NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 CA 0271

TOPCOR BELCO, LLC

VERSUS

BR WELDING SUPPLY, LLC, D/B/A TNT-BATON ROUGE, ROMAR/MEC, LLC, AND ABC INSURANCE COMPANY

consolidated with

2014 CA 0272

RONALD SARVIS

VERSUS

BR WELDING SUPPLY, LLC, D/B/A/ TNT-BATON ROUGE, ROMAR/MEC, LLC, AND ABC INSURANCE COMPANY

DEC 0 3 2014

Judgment Rendered: _____

* * * * *

On Appeal from the
23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
Nos. 90,874 c/w 91,780

The Honorable Ralph Tureau, Judge Presiding

* * * * *

Steven Joffrion
Garrett Joffrion
Prairieville, Louisiana

Plaintiff/2nd Appellant/
1st Appellee
Ronald Sarvis

Lawrence C. DeMarcay, III
New Orleans, Louisiana

Defendant/2nd Appellee/
1st Appellant
Romar/MEC, LLC

* * * * *

BEFORE: GUIDRY, THERIOT, AND DRAKE, JJ.

MRT - by Ed Concurs w/o Reasons
Drake, J. concurs.

DRAKE, J.

This is an appeal by both parties, plaintiff, Ronald Sarvis, and defendant, Romar/MEC, LLC (Romar), following a jury trial. Sarvis filed suit seeking damages following an electrocution by equipment manufactured by Romar. We affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL HISTORY

Sarvis brought a products liability action against Romar following a workplace accident, which occurred on May 29, 2008, at a facility owned and operated by Topcor Belco, LLC (Topcor), a fabricating and welding service shop and the employer of Sarvis, which is located in Prairieville, Louisiana. While attempting to demonstrate the automatic portion of a welding machine, Sarvis was electrocuted causing him severe injuries.

Topcor owned a 405 Miller welding machine manufactured by Praxair Distribution, Inc.[1] In order to create an automatic welding system, Topcor purchased a manipulator, oscillator, and positioner (Romar equipment), which were all manufactured by Romar and sold by BR Welding Supply, LLC d/b/a TNT Baton Rouge (TNT).[2] The manipulator holds a welding torch. The positioner is a table which holds the material to be welded and rotates large objects. The oscillator is connected to the end of the welding torch and allows small back and forth movements of the torch. The Romar equipment was delivered to Topcor on November 7, 2007.

TNT, a Romar distributor, installed the Romar equipment and connected it to the Miller machine. During installation, the TNT representative, Keith Templet, connected the Miller machine to the positioner with a welding clamp.

---

[1] Praxair Distribution, Inc. was brought into the litigation pursuant to a third party demand but was dismissed after the granting of a summary judgment.

[2] TNT settled with Sarvis prior to trial and is no longer a party to this litigation.

On May 28, 2008, the day before the accident, the entire welding system was not operating. A TNT service man, Darren Carpenter, came to Topcor and determined that the breaker had tripped. He turned the breaker on and was able to operate the positioner and oscillator. At trial, it was disputed whether Carpenter informed the Topcor employees to get an electrician to repair the burnt wire or told them to operate the welding system with the burnt wire.

On May 29, 2008, Sarvis was attempting to demonstrate how the welding system worked to a potential customer. He turned on the Romar equipment, picked up the control box, and was electrocuted, when he touched that equipment. Sarvis suffered injuries to his left shoulder and cervical spine and underwent three surgeries on his shoulder and neck and will require future surgery.

This matter was originally consolidated with a companion case, "*Topcor Belco, LLC v. BR Welding Supply, LLC, d/b/a TNT-Baton Rouge Romar/MEC, LLC and ABC Insurance Company,* No. 90,874, 23rd Judicial District Court, Parish of Ascension, State of Louisiana." The two matters were severed for the purposes of trial. This matter was tried before a jury, which rendered a verdict in favor of Sarvis. The jury found that Romar failed to provide an adequate warning, which contributed to Sarvis's injury, but that the product did not have a design defect. The jury also found fault on the part of TNT, which settled with Sarvis prior to trial, and Topcor, which was not a party to the litigation. The jury found Romar to be 15% at fault; TNT to be 65% at fault; and Topcor to be 20% at fault. The jury awarded damages in the following amounts:

A. Past & Future Physical Pain and Suffering	$250,000
B. Past & Future Mental Anguish & Distress	$100,000
C. Temporary & Permanent Physical Disability	$100,000

D. Loss of Enjoyment of Life	$100,000
E. Past & Future Medical Expenses	$144,000
F. Past & Future Replacement Household Help	$15,000
G. Loss of Actual Past Earnings or Potential Earnings	$0
H. Loss of Future Earnings & Future Earning Capacity	$0

On June 10, 2013, the trial court signed a judgment in accordance with the jury verdict casting Romar for 15% of the total jury verdict of $709,000, for a total award of $106,350. Sarvis filed a motion for JNOV and, alternatively, a motion for new trial. After a hearing was held, the trial court denied both motions and signed a judgment in accordance therewith.

Romar suspensively appealed the June 10, 2013 judgment. Sarvis filed a devolutive appeal from the June 10, 2013 judgment and the September 5, 2013 judgment denying his motion for JNOV and alternative motion for new trial.

ASSIGNMENTS OF ERROR

Romar designates six assignments of error. The first five all relate to whether or not Sarvis was a sophisticated user of welding equipment and whether Romar had a legal duty to warn Sarvis that the Romar equipment could cause electrical shock if not grounded properly. The sixth assignment of error by Romar is that even if it owed a duty to Sarvis to place a warning on the Romar equipment, there was insufficient evidence that the lack of warning caused Sarvis's injuries.

Sarvis submits the following assignments of error:

1. The jury/trial court erred in finding that the Product was not unreasonably dangerous in design;

2. The jury/trial court erred in awarding future medical costs and replacement of household help, but failing to make an award for loss of earnings or future earning capacity;

3. The jury/trial court erred by making no award for loss of past earnings;

4. The jury/trial court erred by allocating an unreasonably low portion of fault to defendant, Romar, and an unreasonably high portion of fault to dismissed defendant, TNT;

5. The jury/trial court erred by allocating fault to non-party, Topcor;

6. The trial court erred in denying Plaintiff/Appellant, Mr. Ronald Sarvis's Motion for JNOV;

7. The trial court erred in denying Plaintiff/Appellant, Mr. Sarvis's alternative Motion for a 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 Dep't 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. *LeBlanc v. Appurao*, 13-0491 (La. App. 1 Cir. 2/13/14), 138 So. 3d 1, 4, *writ denied,* 14-0498 (La. 4/17/14), 138 So. 2d 632. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review, even when the appellate court may feel that its own evaluations and inferences are as reasonable. *Robinson v. North American Salt Co.,* 02-1869 (La. App. 1 Cir. 6/27/03), 865 So. 2d 98, 105, *writ denied*, 03-2581 (La. 11/26/03), 860 So. 2d 1139. Where there are two permissible views of the evidence, a fact finder's choice between them can never be manifestly erroneous or clearly wrong. *Dubuisson v. Amclyde Engineered Products Co., Inc.,* 12-0010 (La. App. 1 Cir. 12/31/12), 112 So. 3d 891, 895.

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

The Louisiana Products Liability Act (LPLA) is set forth in Louisiana Revised Statutes 9:2800.51 *et seq.,* and establishes the exclusive theories of liability for manufacturers for damages caused by their products. La. R.S. 9:2800.52; *Gruver v. Kroger Co.,* 10-689 (La. App. 3 Cir. 2/2/11), 54 So. 3d 1249, 1254, *writ denied,* 11-0471 (La. 4/25/11), 62 So. 3d 92. Specifically, the LPLA provides that "[t]he manufacturer of a product shall be liable to a claimant for damage proximately caused by a characteristic of the product that renders the

product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product." La. R.S. 9:2800.54A. In a products liability case, the plaintiff is required to prove: (1) that the defendant manufactured the product; (2) that a characteristic of the product proximately caused the alleged damage; (3) that the characteristic made the product "unreasonably dangerous;" and (4) that the damage arose from a reasonably anticipated use of the product. La. R.S. 9:2800.54A; *See Jack v. Alberto-Culver USA, Inc.*, 06-1883 (La. 2/22/07), 949 So. 2d 1256, 1258. If a plaintiff fails to establish any one of the above elements, his claim must fail and he cannot recover.

Louisiana Revised Statutes 9:2800.54B provides:

> A product is unreasonably dangerous if and only if:
>
> (1) The product is unreasonably dangerous in construction or composition as provided in R.S. 9:2800.55;
>
> (2) The product is unreasonably dangerous in design as provided in R.S. 9:2800.56;
>
> (3) The product is unreasonably dangerous because an adequate warning about the product has not been provided as provided in R.S. 9:2800.57; or
>
> (4) The product is unreasonably dangerous because it does not conform to an express warranty of the manufacturer about the product as provided in R.S. 9:2800.58.

Sarvis contended that the product was unreasonably dangerous in its design and because it contained an inadequate warning.

Louisiana Revised Statutes 9:2800.56 provides:

> A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control:
>
> (1) There existed an alternative design for the product that was capable of preventing the claimant's damage; and
>
> (2) The likelihood that the product's design would cause the claimant's damage and the gravity of that damage outweighed the burden on the manufacturer of adopting such alternative design and the adverse effect, if any, of such alternative design on the utility of the product. An adequate warning about a product shall be considered

> in evaluating the likelihood of damage when the manufacturer has used reasonable care to provide the adequate warning to users and handlers of the product.

With regard to an inadequate warning, Louisiana Revised Statutes 9:2800.57 provides, in pertinent part:

> A. A product is unreasonably dangerous because an adequate warning about the product has not been provided if, at the time the product left its manufacturer's control, the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product.
>
> B. A manufacturer is not required to provide an adequate warning about his product when:
>
> (1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or
>
> (2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

Romar Appeal

Sophisticated User

Romar claims that a manufacturer is not responsible for warning "sophisticated users" of obvious dangers and relies upon *Hines v. Remington Arms Co.,* 94-0455 (La. 12/8/94), 648 So. 2d 331, 337; *Johnston v. Hartford Ins. Co.,* 623 So. 2d 35, 37 (La. App. 1 Cir.), *writ denied,* 626 So. 2d 1170 (La. 1993); *Home Ins. Co. of Illinois v. National Tea Co.,* 577 So. 2d 65, 74 (La. App. 1 Cir. 1990), *aff'd in part, rev'd in part (on other grounds),* 588 So. 2d 361 (1991). Romar claims that both Topcor and Sarvis were sophisticated users. Romar correctly states the law that there is no duty to warn "sophisticated users" of the dangers, which they may be presumed to know about because of their familiarity with the product. *Johnston,* 623 So. 2d at 37. However, the record supports a

reasonable finding that Topcor and Sarvis were not sophisticated users and a finding that the dangers were not obvious.

Sarvis testified that he was becoming familiar with the Romar equipment as he had observed the technician train Topcor employees. Both Topcor and Sarvis presented evidence that they had never used anything like the Romar equipment. Topcor owner and president, Joseph Roccaforte, testified that Topcor decided to increase its market share of the pipe fabrication business and determined there was need for an automated welding process. Topcor had never owned an automatic welding machine. Roccaforte had no independent knowledge how the automatic welding process worked. TNT informed Roccaforte that Topcor could use its current welding machine, the Miller machine, with the positioner and oscillator that were manufactured by Romar. Roccaforte informed TNT that Topcor did not know how to run the Romar equipment. Roccaforte also testified that Topcor had no idea how to set up the Romar equipment to the Miller machine. The connecting of the Miller machine and Romar equipment created an automatic welding system. Roccaforte discussed the need with TNT representative, Keith Templet, to have the welding machine be flexible and be able to move around the shop. Templet informed Roccaforte how to obtain that flexibility by using a clamp on the positioner. Topcor had no idea how to operate the Romar equipment, and the employees had to be instructed on the use. Roccaforte testified that he was unaware of the danger of electrocution if the clamp connecting the Miller machine to the Romar equipment became disconnected. After this accident, he learned there were other ways to permanently bolt the welding system to a ground and still obtain flexibility.

Romar also claims that Sarvis is a sophisticated user because he is a welder by trade with many certifications. Sarvis testified that he was a stick welder, that uses a rod and flux. The Romar equipment which was added to the Miller machine

did not use a stick welder. Sarvis explained that even though stick welders use a clamp to ground a machine, usually the machine will not work if the clamp becomes disconnected.

Although Romar argues that Topcor and Sarvis were aware the Romar equipment was energized because of their welding backgrounds, there is no evidence that either were aware the welding system set up in Topcor with a grounding clamp could cause electrocution if the clamp became disconnected. Michael Macanelly, an expert in the fields of power, control systems, and electrical power control systems, testified on behalf of Sarvis. Macanelly testified that a welder with no experience on this particular machine would not know that if the clamp fell off, he could be electrocuted. A welder would expect the machine not to operate. Sarvis testified that a welding machine normally will not operate if the grounding clamp is not present. Sarvis had never welded with the automatic welding system and had never demonstrated it to employees. Templet trained the Topcor employees on the use of the automatic welding system. Sarvis testified that a removable clamp was used to connect the Miller machine and the Romar equipment. Sarvis did not know the danger of the two machines becoming disconnected. Sarvis believed the welding machine would cease working without the grounding clamp. Sarvis was unfamiliar with the automatic welding process. Sarvis was not welding at the time of the injury; he just touched the Romar equipment.

There is nothing in the record to support Romar's argument that Topcor and Sarvis were sophisticated users of the Romar equipment. Even the Romar operations manager, Will Harris, testified there were at least thirty different combinations of its equipment. Those who had no experience with an automatic welding process cannot be considered sophisticated users simply because they knew how to weld. Since errors one through five assigned by Romar are

contingent upon Topcor and Sarvis being sophisticated users, we affirm the finding of the trial court that Romar had a duty to warn of electrocution as the Romar equipment was installed.

Causation of Failure to Warn

Romar claims that even if it had a duty to warn Sarvis of the danger of electrocution, Sarvis failed to prove that the failure to warn caused his injuries. The LPLA defines "adequate warning" as "a warning or instruction that would lead an ordinary reasonable user or handler of a product to contemplate the danger in using or handling the product and either to decline to use or handle the product or, if possible, to use or handle the product in such a manner as to avoid the damage for which the claim is made." La. R.S. 9:2800.53(9).

To recover under the theory of failure to warn, the plaintiff bears the burden of establishing that (1) the product possessed a characteristic that may cause damage and the manufacturer failed to use reasonable care to provide an adequate warning of such characteristic and its danger to users and handlers of the product; and (2) that the failure to do so proximately caused the claimant's injuries. *See* La. R.S. 9:2800.54 and 2800.57; *Weiss v. Mazda Motor Corp.*, 10-608 (La. App. 5 Cir. 11/23/10), 54 So. 3d 724, 729, *writ denied*, 10-2835 (La. 2/11/11), 56 So. 3d 1006.

Whether a product is unreasonably dangerous due to an inadequate warning is a question for the trier of fact which is reviewed under the clearly wrong/manifest error standard. *Hutto v. McNeil-PPC, Inc.*, 11-609 (La. App. 3 Cir. 12/7/11), 79 So. 3d 1199, 1211, *writ denied*, 12-0402 (La. 4/27/12), 86 So. 3d 628, *cert. denied*, 133 S.Ct. 428, 184 L.Ed.2d 289.

A cause is a legal cause in fact if it has a proximate relation to the harm which occurs. *Butler v. Baber*, 529 So. 2d 374, 378 (La. 1988). "A proximate cause is generally defined as any cause which, in natural and continuous sequence,

unbroken by any efficient, intervening cause, produces the result complained of and without which the result would not have occurred." *Sutton v. Duplessis,* 584 So. 2d 362, 365 (La. App. 4 Cir. 1991). If there is more than one cause of injury, "a defendant's conduct is a cause-in-fact if it is a substantial factor generating plaintiff's harm." *Rando v. Anco Insulations, Inc.,* 08-1163, 08-1169 (La. 5/22/09), 16 So. 3d 1065, 1088.

Romar claims that there was no evidence of causation because Sarvis admitted to being aware that the welding machine was energized on the date of the accident and to knowing to check for a ground before welding. Romar also claims that it had no duty to warn, since Sarvis admitted to knowing that the welding machine was energized. Roccaforte also admitted to knowledge that the welding machine was energized.

Romar equates an individual's knowing that the machine was energized as knowing that a person could be electrocuted. Macanelly testified that the Romar equipment had to be used with a welding machine in order to operate, which required a positive electrode, the gun, and a connection to a negative electrode for a return path of the electricity. He also explained that a clamp can be used for the return path of electricity. Macanelly agreed with Sarvis that normally when a welding machine stands alone, if the clamp becomes disconnected, the machine ceases to weld. In the present case, with the Romar equipment hooked to the welding machine, there was another path for the return of the electricity, and the electricity will follow that path. He also testified that Romar should have warned of the danger of electrical shock with the method used to clamp the Romar equipment to the welding machine. Macanelly also explained that a warning should have been used that the terminal was a ground return which had to be connected to the welding machine before being operated. A welder would not

know that the result of not hooking up a ground to this machine would be extreme risk of electrocution.

Also pertinent to the causation issue is that Sarvis was not operating the Romar equipment to weld at the time of the accident. He was attempting to demonstrate the welding system to a potential customer and show how the pipe oscillator rolls the pipe. Sarvis picked up the control in one hand and was electrocuted when he touched the crank on the Romar equipment. Roccaforte also testified that Sarvis was electrocuted when he touched the crank of the Romar equipment.

The Romar equipment had no manual, labels, stickers, or warnings.[3] Sarvis argues that the lack of instruction as to how to set up the Romar equipment to a welding machine also contributed to the failure to warn. Based on our review of the entire record, we find it reasonable that the jury determined that a failure to warn that the Romar equipment could cause electrocution if not connected to the welding machine was a proximate cause of Sarvis's injuries. Romar admitted that a permanent grounding lug would be recommended with the Romar equipment considering the combination of equipment that Topcor had configured. However, Romar provided no warning on the Romar equipment to use a permanent grounding lug. Although Romar agreed that a manual should have had a warning that unless the Romar equipment was properly grounded electrocution could occur, no manual or warning was ever produced by Romar to Sarvis. It could be reasonably anticipated that not all users would have a permanent ground given the fact that the Romar equipment is made to use with different welding applications. If a permanent ground was necessary, Romar should have provided a warning to use a permanent ground or what could happen without a permanent ground. Sarvis

---

[3] The Romar equipment did have "pinch labels" warning users not to place fingers in parts of the equipment where they could be pinched.

was not even welding at the time of this injury; he only touched the Romar equipment. We find it reasonable for a jury to determine that a warning should have been given that the Romar equipment should not have been touched without either a permanent ground or making sure grounding clamp was in place. We find no manifest error on the part of the jury with respect to the issue of Romar's failure to warn Sarvis.

Sarvis Appeal

Future Loss of Earnings and Earning Capacity[4]

It is well-settled that a judge or jury is given great discretion in its assessment of quantum for both general and special damages. *Guillory v. Lee,* 09-0075 (La. 6/26/09), 16 So. 3d 1104, 1116. Louisiana Civil Code article 2324.1 provides: "In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury." Furthermore, the jury's assessment of quantum or determination of the appropriate amount of damages is a determination of fact which is entitled to great deference on appeal. *Wainwright v. Fontenot,* 00-0492 (La. 10/17/00), 774 So. 2d 70, 74.

Review of the amounts awarded by the jury for general and special damages is subject to the "abuse of discretion" standard of review, *See Leighow v. Crump,* 06-0642 (La. App. 1 Cir. 3/23/07), 960 So. 2d 122, 128-129, *writs denied.* 07-1195, 07-1218 (La. 9/21/07), 964 So. 2d 337, 341; *Harris v. Delta Development Partnership,* 07-2418 (La. App. 1 Cir. 8/21/08), 994 So. 2d 69, 82-83 (*quoting Coco v. Winston Industries, Inc.,* 341 So. 2d 332, 335 (La. 1976)). An appellate court, on review, must be cautious not to re-weigh the evidence or to substitute its own factual finding just because it would have decided the case differently. *Guillory v. Lee,* 16 So. 3d at 1117.

---

[4] Given our affirming of the jury's finding that Romar failed to provide an adequate warning of the equipment's danger, we pretermit any discussion as to Sarvis's claim regarding defective design.

In a personal injury suit, the plaintiff bears the burden of proving the causal connection between an accident and the resulting injuries. *Oden v. Gales,* 06-0946 (La. App. 1 Cir. 3/23/07), 960 So. 2d 114, 118. Whether the accident caused the plaintiff's injuries is a factual question that should not be reversed on appeal absent manifest error. *Pena v. Delchamps, Inc.,* 06-0364 (La. App. 1 Cir. 3/28/07), 960 So. 2d 988, 994, *writ denied,* 07-0875 (La. 6/22/07), 959 So. 2d 498.

Notably, reasonable persons frequently disagree regarding the measure of damages in a particular case. *Guillory v. Lee,* 16 So. 3d at 1117. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Rosell v. ESCO,* 549 So. 2d 840, 844 (La. 1989). An appellate court, on review, must be cautious not to re-weigh the evidence or to substitute its own factual finding just because it would have decided the case differently. *Guillory v. Lee,* 16 So. 3d at 1117.

In reviewing a jury's factual conclusions with regard to special damages, an appellate court must satisfy a two-step process based on the record as a whole: there must be no reasonable factual basis for the trial court's conclusion, and the finding must be clearly wrong. *Guillory v. Insurance Company of North America,* 96-1084 (La. 4/8/97), 692 So. 2d 1029, 1032. This test requires a reviewing court to do more than simply review the record for some evidence, which supports or controverts the trial court's findings. The court must review the entire record to determine whether the trial court's finding was clearly wrong or manifestly erroneous. *Guillory v. Lee,* 16 So. 3d at 1118. The issue to be resolved on review is not whether the jury was right or wrong, but whether the jury's fact finding conclusion was a reasonable one. *Rosell,* 549 So. 2d at 844.

Plaintiff contends that the jury abused its discretion in denying him an award for loss of future wages/wage earning capacity. The jury's determination of the amount, if any, of an award of damages, including lost earning capacity, is a

finding of fact. *Ryan v. Zurich American Ins. Co.,* 072312 (La. 7/1/08), 988 So. 2d 214, 219. As such, the manifest error standard of review is appropriate here to determine whether the jury was clearly wrong in awarding no damages for loss of future earning capacity. *Id.*

Unlike awards for past lost earnings, awards for lost future income or loss of future earning capacity are inherently speculative and are intrinsically insusceptible of being calculated with mathematical certainty. Therefore, the jury is given much discretion in fixing these awards. La. C.C. art. 2324.1; *Graham v. Offshore Specialty Fabricators, Inc.*, 09-0117 (La. App. 1 Cir. 1/8/10), 37 So. 3d 1002, 1016. An award of loss of future income is not based upon the difference between a plaintiff's earnings before and after a disabling injury. Rather, the award is predicated upon the difference between a plaintiff's earning capacity before and after a disabling injury. *Graham,* 37 So. 3d at 1016. Damages may be assessed for the deprivation of what the injured plaintiff could have earned, despite the fact that he may never have seen fit to take advantage of that capacity. The theory is that the injury done him has deprived him of a capacity he would have been entitled to enjoy even though he never profited from it monetarily. *Id.* Additionally, the rule that questions of credibility are for the trier of fact applies to the evaluation of expert testimony, unless the stated reasons of the expert are patently unsound. *Id.*

Roccaforte testified that Sarvis was injured in his first year of working for Topcor. Sarvis was paid an hourly wage and was also paid bonuses based on the profit he generated for the company. There was testimony as to each section of the business and what the expected profit was going to be in five years. The gross profits of Topcor were five million dollars in the first year. Topcor projected earnings of twenty million dollars after five years. However, Sarvis's bonus has remained about the same as what he received the first year. Both Topcor and Sarvis blame the lack of increased bonus on the accident. Roccaforte also testified

that at the time of trial, Sarvis earned more than when he was injured five years previously.

Sarvis testified that the first year he worked with Topcor, he made $35 per hour and received bonuses of approximately $40,000-50,000. Both he and Roccaforte testified that since the accident, Sarvis was earning bonuses in the amount of $90,000 to $100,000 a year but that based on projected earnings of the company after five years, Sarvis should be earning about $400,000 per year with bonuses had it not been for the accident. The evidence at trial was that Sarvis expected to bring in business to Topcor and earn bonuses based on that business. Dr. Randy Rice, an economist, testified on behalf of Sarvis that Sarvis did have future lost wages and loss of future earnings resulting from the accident.

Dr. Ken Boudreaux, an economist who testified on behalf of Romar, testified that Sarvis was able to maintain his employment after the accident and there was no reason that he would not do so in the future. He opined that Sarvis had no future wage loss claim based on the fact that Sarvis had steadily increased his earnings since the accident. Boudreaux also testified that there was no basis for any economist to form an opinion that Sarvis had a future income loss.

As the fact finder, the jury had the choice to believe the testimony and evidence of the plaintiff's witnesses or those of the defendants. Following a thorough review of the record, we cannot say that because the jury chose to believe the testimony and evidence as presented by the defendant, the verdict of the jury, that Sarvis failed to a future wage loss or future loss of earnings, was manifestly erroneous or clearly wrong. It was reasonable for the jury to believe that Topcor may not have reached the forecasted earnings that Roccaforte wanted for the company given that at the time of the injury, Topcor was relatively new to the business. Although we may have weighed the evidence differently had we been sitting as the trier of fact, the jury findings are reasonable in light of the record

reviewed in its entirety. *Rosell* 549 So. 2d at 844. This assignment of error is without merit.

Loss of Past Earnings

A plaintiff seeking damages for past lost wages bears the burden of proving lost earnings. *Graham,* 37 So. 3d at 1015. An award for lost wages is subject to the manifest error standard of review because such damages must be proven with reasonable certainty. *Boudreaux v. State, Dept. of Transp. & Dev.,* 04-0985 (La. App. 1 Cir. 6/10/05), 906 So. 2d 695, 705, *writ denied,* 05-2164 (La. 2/10/06), 924 So. 2d 174, *and writ denied,* 05-2242 (La. 2/17/06), 924 So. 2d 1018.

The evidence at trial was that Topcor paid Sarvis every day even though he missed work from the accident and had three surgeries. Topcor also paid Sarvis bonuses even though Sarvis was not at work for some of those days. Sarvis agreed at trial that he continued to earn what he did prior to the accident and that his salary has increased. His tax records also show that Sarvis's wages have increased since the accident. Dr. Kenneth Boudreaux testified on behalf of Romar that Sarvis did not have any lost wages resulting from this accident. Following our review of the record, we cannot conclude that the jury was manifestly erroneous in finding that Sarvis failed to prove his claim for lost wages with reasonable certainty.

Apportionment of Fault

Sarvis asserts that the jury erred in allocating an unreasonably low portion of fault to Romar and an unreasonably high portion of fault to TNT. Allocation of fault is a factual determination subject to the manifest error rule. *Great West Casualty Co. v. State ex rel. Dept. of Transp. and Development,* 06-1776 (La. App. 1 Cir. 3/28/07), 960 So. 2d 973, 977-78.

In *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985), the supreme court stated:

> In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed.
>
> In assessing the nature of the conduct of the parties, 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, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. And, of course, as evidenced by concepts such as last clear chance, the relationship between the fault/negligent conduct and the harm to the plaintiff are considerations in determining the relative fault of the parties.

The evidence at trial was that Romar manufactured the positioner, the oscillator, and the manipulator, which were connected to the Miller machine on site at Topcor. TNT installed the Romar equipment and hooked it up to the Miller machine to create an automatic welding machine. It worked well for a few months. Then the day before this accident, TNT was called to repair the entire automatic welding machine because it was not working. Darren Carpenter, a TNT service man, came to Topcor and reset the breaker, which had been thrown. Carpenter also noticed a burnt wire. Carpenter testified that the positioner and oscillator were working fine when he left, but that no one welded on the machine while he was there. He also testified that he was not an electrician and advised Topcor to get the burnt wire fixed. Sarvis testified that TNT actually told one of the Topcor welders that it was safe to use the automatic welding machine with the burnt wire. Although the machine may have worked that evening, the next day Sarvis was electrocuted.

Given our review of the record and the discussion of this opinion, there is evidence in the record for the jury to have reasonably allocated fault in the manner it did. Therefore, we find no manifest error.

JNOV/New Trial

Both Romar and Sarvis appeal the trial court's denial of their requests for a JNOV. Based on our determination of the issues related to the failure to warn, loss of future earnings and earning capacity, loss of past earnings, and comparative fault, we likewise find no manifest error in the trial courts failure to grant both parties request for a JNOV. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 92-1544, 92-1545 (La. App. 1 Cir. 3/11/94), 634 So. 2d 466, 491-492, *writ denied*, 94-0906 (La. 6/7/94), 638 So. 2d 1094.

Alternatively, Sarvis 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. We do not find that the jury verdict was clearly contrary to the law and evidence.

CONCLUSION

For the reasons set forth above, the judgment of the trial court is affirmed. Costs of the appeal are assessed against plaintiff, Ronald Sarvis.

JUDGMENT AFFIRMED.