NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

JEW

FIRST CIRCUIT

NUMBER 2014 CA 1244

RAYMOND STUERHOFF

VERSUS

CORT BUSINESS SERVICES CORPORATION,
D/B/A CORT FURNITURE RENTAL AND
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA

Judgment Rendered: MAR 06 2015

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 581,051

Honorable Janice Clark, Judge

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Sean M. Casey Mandeville, LA and Joseph A. Ciucci Atlanta, GA	Attorneys for Appellants Defendants – CORT Business Services Corporation d/b/a CORT Furniture Rental and Travelers Property Casualty Company of America
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BEFORE: PETTIGREW, WELCH, AND CHUTZ, JJ.

Chutz, J. - Dissents w/ Reasons
gdf Pettigrew, J. Concurs with the Results

WELCH, J.

In this action for damages arising out of an infestation of cimicidae (commonly referred to as "bed bugs") in a mattress and box spring that the plaintiff, Raymond Stuerhoff, rented from the defendant, CORT Business Services Corporation d/b/a CORT Furniture Rental ("CORT"), the defendants, CORT and its insurer, Travelers Property Casualty Company of America, appeal a judgment rendered in favor of the plaintiff and against the defendants in the amount of $10,500.00 for general damages, plus special damages in the amount of $349.00 and judicial interest from the date of judicial demand. For reasons that follow, we affirm the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

On August 8, 2008, the plaintiff, while temporarily residing in Baton Rouge for job-related purposes, went to CORT and rented several pieces of furniture, including a twin mattress, box spring, and bed frame.[1] The furniture was delivered to the plaintiff on August 11, 2008, at his apartment at Indigo Park Apartments. At the time, Indigo Park Apartments was a brand new apartment complex, and the plaintiff was the first occupant of his particular apartment unit. According to the plaintiff, the night after the furniture was delivered, he developed a skin condition, which he initially thought was a rash. The plaintiff explained that at first, the rash was on his feet, then it spread to his legs, and eventually it was on his whole body—from his "earlobes to [his] toe[s]."

Therefore, on August 24, 2008, the plaintiff sought medical treatment for the rash at Lake After Hours. There, it was noted that the plaintiff had a "[r]ash, papules and vesicles on dorsum of foot, anterior surface of arms and back." The plaintiff was prescribed a cream for the lesions, was told to use over-the-counter

[1] Although the plaintiff entered into the rental agreement with CORT, the plaintiff's employer, ARCO/Murray National Construction Company, Inc. ("ARCO") paid the amounts due under the lease through its corporate account with CORT.

Calamine and Benadryl or Claritin as needed for itching, and was told to follow up with his primary physician if the condition did not improve or if it got worse. On August 26, 2008, the plaintiff visited the Dermatology Clinic. There, the plaintiff was diagnosed with varicella ("chicken pox") and was prescribed additional medication for the sores.

At the beginning of September 2008, the plaintiff returned home to Chicago, Illinois (due to Hurricane Gustav) for approximately ten days, and while he was at home in Chicago, his skin condition improved. The plaintiff then returned to Louisiana, went to his apartment to sleep, and then his skin condition reappeared. The plaintiff went to work that day (September 12, 2008), but went home to his apartment early because he was feeling ill. While at his apartment, he began experiencing chest pain, so he went to Our Lady of the Lake Regional Medical Center ("OLOL") for medical treatment. While at OLOL, his skin condition was noted and he was told by a nurse that his skin condition was caused by bed bugs.[2]

The plaintiff was discharged from OLOL on September 13, 2008, and based on what he was told in the hospital, he contacted a local exterminator, J&J Exterminating Co., Inc. The exterminator came to the plaintiff's apartment and discovered bed bugs in the mattress. The plaintiff explained that the exterminator examined the mattress, took the mattress outside, and then cut it open. The plaintiff and exterminator then observed that the inside of the mattress was infested with bugs and the plaintiff was then was told by the exterminator that the bugs were bed bugs.[3] The exterminator and the plaintiff collected some of the bugs

[2] The defendants objected to the admission of this evidence on the basis of hearsay. The trial court overruled the objection, and the defendants have challenged that ruling on appeal. For reasons set forth hereinafter, we find no error in the trial court's evidentiary ruling in this regard.

[3] The defendants objected to the admission of this evidence on the basis of hearsay. The trial court overruled the objection, and the defendants have challenged that ruling on appeal. For reasons set forth hereinafter, we find no error in the trial court's evidentiary ruling in this regard.

from the mattress and then placed them in a plastic bag.[4] The plaintiff's apartment was then treated for bed bugs. The plaintiff also contacted CORT about the situation, and on September 17, 2008, CORT removed all of the rented furniture from the plaintiff's apartment. CORT subsequently destroyed the mattress, box spring, and bed frame pursuant to its internal bed bug policy and ultimately issued a refund of all sums paid pursuant to the lease.[5]

On August 4, 2009, the plaintiff filed a petition seeking damages from the defendants for the injuries he sustained. Following a trial on the merits, the trial court rendered and signed a judgment on May 2, 2014, in favor of the plaintiff in the amount of $10,500.00 in general damages, plus special damages in the amount of $349.00 and judicial interest from the date of judicial demand. This appeal by the defendants followed.

II. LAW AND DISCUSSION

The defendants allege, in their first three assignments of error, that the trial court committed certain evidentiary errors. Thus, we must first address the evidentiary challenges because the finding of an evidentiary error may affect the applicable standard of review, in that this court must conduct a *de novo* review if the trial court committed an evidentiary error that interdicted the fact finding process. **Devall v. Baton Rouge Fire Department**, 2007-0156 (La. App. 1st Cir. 11/2/07), 979 So.2d 500, 502; **Wright v. Bennett**, 2004-1944 (La. App. 1st Cir. 9/28/05), 924 So.2d 178, 182.

Generally, the trial court is granted broad discretion in its evidentiary rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. **Wright**, 924 So.2d at 183. Additionally, La. C.E. art. 103(A) provides,

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[4] The plastic bag containing the dead bugs was offered into evidence at trial. The defendants did not object to the admission of the plastic bag containing the bugs into evidence; however, on appeal, the defendants contend that the trial court erred in taking "judicial notice" that the insects in the bag were bed bugs. The merits of this assignment of error is hereinafter discussed.

[5] The refund was issued to the plaintiff's employer, ARCO.

in pertinent part, that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected." The proper inquiry for determining whether a party was prejudiced by a trial court's alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case; if the effect on the outcome is not substantial, reversal is not warranted. **Wright**, 924 So.2d at 183.

The specific evidentiary errors challenged by the defendants on appeal are: (1) the admission of hearsay testimony from the plaintiff of an out-of-court statement made by an unidentified nurse at OLOL that the plaintiff had been exposed to or bitten by bedbugs; (2) the admission of hearsay testimony from the plaintiff of an out-of-court statement made by an exterminator identifying insects and/or insect debris found on the box spring as bed bugs; and (3) the admission of a copy of the service agreement between the exterminator and the plaintiff, which contained hearsay statements of the exterminator identifying the insects as bed bugs.

Hearsay is "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." La. C.E. art. 801(C). Hearsay is generally not admissible unless it falls under one of the statutory exceptions set forth in La. C.E. arts. 803 or 804. See La. C.E. art. 802. The admission of hearsay evidence is subject to the harmless error analysis. **Clement v. Graves**, 2004-1831 (La. App. 1st Cir. 9/28/05), 924 So.2d 196, 204-205. The admission of a hearsay that is merely cumulative or corroborative of other evidence is generally held to be harmless error. *Id.* at 205.

The testimony of the plaintiff at issue with regard to what he was told by the nurse was as follows:

By [plaintiff's attorney]

Q. Were you told anything else during that stay and treatment?

A. Yes, I was told by one of the nurses there that came into my room that morning ... [s]he came into the room. She says –she says, boy, them bugs had their way with you. And I said what bugs? She says the bedbugs. She said them are bed bug bites. And I said no way. I said I knew something was up. I says I knew it. I knew something was wrong. I said I had a bad feeling about this from day one when they delivered that mattress. I said I knew it. And, sure enough, she – she confirmed that. So then I got home, and I called an exterminator and health department and I told them, I said, we've got [an] issue.

The trial court overruled the objection to the testimony on the basis that it was not hearsay because it was not being offered to prove the truth of the matter asserted, but rather, to explain that, as a result of what he was told, he contacted an exterminator. See La. C.E. art. 801(C). A review of the plaintiff's testimony in this regard supports the trial court's determination that the statement was not being offered to prove that the plaintiff's rash was in fact caused by bed bug bites, but rather, as part of the plaintiff's recollection of the incident and that based on what the nurse told him while he was at OLOL, he contacted the exterminator and health department. Therefore, we cannot say that the trial court erred or abused its discretion in allowing the testimony into evidence.

With regard to the testimony of the plaintiff regarding statements made by the exterminator, the testimony was as follows:

By [plaintiff's attorney]:

Q. When you contacted the exterminator, who did you contact?

A. JJ Exterminators, and I called them and I said, you know, can you come here right away. They came out and they looked at it and they said you've got a real problem. And then they took the mattress outside and cut it open and it was just infested with bugs, which you have in that – you know –

By the court:

Q. Now, you saw the bugs yourself?

A. Yes, ma'am

Q. You observed them?

A. It was – it was more than evident. They were falling out.

Q. And you recognized them as bedbugs?

A. Ma'am, I've never seen a bedbug ever until they pointed out to me and showed me what it was and everything and how they were infested in the corner of the mattress and –

[Counsel for defendants]: Objection. This is hearsay. He's now talking about what somebody else may have said.

The Court: Overruled.

By the Court:

Q. You saw them – you observed the bedbugs yourself?

A. Yes, your honor, I did.

Q. And what did you do with the bedbugs after you observed them?

A. We put the mattress outside on a little like porch that they had out there. And he said put it out here. He said get it out of this apartment immediately. It's going to affect your clothes and everything else. He said these bedbugs will get rampant. So the exterminator came in and exterminated the apartment and then he collected a couple of the bugs and exterminated the mattress and everything else.

Based on our review of the record, we cannot say that the trial court erred or otherwise abused its discretion in allowing this testimony, as we find this testimony was admissible under La. C.E. art. 803(1) as a statement describing or explaining a condition while the declarant was perceiving the condition or immediately thereafter. Pursuant to La. C.E. art. 803(1) a "present sense impression" is confined to "describing or explaining" an event or condition perceived by the speaker. See **Buckbee v. United Gas Pipe Line Co. Inc.**, 561 So.2d 76, 84 (La. 1990). The critical factor is whether the statement was made while the speaker was perceiving the event or condition or immediately thereafter. *Id.* Thus, the statement may follow immediately after perceiving the event or condition, allowing only for the time needed for translating observation into

speech. *Id.* Herein, the testimony of the plaintiff indicates that the exterminator's statements to the plaintiff were made immediately upon inspecting the mattress, cutting the mattress open, and observing (with the plaintiff) an infestation of bugs in the mattress. Thus, the statements were made by the exterminator while immediately perceiving the condition of the inside of the mattress, thereby constituting the exterminator's present sense impression and were an exception to the hearsay rule under La. C.E. art. 803(1). Accordingly, the statements were properly admitted into evidence by the trial court.

Insofar as the copy of the service agreement between the exterminator and the plaintiff was admitted into evidence, this document notes that there were bed bugs in the mattress and that the plaintiff's apartment was treated for bed bugs. The defendants objected to the introduction of this document into evidence on the basis that it was hearsay; however, the trial court admitted the document on the basis that the plaintiff received it in the ordinary course of business, *i.e.*, the business records exception set forth in La. C.E. art. 803(6). We agree with the defendants that this document contained hearsay, that the document did not meet the business record exception to the hearsay rule (or any other exception to the hearsay rule set forth in La. C.E. arts. 803 and 804), and that the document should not have been admitted into evidence. However, after reviewing the record in its entirety, we find that even if the document was improperly admitted into evidence, any such error was harmless because it was cumulative or corroborative of the other evidence establishing that there were bed bugs in the mattress and that the apartment was exterminated for bed bugs.

Accordingly, we find no merit to the defendants' first three assignments of error claiming that the trial court committed certain evidentiary errors.

In the defendants' fourth assignment of error, they contend that the trial court erred in taking judicial notice that the dried insects contained in the plastic

bag were bed bugs. With regard to the insects or bugs contained in the plastic bag, the trial court stated as follows:

> [the plaintiff] presented to the [c]ourt the actual specimen in a plastic bag containing those bed bugs, which of course, are very graphic, and the [c]ourt notes for the record that those specimen did indeed appear to be dried bed bugs. The [c]ourt is well aware that this evidence is evidence that is well within the knowledge of the common folk.

We agree with the defendants that a reasonable interpretation of the trial court's reasons for judgment suggests that the trial court took judicial notice of the fact that the dried insects contained in the plastic bag were bed bugs and that, in general, this was probably not a fact for which judicial notice was appropriate, as the identification of a particular bug or insect as a bed bug is not "[g]enerally known within the territorial jurisdiction of the trial court; or ... [c]apable of accurate and ready determination by resort to sources who accuracy cannot be reasonably questioned." See La. C.E. art. 201(B)(1) and (2). However, it is well-settled that appeals are taken from judgments, not the reasons for judgment. See **Davis v. Farm Fresh Food Supplier**, 2002-1401 (La. App. 1st Cir. 3/28/03), 844 So.2d 352, 353-54. Mindful that the trial court's judgment provides that the defendants were liable to the plaintiff for damages sustained (as a result of bed bugs in the mattress and box spring the plaintiff rented from CORT), the trial court's determination that the plastic bag contained bed bugs was one of several underlying factual findings by the trial court in reaching its ultimate conclusion that the defendants were liable to the plaintiff. When the record is reviewed in its entirety, we find the trial court's factual finding in this regard is reasonably supported by the evidence in the record, *i.e.*, testimony of the plaintiff, that after the exterminators cut the mattress open and the plaintiff personally saw an infestation of bugs in the mattress (which have been identified as bed bugs) some of the bugs were collected and placed in a plastic bag. Therefore, we find no merit to this assignment of error.

Lastly, on appeal, the defendants contend that the trial court erred in determining that the plaintiff met his burden of proving: (1) that the mattress and/or box spring contained bed bugs when delivered by CORT and (2) that the plaintiff's skin condition was caused by exposure to or bites from bed bugs because the plaintiff failed to offer medical testimony.[6]

In making the determination that the plaintiff sustained his burden of proof, the trial court's reasons for judgment reflect that it was "most impressed with the testimony" of the plaintiff, and that based on that testimony, the trial court found that the plaintiff "indeed ... suffered personal injury as a result of the bed bugs that were in a mattress rented from the defendants." The trial court further found that "[w]ith respect to the rash that appeared and photographs submitted by [the plaintiff] as a result of the bite of the bed bugs together with the medical, the [c]ourt [was] of the opinion that the plaintiff has sustained his cause of action by more than a preponderance of the evidence."

It is well-settled that 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, and where there is a 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.

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[6] The plaintiff's action against defendants was based on La. C.C. art. 2317.1, which provides:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon 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.

Thus, as applied herein, the plaintiff had the burden of proving that (1) the mattress and/or box spring that cause the plaintiff's damages from bed bugs was in CORT's custody or control; (2) that the mattress and/or box spring had a vice or defect (bed bugs) which created an unreasonable risk of harm; (3) that his injuries were caused by exposure to bed bugs; (4) that CORT knew or should have known of the unreasonable risk of harm; and (5) that the damage could have been prevented by the exercise of reasonable care, which CORT failed to exercise.

Rosell v. ESCO, 549 So.2d 840, 844 (La. 1989). Moreover, a trial court's credibility determinations are entitled to great deference; thus, if the fact finder's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. **Riverside Recycling, LLC v. BWI Companies, Inc. of Texas**, 2012-0588 (La. App. 1st Cir. 12/28/12), 112 So.3d 869, 872-873. Where there are two permissible views of the evidence, the fact finders choice between them cannot be manifestly erroneous or clearly wrong. **Rosell**, 549 So.2d at 844.

Although the plaintiff's claims against CORT were based on La. C.C. art. 2317.1 (known as "custodial liability"), such liability is nevertheless predicated upon a finding of negligence. See **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. It is well-settled that the plaintiff in a negligence case may meet his burden of proof by presenting both direct and circumstantial evidence. **Cangelosi v. Our Lady of the Lake Regional Medical Center**, 564 So.2d 654, 664 (La. 1990) (on rehearing). A fact established by direct evidence is one which has been testified to by witnesses as having come under the cognizance of their senses; circumstantial evidence, on the other hand, is evidence of one fact, or set of facts, from which the existence of the fact sought to be determined may reasonably be inferred. **Cangelosi**, 564 So.2d at 664-65.

Herein, the evidence offered by the plaintiff in support of his claims was largely circumstantial and was based on his recollection of the events that occurred. With regard to whether the mattress and box spring had bed bugs when CORT delivered the items to the plaintiff, the plaintiff testified that his skin condition appeared the night after the furniture was delivered. The plaintiff further testified that as he continued to sleep on the mattress and box spring, the skin

condition spread to his whole body, his skin condition got better when he left town for ten days, and it reappeared when he began sleeping on the mattress again.

The trial court's reasons for judgment reflect that it found the testimony of the plaintiff to be credible. Giving the plaintiff's testimony the deference to which it is entitled under the standard of review, when the totality of the circumstantial evidence is evaluated, we find the factual inference made by the trial court that there were bed bugs in the mattress and/or box spring when delivered to the plaintiff is supported by the record. Although the defendants suggest that the evidence established that there were alternative explanations for how the bed bugs got into the plaintiff's apartment, *i.e.*, that the plaintiff stayed in numerous hotels in the two weeks prior to moving into the apartment, and that the furniture did not contain bed bugs when it was delivered because its employees inspected the furniture, where there are two permissible views of the evidence, the fact finders choice between them cannot be manifestly erroneous. Accordingly, we find no manifest error in the trial court's factual determination that the plaintiff met his burden of proving that the mattress and/or box spring contained bed bugs when CORT delivered it to the plaintiff.

We also find no merit to the defendants' contention that the plaintiff was required to rely on medical testimony to establish that the plaintiff's skin condition was caused by exposure to or bites from bed bugs. As explained by the supreme court in **Lasha v. Olin Corp.**, 625 So.2d 1002, 1005 (La. 1993), "[w]hile expert medical evidence is sometimes essential, it is self-evident, that as a general rule, whether the defendant's fault was a cause-in-fact of a plaintiff's personal injury or damage may be proved by other direct or circumstantial evidence." In other words, while expert evidence is sometimes needed to prove causation, "[w]here the conclusion is not one within common knowledge ... on medical matters within common knowledge, no expert testimony is required to permit a conclusion as to

causation." *Id.* (citations omitted). Here, the trial court specifically found that the plaintiff's skin condition or rash that appeared shortly after the mattress was delivered was caused by bed bugs. Given the trial court's previous factual determination regarding the presence of bed bugs in the mattress and/or box spring when CORT delivered the furniture, and because the causal link between the presence of bed bugs in a mattress and the fact that bed bugs bite—or as described in CORT's internal bed bug policy, they "feed on their 'host'"—is within the realm of determination not requiring expert testimony, we cannot say that the trial court manifestly erred in concluding that the plaintiff's skin condition was caused by exposure to or bites from bed bugs.

III. CONCLUSION

Therefore, for all of the above and foregoing reasons, the May 2, 2014 judgment of the trial court is affirmed. All costs of this appeal are assessed to the defendants, CORT Business Services Corporation d/b/a CORT Furniture Rental and its insurer, Travelers Property Casualty Company of America.

AFFIRMED.

RAYMOND STUERHOFF

VERSUS

CORT BUSINESS SERVICES CORPORATION, ET AL.

FIRST CIRCUIT

COURT OF APPEAL

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NO. 2014 CA 1244

CHUTZ, J., dissenting.

I disagree with the majority opinion affirming the trial court judgment in favor of the plaintiff. The majority correctly points out that medical evidence is not always required to establish causation, particularly when the matter is one within common knowledge. However, the medical cause of the rash suffered by the plaintiff in this case was not a matter within common knowledge. Further, the dermatologist consulted by the plaintiff specifically diagnosed the cause of the rash as chicken pox. In the absence of any medical evidence contradicting this diagnosis, I believe the trial court's conclusion that plaintiff proved medical causation was clearly wrong.

Additionally, the record does not reasonably support the trial court's conclusion that the bugs introduced into evidence were bed bugs, as no competent evidence to that effect was offered by the plaintiff. While the record does contain hearsay testimony from the plaintiff as to statements made by the exterminator he hired, the record is devoid of any information regarding the exterminator's qualifications and experience. Lastly, the record fails to adequately establish that the mattress was infested with the bugs at the time of delivery, particularly considering the significant amount of traveling and occupancy in various hotels by the plaintiff.

For these reasons, I respectfully dissent.