NOT DESIGNATED FOR PUBLICATION

STELLA LEE	*	**NO. 2013-CA-0613**
VERSUS	*	
		COURT OF APPEAL
HARRAH'S NEW ORLEANS INVESTMENT COMPANY, AND THE CITY OF NEW ORLEANS, ET AL.	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-03416, DIVISION "J"
Honorable Paula A. Brown, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Roland L. Belsome, Judge Sandra Cabrina Jenkins)

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NOVEMBER 6, 2013

AFFIRMED

Plaintiff, Stella Lee, filed this suit against Jazz Casino Company, L.L.C. ("Jazz Casino") and the City of New Orleans[1] after she tripped and fell over an uneven mass of concrete located on the sidewalk of a building[2] owned by Jazz Casino. The trial court entered judgment in favor of Jazz Casino after finding that Ms. Lee failed to establish, by a preponderance of the evidence, that the defect in the sidewalk presented an unreasonable risk of harm. Ms. Lee now appeals this final judgment. For the following reasons, we hereby affirm.

FACTS

In March 2000, Ms. Lee was employed full time as a shuttle driver for Washington Bus and Limousine Company. Jazz Casino contracted with Washington Bus and Limousine Company to shuttle Harrah's Casino employees to and from the casino and the parking lot. The building located at 529 Fulton Street was used by Harrah's Casino employees as a training center and by the employees of Washington Bus and Limousine Service as a break room. On March 8, 2000, at approximately 10:45 p.m., after leaving the Harrah's Casino employee break room and exiting the building at 529 Fulton Street, Ms. Lee tripped and fell on an uneven

[1] Prior to trial, Ms. Lee settled her claim with the City of New Orleans.
[2] Jazz Casino owned the building located at 529 Fulton Street, New Orleans, Louisiana.

mass of concrete located directly in front of the door of the building. After a one-day judge trial, the trial court found that Ms. Lee failed to sustain her burden of proof that the defect in the sidewalk presented an unreasonable risk of harm. Specifically, the trial court stated in its reasons for judgment, in pertinent part:

> [I]n evaluating whether a defect in a sidewalk creates an unreasonable risk of harm a risk-utility balancing test must be employed; to wit, 'the trier of fact must balance the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair.' Stated otherwise, '[t]he trier of fact must decide whether the social value and utility of the hazard outweigh, and thus justify, its potential harm to others.' In its discussion that municipalities are not liable for every defect or irregularity in sidewalks that cause injury, the Supreme Court noted in *Reed v. Wal-Mart Inc*. that, '[i]t is common for the surfaces of streets, sidewalks, and parking lots to be irregular. It is not the duty of the party having garde of the same to eliminate all variations in elevations existing along the countless cracks, seams, joints, and curbs. These surfaces are not required to be smooth and lacking in deviations, and indeed, such a requirement would be impossible to meet. Rather, a party may only be held liable for those defects which present an unreasonable risk of harm.' Here, in the case at bar, plaintiff failed to offer expert testimony regarding the unreasonableness of the uneven concrete mass. On this point, not only did plaintiff fail to establish what caused the uneven mass of concrete to be on the sidewalk, plaintiff failed to produce any testimony relative to the elevation and/or height variances of the uneven concrete mass sufficient to constitute an unreasonable risk of harm to plaintiff. As a result, this Court need not address the remaining elements of plaintiffs claim, because she has failed to establish by a preponderance of the evidence that the vice and/or defect in the sidewalk presented an unreasonable risk of harm.

STANDARD OF REVIEW

In Louisiana, appellate courts review both law and facts. La. Const. Art. V, Sec. 10(B). The standard of review for a factual finding is the manifestly erroneous or clearly wrong standard. To reverse a fact finder's determination

under this standard of review, an appellate court must undertake a two-part inquiry: (1) the court must find from the record that a reasonable factual basis does not exist for the finding of the trier of fact; and (2) the court must further determine the record establishes the finding is clearly wrong. *Stobart v. State, through Dept. of Transp. and Development*, 617 So.2d 880, 882 (La.1993). The issue to be resolved by the reviewing court is not whether the trier of fact was right or wrong, but whether the fact finder's conclusion was a reasonable one. *Stobart*, 617 So.2d at 882. If the factual findings are reasonable in light of the record reviewed in its entirety, a reviewing court may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. *Stobart*, 617 So.2d at 882-883. Accordingly, where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous. *Stobart*, 617 So.2d at 883. Further, when a fact finder's determination is based on its decision to credit the testimony of one of two or more witnesses, that finding can virtually never be manifestly erroneous or clearly wrong. *Rosell v. ESCO*, 549 So.2d 840, 844-845 (La.1989). The credibility determinations of the trier of fact are subject to the strictest deference under the manifest error-clearly wrong standard. *Theriot v. Lasseigne*, 93-2661 (La.7/5/94), 640 So.2d 1305, 1313.

DISCUSSION

The issue before this Court is whether the trial court correctly concluded that plaintiff failed to meet her burden that the uneven mass of concrete created an unreasonable risk of harm. Ms. Lee argues that the trial court failed to employ the risk-utility balancing test and that Jazz Casino should have known that this defect in the sidewalk could cause injury to a pedestrian, especially at night, and that Jazz Casino could have placed cones over the area or have it roped off. Jazz Casino, on

the other hand, argues that Ms. Lee simply failed to present evidence at trial to prove that the defect in the sidewalk presented an unreasonable risk of harm.

The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect that 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. La.Code Civ. Proc. art. 2317.1; *see Dede v. Tip's Development, L.L.C.,* 09-019, p. 4-5 (La. App. 4 Cir. 7/1/09) 16 So.3d 526, 529-530. The plaintiff has the burden of proving that: (1) the property which caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. *Id.*

Our courts employ a risk-utility balancing test to determine whether a condition creates an unreasonable risk of harm. *Pryor v. Iberia Parish School Board*., 10–1683 (La. 3/15/11), 60 So.3d 594. The factors are (1) the utility of the thing; (2) the likelihood and magnitude of harm, which includes the obviousness or apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activity, or whether the activity was inherently dangerous. *Id.*; *Pitre v. Louisiana Tech University*, 95–1466 (La.5/10/96), 673 So.2d 585.

Because it is common for streets and sidewalks to be irregular, we find that Ms. Lee had the burden of proving how this uneven concrete on the sidewalk created an unreasonable risk of harm. Ms. Lee testified that she had previously walked on the concrete without incident, that the area was sufficiently lit for her to

see the uneven surface, that she was aware of the condition for at least four months prior to the accident, and that she did not have to walk over the uneven concrete in order to get in and out of the building. However, Ms. Lee failed to present any testimony or evidence indicating that the defect created an unreasonable risk of harm. Thus, considering the totality of the record and facts of this case, we find that the trial court was not manifestly erroneous in its ruling.

For these reasons, we hereby affirm the trial court's judgment, which found in favor of Jazz Casino and dismissed Ms. Lee's claims against it with prejudice.

AFFIRMED