NOT DESIGNATED FOR PUBLICATION

PETER A. ASCANI, JR.	*	**NO. 2000-CA-2790**
VERSUS	*	**COURT OF APPEAL**
THOMAS KURTZ AND TRAVELERS INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 96-17779, DIVISION "N"
Honorable Ethel Simms Julien, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Judge Charles R. Jones, Judge James F. McKay, III, Judge David S. Gorbaty)

Murray A. Roth, Jr.
MURRAY A. ROTH, JR., APLC
611 Metairie Road
Metairie, LA 70005
COUNSEL FOR PLAINTIFF/APPELLANT

Jerome M. Volk, Jr.
Michael E. Escudier
DeMARTINI, D'AQUILA & VOLK
3329 Florida Avenue
Kenner, LA 70065
COUNSEL FOR APPELLEES, SEARS, ROEBUCK & CO. AND W. C.
BRADLEY CO.

James J. Kokemor
WALLER & ASSOCIATES
3838 North Causeway Boulevard
Suite 3160
Metairie, LA 70002
COUNSEL FOR DEFENDANTS/APPELLEES, THOMAS KURTZ AND TRAVELERS INSURANCE CO.

AFFIRMED

Peter A. Ascani, Jr., appeals a judgment rendered in his favor, but finding him 40 percent at fault for the damages he sustained. For the following reasons, we affirm the judgment of the trial court.

FACTS:

On September 13, 1996, a fire broke out at a double owned by Peter Ascani. Thomas Kurtz rented one-half of the double from Mr. Ascani. Mr. Kurtz admitted that on the day in question, he was grilling salmon steaks on a propane gas grill that was within one foot of the outside of the house. He turned down the temperature on the grill, left a steak on it, and went inside to have dinner. Shortly thereafter he and his wife heard two small explosions. Mr. Kurtz ran outside and found the entire side of his house on fire. He

attempted to put out the fire but could not.

Mr. Ascani filed suit against Mr. Kurtz and his liability insurer, Travelers, to recover for the damages to his rental property. Mr. Kurtz answered the suit alleging the comparative fault of Mr. Ascani, and third-partied Sears as the manufacturer of the grill he claimed was defective. Travelers likewise amended its third-party demand to add Sears as seller and W. C. Bradley as manufacturer of the grill. Mr. Ascani amended his petition to add W. C. Bradley as the manufacturer and Sears as the seller of the allegedly defective grill. Audubon Insurance Company, Mr. Ascani's liability insurer, intervened in the lawsuit seeking its subrogated interest.

After a trial on November 15, 1999, the jury found in favor of Mr. Ascani for $82,782.12, but also found that Mr. Ascani was 40 percent responsible for his damages. Sears and W. C. Bradley were found to be free from fault. Mr. Ascani filed a motion for new trial and for judgment notwithstanding the verdict, which were denied by the trial court. This appeal followed.

DISCUSSION:

In his first assignment of error, Mr. Ascani argues that the jury was

manifestly erroneous in finding him 40 percent at fault for the fire. He claims that there is insufficient evidence to prove that a natural gas leak existed on the property prior to the fire.

The Louisiana Supreme Court has recognized on numerous occasions that "if the trial court or jury's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even if convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Stobart v. State through Dept. of Transp. & Dev.*, 617 So.2d 880, 882-3 (La. 1993), and its progeny. Where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. *Canter v. Koehring Co.*, 283 So.2d 716 (La. 1973).

In the present case, we conclude, after review of the record in its entirety, that the jury was presented with two permissible views concerning whether a natural gas leak existed under the house in question prior to ignition by the gas grill, and, thus was an additional source of fuel for the fire. As such, the jury's conclusion that Mr. Ascani was 40 percent at fault for the fire was not manifestly erroneous.

Mr. Ascani argues that the jury placed undue weight on the testimony

of George Hero, an expert hired by Mr. Kurtz and his insurer, and that of James Peterson, an expert hired by Sears and W. C. Bradley. Mr. Ascani contends that the testimony of the firemen who responded to the call and other expert testimony, specifically the testimony of Dr. Courtney Busch, should have been given more weight.

George Hero was qualified as an expert in mechanical engineering, cause and origin of fires, and as a master gas fitter. He was the first expert to inspect the house and the gas grill after the fire. Upon inspection of the underside of the house, he discovered a damaged gas cog near the rear floor furnace that he believed had been leaking for some time prior to the fire, causing natural gas to pool under the house. It was his opinion that there were two possible scenarios for the fire. The first was that a hose on the grill failed allowing propane gas to leak into the atmosphere. In turn, the explosion of the propane gas caused the pooled natural gas under the house to explode. The second scenario, which Mr. Hero felt was the more probable, was that the heat from the gas grill ignited the natural gas under the house causing the first "explosion" heard by Mr. Kurtz and his wife. The heat from the fire then caused the hoses on the propane tank to melt, allowing propane gas to rapidly escape the tank. This was the source of the second "explosion." Thus, Mr. Hero opined that two gases fueled the fire,

the natural gas that had pooled underneath the house due to the faulty gas valve, and the propane gas that was released when the hoses on the grill melted. Mr. Hero did not believe that radiant heat from the grill caused the wood siding to ignite.

Fred Vanderbrook, an expert hired by Mr. Ascani's insurer, Audubon Insurance, was qualified as an expert in mechanical engineering and causes and origins of fires. He inspected the fire scene four days after Mr. Hero's inspection. It was his initial opinion that the fire originated near the site of the gas grill, but he was unsure of the source of ignition. Mr. Vanderbrook was aware that George Hero had removed a gas valve from the floor furnace. He viewed the valve at Mr. Hero's office and they agreed to have it analyzed by a metallurgist, Dr. Courtney Busch. Mr. Vanderbrook also inspected the gas grill, but due to its badly burned condition, he could not tell if the grill malfunctioned or whether the heat from the grill caused some nearby combustible material to ignite. Relying on Dr. Busch's opinion that the valve cracked as a result of the fire, Mr. Vanderbrook did not believe that natural gas was the initial fuel source of the fire. On cross-examination, he stated that it was possible for a small leak to have existed prior to the fire, but not enough to cause an explosion. He explained that if large amounts of gas were leaking, someone would have smelled it.

Dr. Courtney Busch, an expert in mechanical and metallurgical engineering, tested the gas valve removed from the floor furnace by George Hero. It was his opinion that the valve broke as a result of the fire due to extreme overheating. Dr. Busch admitted that he did not actually inspect the fire scene. His narrow involvement in this matter was to determine if the gas cog was fractured before the fire, or if it fractured as a result of the fire. To do this, he examined the broken edges of the metal under a microscope, and determined that heat caused the crack in the gas cog. He explained that it would take an intense heat of around 1800 degrees to melt the gas cog fitting. Dr. Busch had no way of determining if the gas cog was leaking prior to the fire.

Jim Moore, who was qualified as an expert in engineering and cause and origin of fires, concluded that, since the propane tank was intact after the fire, and the regulator was missing, one of the fittings to the hose or regulator valve must have leaked. He opined that the fire started above the level of the bottom of the raised house, i.e., at the level of the pit, and, therefore, pressurized gas had to be involved for the flames to shoot out on the opposite side of the structure as described by the firemen on the scene. Mr. Moore testified that he found no defects in the furnace system of the house, and insisted that if natural gas leaking from the furnace played a part

in this fire, there would have been more charring near the floor furnace. It was his expert opinion that the gas grill was defective in some way, and was the source of ignition and fuel for the fire.

James Peterson, an expert hired by Sears and W. C. Bradley, was qualified as an expert in mechanical engineering, construction and design of gas cog valves, handling and transportation of natural and propane gas, design of gas grills and the propane gas systems connected therewith. He personally inspected the fire scene, albeit two and one half years after the fire. Mr. Peterson was asked to comment on the opinions and theories reached by the other experts in the case. He disagreed with Dr. Busch's conclusion that the gas cog fractured during the fire. He explained that he has seen these same types of valves fracture even if cold. Although he did not personally analyze or inspect the gas cog, pictures he examined indicated an orange tinge around the valve, which he said could indicate a long-term leak. He also did not believe that the valve fractured during the fire because Dr. Busch said it would take temperatures of at least 1800 degrees to do so, and a wood burning fire would not reach 1800 degrees between the time Mr. Kurtz left the grill and the time he heard the first explosion. He also disagreed with the theory that the hose on the propane tank melted causing propane gas to shoot across underneath the house. He said that the pressure

in the propane tank was not sufficient to shoot gas 25 feet to the floor furnace, much less to the other side of the double. Mr. Peterson opined that the most likely source of the ignition was the gas grill, but not because of any defect in the grill. He believed that the first "explosion" Mr. Kurtz heard was the ignition of the natural gas accumulated under the house by the heat from the grill. The fire then flashed back to the leaking gas cog and reached temperatures high enough to totally crack the cog. The fire also caused the hose on the grill to melt, releasing propane gas. That is the fire that burned the side of the house. Alternatively, he opined that the grill was too close to the house, causing the wood siding to ignite. This ignition subsequently ignited the natural gas under the house. In either scenario, Mr. Peterson believed that natural gas was involved in fueling the fire because the gas cog was leaking prior to the fire.

Mr. Ascani argues that the jury placed undue weight on the opinions of George Hero and James Peterson. He claims that Mr. Hero accepted the findings of the metallurgist, i.e., the gas cog cracked during the fire, but then stated for the first time at trial that there was a possibility that another leak existed somewhere else in the line. James Peterson contradicted the opinions of all the other experts. Therefore, the jury should have discounted his testimony.

The jury was presented with the testimony of five mechanical engineers, each with his own area of expertise, and each with his own theory of how the fire started and progressed. The factfinder is entitled to accept expert testimony unless it is patently unsound, and has broad discretion to assign appropriate effect and weight to any expert testimony. *Lirette v. State Farm Ins. Co.*, 563 So.2d 850 (La. 1990). Where testimony of expert witnesses differs, it is the responsibility of the factfinder to determine which expert is the most credible. *Mistich v. Volkwagen of Germany, Inc.*, 95-0939, p. 5 (La. 1/29/96), 666 So.2d 1073, 1077, *rehearing granted*, 95-0939 (La. 11/25/96), 682 So.2d 239 (original opinion reinstated). The acceptance of one expert's opinion over that of others is not an abuse of discretion. The record contains sufficient evidence to support the jury's finding.

Mr. Ascani also argues that without any evidence of strict liability on his part, i.e., that he knew or should have known of the existence of a gas leak on his property and then failed to correct it, the jury erred in finding him 40 percent responsible for the fire. A review of the jury charges indicates that the trial court charged the jury: "If the plaintiff suffered damages partly as a result of his own negligence, his claim for damages shall not be defeated but the amount of damages recovered shall be reduced in proportion to the degee [sic] of percentage of the plaintiff's negligence."

Defendants, Mr. Kurtz and his insurer, assert that La. Civ. Code art. 2695 provides a basis for finding Mr. Ascani at fault. The article provides:

> The lessor guarantees the lessee against all the vices and defects of the thing, which may prevent its being used even in case it should appear he knew nothing of the existence of such vices and defects, at the time the lease was made, and even if they have arisen since, provided they do not arise from the fault of the lessee; and if any loss should result to the lessee from the vices and defects, the lessor shall be bound to indemnify him for the same.

Mr. Ascani argues that this article can have no applicability to him because the clear language of the article prohibits its application if the lessee is found at fault. The jury found Mr. Kurtz to be 60 percent responsible for the fire. The clear language of the article provides that a lessor guarantees the lessee against all **vices and defects that are not the fault of the lessee**. There is no evidence that Mr. Kurtz was at fault for the natural gas leak the jury determined contributed to the fire. Mr. Kurtz's fault was attributable to his improper use of the gas grill. Clearly the jury found that a natural gas leak existed, and that Mr. Ascani, as landlord, was responsible for that vice or defect in his property. Thus, we find no error in the jury assessing Mr. Ascani 40 percent at fault for the fire.

In his second assignment of error, Mr. Ascani argues that the trial court erred in its calculation of damages. He claims that the jury erroneously

based its repair cost determination on the wrong evidence. Further, the jury's lost rent and maintenance determination was not supported by the record.

Mr. Ascani contends that the $77,000 repair cost award was based on the testimony of his insurance company's adjuster, Nolan Allain. Mr. Allain testified that after a thorough inspection of the property, he estimated the cost of repairing the structure at approximately $77,000, and the cost of replacing the structure at approximately $86,000. After applying a depreciation factor, the cost of repairing the structure was approximately $63,000. Mr. Ascani received the full policy limits of $55,000 for his property.

Mr. Ascani argues that Mr. Allain was merely an insurance adjuster and was not qualified to testify as an expert in contracting. The jury should have accepted the $139,000 cost of repair estimate offered by Mr. Ascani's expert, Mark Dahlman.

As stated earlier, a factfinder has broad discretion in weighing expert testimony, and may accept the testimony or reject it in its entirety. *See Lirette v. State Farm Ins. Co., supra*. Although not qualified as an expert, Mr. Allain testified that he had over thirty years appraisal experience. The jury was free to accept his estimate of the damages and reject the higher

figure offered by Mr. Ascani's expert.

Mr. Ascani also claims that the jury erred in its calculation of the rent he lost as a result of the fire, and the cost of maintaining the house after the fire. The jury awarded $4,250 for lost rental income, and $1,537.12 in maintenance expenses. Mr. Ascani testified that he collected $500 per month from each tenant and, at the time of trial, had lost 37 months of rent. He returned a half month's rent to the other tenant, and would need at least 3 months to repair the structure. Therefore, his total lost rental income was $40,250. Also, because he could not rent the property, he had to pay water bills and a grass cutter, items previously covered by the tenants. These maintenance expenses amounted to $989.20 as of the time of trial.

Defendants argue that the jury heard evidence that Mr. Ascani had made no effort to repair his property at all since the fire, despite his having received $55,000 from his fire insurance company one month after the fire. Because La. Civ. Code art. 2002 requires an obligee to mitigate his damages, the jury was correct in finding that Mr. Ascani did not do so, and in refusing to award him the full amount of lost rental damages he claimed. The same reasoning applies to his claim for maintenance. If he had repaired his property with the funds from his insurance policy, the property would be rented and the tenants would be paying the water bills and cutting the grass.

An award of damages should rarely be disturbed by an appellate court absent an abuse of discretion by the trier of fact. Only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the damages sustained, should an award be increased or decreased. *See Youn v. Maritime Overseas Co.*, 623 So.2d 1257, 1261 (La. 1993).

The jury was aware that Mr. Ascani was a contractor by trade, that he received $55,000 from his insurance company one month after the fire to repair the structure, and that he did not make any repairs to the structure between the time of the fire and trial. Based on this record evidence, we do not find the jury abused its vast discretion in making its damage award.

Accordingly, we affirm the judgment of the trial court.

AFFIRMED