STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 0599

VICKI BADEAUX

VERSUS

STATE OF LOUISIANA, THORUGH THE LOUISIANA
DEPARTMENT OF ECONOMIC DEVELOPMENT AND JOHN DOES

Judgment Rendered: NOV 0 1 2017

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APPEALED FROM THE 19th JUDICIAL DISTRICT COURT
EAST BATON ROUGE PARISH, LOUISIANA
DOCKET NUMBER C607627, SECTION 26

HONORABLE DONALD R. JOHNSON, JUDGE

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

McDONALD, J.

In this appeal, a state entity appeals a judgment finding it liable for damages to an actress the entity hired to film an informational video. The actress was injured when the stand upon which she was instructed to hang her extra clothing toppled and struck her on the head. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On December 14, 2010, Vicki Badeaux was scheduled to perform as an actress in an informational video filmed by The Louisiana Department of Economic Development (LDED). As instructed, Mrs. Badeaux arrived at the set with extra clothing from which her outfit for the video would be chosen. Mr. James Dupree, the LDED Fast Start Media Department Manager, instructed her to hang her extra outfits on a nearby C-stand so they could review her script before filming. The C-stand was a general purpose stand having an extendable arm and typically used for multiple purposes on a movie set. As Mrs. Badeaux hung her clothes on the C-stand, it tipped over and struck her on the right side of the head. Mr. Dupree yelled a warning and caught the C-stand before it fell completely over, but not before it struck Mrs. Badeaux and knocked her backward. Mr. Dupree sat Mrs. Badeaux in a nearby chair for about 15 to 30 minutes, noticed a red bump on her head, and asked if she needed medical treatment, which she declined. After Mrs. Badeaux said she could continue, Mr. Dupree chose her outfit, gave her a script, and her part in the video was filmed.

About two weeks after the incident, Mrs. Badeaux began to have sharp, shooting pains in her right temple. Over the next seven months, she consulted her primary care physician, underwent brain imaging, and saw two neurologists. In May 2011, she was diagnosed with a mild concussive head injury and chronic post-traumatic headaches attributable to the December 2010 incident. She took prescription medication for a while but experienced side effects and decided to discontinue the medication. At the time of trial, in December 2016, Mrs. Badeaux testified that she still had sharp shooting pains in her head.

In December 2011, Mrs. Badeaux filed this personal injury suit against LDED, and the case ultimately proceeded to a bench trial. At the end of Mrs. Badeaux's case, LDED moved for an involuntary dismissal, which the district court denied. LDED proceeded with its case, after which the district court took the case under advisement. On January 27, 2017, the district court signed a judgment: (1) finding LDED 75% at fault and Mrs. Badeaux 25% at fault for her damages; (2) finding Mrs. Badeaux sustained $8,345 in special damages and $41,655 in general damages; and (3) finding LDED liable to her for $37,500 (75% of her total damages), plus interest; and (4) ordering LDED to pay all court costs.

LDED appeals from the adverse judgment, asserting that the district court erred: (1) in denying its motion for involuntary dismissal, and (2) by finding Mrs. Badeaux sustained $41,655 in general damages when the evidence showed that not all of her medical expenses were attributable to the December 14, 2010 accident.

INVOLUNTARY DISMISSAL

Although LDED characterized its motion as one for a directed verdict, it actually was a motion for involuntary dismissal, since this matter was tried by a court rather than a jury. *See* LSA-C.C.P. arts. 1672 and 1810. Nevertheless, the error is one of form rather than substance, as the ultimate object of both motions is the same. *Gillmer v. Parish Sterling Stuckey*, 09-0901 (La. App. 1 Cir. 12/23/09), 30 So.3d 782, 785 n.2. Under LSA-C.C.P. art. 1672B, after the plaintiff has presented his evidence, any party may move for dismissal of the action on the ground that, upon the facts and law, the plaintiff has shown no right to relief. The district court may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence. The district court's purely discretionary decision to deny a motion for involuntary dismissal at the close of a plaintiff's case leaves nothing for this court to review on appeal. *Pierrotti v. Johnson*, 16-0204 (La. App. 1 Cir. 10/28/16), 2016 WL 6330423 at *12 (unpublished), *writ denied*, 17-0002 (La. 2/10/17), 216 So.3d 47;

Townsend v. Delchamps, Inc., 94-1511 (La. App. 1 Cir. 10/06/95), 671 So.2d 513, 514 n.1, *writ denied*, 95-2648 (La. 1/12/96), 667 So.2d 522.

Here, the district court, in its discretion, denied LDED's motion to dismiss and heard all of the evidence presented before rendering its decision on the merits. Thus, we have nothing to review on appeal with regard to that ruling. But, we note that LDED's appeal was expressly taken from the district court's January 27, 2017 final judgment, which was rendered after all evidence was presented. And, after reading LDED's appellate brief, it is clear that LDED's first assignment of error is a challenge to the district court's final judgment finding LDED liable to Mrs. Badeaux rather than just a challenge to the district court's denial of the motion for involuntary dismissal. Under LSA-C.C.P. art. 2164, an appellate court shall render any judgment that is just, legal, and proper upon the record on appeal. Thus, under LSA-C.C.P. art. 2164, we will review the district's court ultimate finding of LDED's liability to Mrs. Badeaux.

LIABILITY OF A PUBLIC ENTITY FOR A THING WITHIN ITS CUSTODY

Tort claims against a public entity may be pursued as negligence under LSA-C.C. art. 2315, or as strict liability under LSA-R.S. 9:2800, LSA-C.C. arts. 2317, and 2317.1. Under either theory, the legal analysis is the same. *Fontenot v. Patterson Ins.*, 09-0669 (La. 10/20/09), 23 So.3d 259, 267. The plaintiff must prove: (1) LDED had custody of the thing that caused plaintiff's damages; (2) the thing was defective because it had a condition that created an unreasonable risk of harm; (3) the LDED had actual or constructive notice of the defect and failed to timely take corrective measures; and (4) the defect caused the plaintiff's injury. LSA-R.S. 9:2800C; LSA-C.C. arts. 2317 and 2317.1; *Cotton v. State Farm Mut. Auto. Ins. Co.*, 10-1609 (La. App. 1 Cir. 5/6/11), 65 So.3d 213, 217, *writ denied*, 11-1084 (La. (9/2/11), 68 So.3d 522.

LDED does not dispute that it had custody of the C-stand or that the C-stand caused injury to Mrs. Badeaux. However, it argues Mrs. Badeaux failed to prove the C-stand created an unreasonable risk of harm or that LDED had notice that the C-

stand created an unreasonable risk of harm. A trier of fact's findings regarding defect (unreasonable risk of harm) and notice under LSA-R.S. 9:2800 are subject to the manifest error standard of review. *Id.*

In finding LDED liable to Mrs. Badeaux, the district court gave the following reasons for its judgment:

> The Court finds that the defendant had actual knowledge that the [C-stand] was being used for a purpose other than what it was intended to be used despite the fact that there had not been any other accidents that arose from using the [C-stand] as a clothing rack. The Court finds that directing the plaintiff to use the stand as a clothing rack created an unreasonable risk of harm that lead to the object falling onto the plaintiff causing her injuries. Under the facts of this case, the Court further finds that the defendant had an obligation to warn the plaintiff that the [C-stand] which she was instructed to use for a clothing rack was not designed to be used as a clothing rack. Therefore, the Court finds that the defendant is partially liable 75% for the plaintiff's damages. This Court finds that the plaintiff should have had some knowledge that the [C-stand] was not in fact a clothing stand and was not being used for the purpose for which it was intended to be used. Therefore, the Court finds that the plaintiff is comparatively at fault 25% for the damages she sustained.

At trial, Mr. Dupree described a C-stand as a "common use stand in the film and video industry, ... used for everything from supporting very large equipment, to small equipment, to providing places to hang things." And, in an earlier deposition, Mr. Dupree described the C-stand at issue here as a "standard movie C-stand" consisting of "a stand and a knuckle at the top and an arm, which has another knuckle that you can grip things with so that you can extend that out and clamp it onto things." He explained that the C-stand is used for "pretty much ... anything and everything on a film or video shoot," including to hold backgrounds, lighting filters, flags, and hanging clothes. He admitted that a C-stand is not a clothing rack, but explained that LDED used the C-stand as a replacement for a clothing rack, because a clothing rack "is only good for holding clothes," whereas a C-stand is "good for doing a hundred different things." Mr. Dupree explained that, while at LDED, he had shot 50 or 60 videos, and hundreds of persons had hung clothes on a C-stand without incident. He stated that he did not direct actors, including Mrs. Badeaux, where on the C-stand to hang their clothes, but explained that "normally what they would do is ... hang them on the knuckle, the center knuckle." He was "pretty sure"

however that Mrs. Badeaux hung her clothes on the rod or arm part of the C-stand. He also stated that, when he caught the C-stand after it struck Mrs. Badeaux, he slid her clothes to the center toward the "ball" in the middle of the C-stand and the C-stand then stood with the clothes on it.

There is no evidence showing the C-stand at issue was imperfectly designed or constructed, or was broken in some manner, so as to create an unreasonable risk of harm *as a C-stand;* but, we agree with the district court that, *as a clothing rack*, the C-stand created an unreasonable risk of harm to Mrs. Badeaux. Mr. Dupree instructed her to use the C-stand as a clothing rack, and his instruction to her included the implication that the C-stand was capable of serving that purpose. Mr. Dupree's testimony showed that he knew actors generally hung their clothes near the center knuckle of the C-stand; thus, he knew this was the correct way to use the C-stand when hanging clothes. And, in fact, he demonstrated this knowledge when he caught the falling C-stand and moved Mrs. Badeaux's clothes toward the center. His instruction to Mrs. Badeaux to use the C-stand as a clothing rack, without more specifically telling her to hang her clothes near the center knuckle, is what created the unreasonable risk of harm in this case. *Accord* LSA-R.S. 9:2800.57 (in a products liability case, a product may be unreasonably dangerous because the manufacturer failed to give an adequate warning about a characteristic of the product that may cause damage).

Based on the particular circumstances of this case, we conclude the district court did not manifestly err in its findings regarding a defect or LDED's notice of the defect. This assignment of error is without merit.

GENERAL DAMAGES

In its second assignment of error, LDED contends the district court erred in finding Mrs. Badeaux sustained $41,655 in general damages, because the evidence showed that not all of her medical expenses were attributable to the December 14, 2010 accident. Although LDED disputes the causal connection between the accident and certain medical expenses, LDED did not assign error to the district court's special

damage award, of which medical expenses are a part. Thus, we limit our review to that which LDED assigned as error - the amount of the general damage award.

General damages involve mental or physical pain or suffering, inconvenience, loss of gratification or intellectual or physical enjoyment, or other losses of lifestyle that cannot be definitively measured in terms of money. *Mack v. Imperial Fire and Cas. Ins. Co.*, 14-0597 (La. App. 1 Cir. 11/7/14), 167 So.3d 691, 696. The trier of fact is accorded vast discretion in fixing a general damage award. LSA-C.C. art. 2324.1; *Purvis v. Grant Parish School Bd.*, 13-1424 (La. 2/14/14), 144 So.3d 922, 927. This vast discretion is such that an appellate court should rarely disturb a general damage award. *Id.* at 927-28. Thus, the appellate court's role is not to decide what it considers to be an appropriate award, but rather to review the trier of fact's exercise of discretion. *Id.* at 928. To properly review the district court's general damages award, we summarize the evidence supporting the award as follows.

On December 15, 2010, the day after the incident, Mrs. Badeaux saw her primary care physician, Dr. Lara Falcon, who noted tenderness and bruising in the right temple area and told Mrs. Badeaux to let her know if more serious symptoms developed. In February 2011, Mrs. Badeaux returned to Dr. Falcon complaining that, about two weeks after the December 2010 incident, she began to have quick, non-severe pain or pressure in her right temple, sometimes occurring up to 20 times per day. Dr. Falcon ordered an MRI and an MRA of Mrs. Badeaux's brain, which returned normal, and in April 2011, when the pains continued, Dr. Falcon referred her to Dr. Brian Murphy, a neurologist.

Dr. Murphy saw Mrs. Badeaux in mid-May 2011 with continuing complaints of right temporal pressure headaches occurring 10-15 times per day. Dr. Murphy diagnosed Mrs. Badeaux with a mild concussive head injury and chronic post-traumatic headaches attributable to the December 2010 incident. He prescribed pain medication, which reduced her headaches, but because of side effects, she decided to discontinue the medication about five weeks later. Mrs. Badeaux also saw

neurologist Dr. Gerard Dynes in July 2011 with complaints of headaches, but the evidence is not clear as to what diagnosis or treatment he gave.[1]

At a November 2013 deposition, Mrs. Badeaux reported continuing sharp shooting pains but was taking no medication. She stated that her only treatment for the last year had been acupuncture. She also stated that the pains woke her up at night, caused her to lose sleep, made her distracted, and made her irritable with family members. In May and November 2014, Drs. Falcon and Dynes noted in their records that Mrs. Badeaux still had headaches, but they were not frequent nor regular enough to require medication. At the time of trial, in December 2016, Mrs. Badeaux testified that she still had the sharp shooting pains. Although she sometimes will go days without any pains, she estimated that they occur "three, ten, fifteen a week; it just depends."

Based on our review of the record, we conclude the district court's finding that Mrs. Badeaux sustained $41,655 in general damages does not constitute an abuse of discretion. Dr. Murphy opined that Mrs. Badeaux suffered a concussive head injury and chronic headaches that were attributable to the blow on her head by the C-stand, and Dr. Falcon agreed with Dr. Murphy's diagnosis. At first, Mrs. Badeaux's headaches occurred up to 20 times per day. About three years later, when her deposition was taken, her headaches had decreased in frequency and she was taking no medication. About four years later, both Drs. Falcon and Dynes noted that the headaches continued but were infrequent, irregular, and required no medication. And, at trial, about six years after the incident, Mrs. Badeaux continued to experience sharp shooting pains. Thus, even though Mrs. Badeaux's medical records may suggest that she sought no medical treatment for her headaches after 2012, the record clearly shows that the pains lasted at least six years and affected her quality of life. The general damage award for Mrs. Badeaux's physical pain, inconvenience,

[1] In January 2013, Mrs. Badeaux returned to Dr. Dynes after a picture frame fell from the wall and hit her on the top of the head. Although the top of Mrs. Badeaux's head hurt for about a day after the January 2013 accident, she testified at trial that that pain was different than the sharp, shooting pains from the December 2010 accident.

and other lifestyle losses, was within the district court's vast discretion. This assignment of error is without merit.

CONCLUSION

For the foregoing reasons, the January 27, 2017 judgment is affirmed. We assess appeal costs in the amount of $964.50 to the Louisiana Department of Economic Development.

AFFIRMED.