uprooting of the tree by hurricane force winds is not deemed an act of God, APD nonetheless failed to establish there was a vice or defect rendering the tree unreasonably dangerous, or, that they had either actual or constructive knowledge of any alleged defect, which is necessary for a finding of liability under LSA-C.C. art. 2315 and LSA-C.C. art. 2317. Moreover, to the extent that ADP contends that the delay in removing the tree caused additional damages, Mr. and Mrs. Ricks contend that they made a reasonable effort to help ADP, noting that Mr. Ricks hired two different crews to cut the tree. They further contend that Mr. Ricks acted reasonably under the circumstances in that he attempted to contact the ADP representative to advise that he was unable to proceed, unlike ADP, whose representative testified that she never attempted to again make contact and whose owner testified he never attempted to contact Mr. Ricks. As such, they contend they exercised reasonable care under the circumstances and that their conduct conformed to the appropriate standard of care owed, if any.

In general, the owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. Bozeman v. Scott Range Twelve Limited Partnership, 2003-0903 (La. App. 1st Cir. 4/2/04), 878 So.

2d 615, 619, writ not considered, 2004-1945 (La. 11/8/04), 885 So. 2d 1142. Thus, he must discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence. Vinccinelli v. Musso, 2001-0557 (La. App. 1st Cir. 2/27/02), 818 So. 2d 163, 165, writ denied, 2002-0961 (La. 6/7/02), 818 So. 2d 767. This duty is the same under liability theories asserted under LSA-C.C. arts. 2317 and 2315. Willliams v. Leonard Chabert Medical Center, 98-1029 (La. App. 1st Cir. 9/26/99), 744 So. 2d 206, 209, writ denied, 2000-0011 (La. 2/18/00), 754 So. 2d 974. Moreover, under either theory, the plaintiff has the burden of proving that: (1) the property that caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. Vinccinelli v. Musso, 818 So. 2d at 165.

A threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. Rando v. Anco Insulations, Inc., 2008-1163, 2008-1169 (La. 5/22/09), 16 So. 3d 1065, 1086. Although the determination of whether to assign a legal duty is fact specific, the issue of whether a duty was owed is ultimately a question of law. Smith v. Kopynec, 2012-1472 (La. App. 1st Cir. 6/7/13), 119 So. 3d 835, 838.

An act of God is an unusual, extraordinary, sudden and unexpected manifestation of the forces of nature which cannot be prevented by human care, skill, or foresight. K & M Enterprises of Slaughter, Inc. v. C.B. Pennington, 99-0930 (La. App. 1st Cir. 5/12/00), 764 So. 2d 1089, 1092, writ denied, 2000-1537 (La. 6/30/00), 766 So. 2d 548. The fact that no human agency can resist an act of God renders misfortune occasioned solely thereby a loss by inevitable accident, which must be borne by the one upon whom it falls. Rector v. Hartford Accident

& Indemnity Company of Hartford, Connecticut, 120 So. 2d 511, 515 (La. App. 1st Cir. 1960). An injury caused by an act of God is an injury due directly and exclusively to natural causes, which could not have been prevented by the exercise of reasonable care and foresight. Thus, recovery for injuries caused by extreme weather conditions may be precluded by the application of this rule. Rector v. Hartford Accident & Indemnity Company of Hartford, Connecticut, 120 So. 2d at 515.

In the instant matter, the trial court heard the testimony and reviewed the evidence submitted by the parties prior to rendering its oral reasons. Based on the evidence adduced at trial and the credibility determinations made by the trial court, the trial court concluded that the evidence established that the tree was healthy, and implicitly found that the uprooting of the healthy tree by Hurricane Katrina's winds was an act of God, as follows:

> I think most of the people in here lived through Katrina. We all know how devastating it was. We all know the circumstances. We lived under it for weeks without power. We know the trees that were down and the damage that was occasioned by those trees. The fact that this was a green tree. The fact that it was a solid tree. That it was not something that should have incurred notice to either side. The court does not find that [the Rickses were] negligent in the fact that the tree fell on the building. It's regrettable that it was not repaired within a seven month period. Regrettable that neither side had insurance that would cover this. But based upon the credibility of the witnesses and the evidence that has been adduced at this trial, the court does not find for plaintiff.

Under the manifest error rule, the reviewing court does not decide whether the factual findings are right or wrong, but whether they are reasonable in light of the record. Butler v. L & N Food Stores, 2011-0577 (La. App. 1st Cir. 2/10/12), 91 So. 3d 342, 344. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact may 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). It is the role

of the factfinder to weigh the respective credibilities of the witnesses, and this court will not second-guess the credibility determinations of the trier of fact. Granger v. Christus Health Central Louisiana, 2012-1892 (La. 6/28/13), ___ So. 3d ___, ___.

Photographs of the tree that were introduced into evidence show that the tree was uprooted before falling onto ADP's property. The testimony further established that the tree was solid. ADP presented no evidence whatsoever to establish that the tree contained any defect, vice, or condition that created an unreasonable risk of harm or otherwise rendered it unreasonably dangerous, as required to prevail on a negligence or strict liability claim herein. Indeed, Mr. Daneshian conceded that he saw nothing wrong with the tree and that it did not appear to be rotten or have any defects. After a thorough review of the record herein, we are unable to say the trial court erred in its determination that the loss was caused by an inevitable accident for which recovery of damages from Mr. and Mrs. Ricks is precluded. See Dotson v. Hubbard, 2009-1194 (La. App. 1st Cir. 2/12/10)(unpublished opinion).

To the extent that ADP contends that the Ricks' conduct was substandard in that they failed to take appropriate removal actions, the testimony showed that Mr. Ricks hired two different crews to assist ADP in the removal of the tree from Building 9. After the second crew was informed by Entergy that the power lines that bound the tree could only be removed by the property owner, i.e., APD, Mr. Ricks attempted, without success, to so advise an ADP representative that his crew could not proceed. Mr. Daneshian made no attempt whatsoever to contact Mr. Ricks, and Ms. Ard contacted Mr. Ricks only once after the storm. ADP made no further attempts to communicate with Mr. Ricks.

On review, and considering the record in its entirety, we likewise find no error in the trial court's determination that Mr. and Mrs. Ricks exercised

reasonable care under the circumstances after this unfortunate incident. Thus, finding no error in the trial court's factual findings, which are amply supported by the record, we find no error in the trial court's ultimate conclusion that there was no negligence on their part. Thus, this assignment of error lacks merit.

Given our conclusion that the trial court correctly determined that Mr. and Mrs. Ricks were not negligent herein, we pretermit discussion of ADP's remaining assignment of errors.

## CONCLUSION

For the above and foregoing reasons, the October 17, 2012 judgment of the trial court is hereby affirmed. Costs of this appeal are assessed against the plaintiff/appellant, ADP Properties, Ltd.

**AFFIRMED.**