NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1368

BARBARA A. PRICE AND GERALD A. PRICE

VERSUS

HARDEN KIMBALL RENTALS LLC AND S AND D OF MORGAN CITY, LLC, ET AL

DATE OF JUDGMENT: March 27, 2009

ON APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT
NUMBER 112,035, DIV. D, PARISH OF ST. MARY
STATE OF LOUISIANA

HONORABLE WILLIAM D. HUNTER, JUDGE

* * * * * *

C.E. Bourg, II
Morgan City, Louisiana

Counsel for Plaintiffs-Appellant
Barbara and Gerald Price

Jefferson R. Tillery
R. Scott Jenkins
New Orleans, Louisiana

Counsel for Defendants-Appellees
Harden & Kimball Rentals, L.L.C.
and Allstate Insurance Company

* * * * * *

BEFORE: KUHN, GUIDRY, AND GAIDRY, JJ.

Disposition: AFFIRMED.

KUHN, J.

Plaintiff-appellant, Barbara A. Price, and her husband, Gerald, appeal the trial court's judgment, rendered in accordance with the jury's verdict, dismissing her claims for damages based on the conclusion that defendant, Harden & Kimball Rentals, LLC (Harden & Kimball),[1] the owner of property upon which Mrs. Price fell and sustained personal injuries, was not liable to her. We affirm.

After Mrs. Price and her grandson exited a pediatric clinic located at 1234 David Drive in Morgan City, and walked toward the parking lot where her vehicle was located, she fell on a pedestrian aisle and sustained personal injuries. She and her husband subsequently sued, among others, Harden & Kimball, the owner of the parking lot. A jury concluded that Harden & Kimball was not "liable for any defect relating to the parking lot curb at issue in this case," and that Mrs. Price was "liable for her injuries." Noting that the jury had returned a verdict in favor of Harden & Kimball, the trial court signed a judgment dismissing the Prices' petition. The Prices filed, among other things, a motion for a new trial. The trial court denied the motion, and the Prices have appealed the dismissal of their claims.

On appeal, the Prices contend the trial court erred in permitting Fabian Patin, accepted as an expert in the field of architecture, to testify outside his area of expertise. They urge the jury's verdict was tainted by the unsound reasoning of this expert and, therefore, they are entitled to have the matter retried. The Prices also claim the trial court erred by denying their motion for new trial.

In challenging Patin's opinion, the Prices first contend that the photograph

[1] Although the Prices identified this party as "Harden Kimball Rentals LLC," we refer to this entity by the name set forth in its answer.

taken by Patin was a misrepresentation of the accident site because it was taken on a different day of the year than the date of the accident. They also urge that the failure of Patin to correct his camera for a known color to insure an accurate color representation in the photograph additionally contributed to the misrepresentation of the accident site.

Patin explained to the jury that he picked October 15, 2004, to recreate the conditions at the accident site relative to the sun on February 24, 2003, the date that Mrs. Price fell. He detailed how he chose October 15th based on the winter solstice, and that he adjusted the time of day he took the photograph to account for daylight savings time. The Prices were permitted to cross examine Patin and challenge the soundness of his determination. The jury had other photographs that it could have chosen to rely on and to compare with that taken by Patin. It heard the Prices' expert and the basis by which he attempted to recreate the conditions at the accident site on the date that Mrs. Price fell, including his technique of adjusting the color to portray a more accurate representation. And in closing argument, the jury was reminded of the deficiencies the Prices felt were presented by Patin's photograph. Thus, any decision by the jury to rely on the photograph taken by Patin over those offered by the Prices' expert was not manifestly erroneous. See ***Stobart v. State***, 617 So.2d 880, 882 (La. 1993).

The Prices next complain that the trial court erred by allowing Patin to testify on color contrast, which they suggest is outside his field of expertise. The Prices assert that Patin did not use an accepted method to test the difference in his measure of the color contrast of blue paint (used to designate handicapped areas) and yellow paint (used to alert users to changes in elevation). They urge that Patin took the

sample of yellow from an area that was soiled, thereby diminishing the reliability of his results.

Patin was admitted as an expert in the field of architecture without objection by the Prices. When the Prices objected to his testimony about color contrasting, Patin testified that he had taught Architectural Illumination at the University of Louisiana (Lafayette) and the University of Illinois. He explained how that course focused on light contrast and light meter readings. He told the judge and the jury, "you don't experience architecture virtually at all without light. If you can't see anything ... there is no architecture." He further elaborated, "architectural [illumination] is a critical component of architecture. You only experience architecture through the light for the most part." As such, Patin acknowledged that he has experience conducting contrast studies for the purpose of determining the reflectivity of one color versus another Obviously, the judge believed that the expert's opinion about color contrast was one that may have assisted the jury in understanding the evidence and in its determination of a fact in issue. We find no abuse of discretion by the trial judge in his finding that, based on the testimony provided at the time of the Prices' objection, Patin was qualified by knowledge, skill, experience, training, or education to provide an expert opinion on color contrast. See La. C.E. art. 702; see also ***Succession of Werner v. Zarate***, 2007-0829, pp. 4-5 (La. App. 1st Cir. 12/21/07), 979 So.2d 506, 509.

Additionally, on cross-examination of Patin, the Prices questioned the expert about his selection of paint samples to test, and in closing argument, the jury was presented with the potential flaws of Patin's methodology. The jury was free to credit Patin's testimony that he "picked ones that really weren't dirty." Accordingly, the

jury was not manifestly erroneous to rely on Patin's color contrast results to determine that Harden & Kimball was not liable for Mrs. Price's injuries. See ***Stobart***, 617 So.2d at 882.

The Prices' contention that Patin's disagreement with the survey of their expert, engineer George Michael, on the issue of whether a portion of the pedestrian aisle projected beyond the parking space was erroneous because Michael's new scale drawing demonstrated to the contrary, was likewise an issue presented to the jury. Patin was cross examined on his calculations and the jury was shown photographs that indicated the pedestrian aisle projected beyond the end of many vehicles. Nevertheless, the jury could have reasonably concluded that none of the spots that Mrs. Price pointed out as the place where she fell was located in the area where the pedestrian aisle projected beyond the parking spaces. Thus, it was not manifestly erroneous for the jury to determine that any potential defect in the premises that may have been suggested by Michael's survey was not one that caused Mrs. Price's fall and, therefore, Harden & Kimball were not liable for her injuries. See ***Stobart***, 617 So.2d at 882.

The Prices claim that the matter should be remanded for a new trial because Patin has previously testified that yellow was an appropriate color for a change in elevation. See ***Bergeron v. Wal-Mart Stores, Inc.***, 617 So.2d 179, 180 (La. App. 3d Cir.), writ denied, 619 So.2d 1065 (La. 1993). It is axiomatic that the facts of the case determine the scope of an expert's testimony. Whether premises contain a defect that presents an unreasonable risk of harm is a question of fact that is determined on a case-by-case basis; there is no bright line rule. See ***Reed v. Wal-Mart Stores, Inc.***, 97-1174, pp. 3-5 (La. 3/4/98), 708 So.2d 362, 364. Moreover, nothing in ***Bergeron***

indicates the location where plaintiff fell was one that was designated as a handicapped area as was the place where Mrs. Price fell. And the expert testimony established the blue paint mandated by the Americans with Disabilities Act did not become applicable until 1994, well after the fall in ***Bergeron***. More importantly, in the case before us, it is undisputed that there was no duty to paint the area where Mrs. Price fell. Thus, the color contrast at issue in ***Bergeron*** differed significantly from that presented in this case. Accordingly, we find Patin's trial testimony in another case does not provide a basis to remand this matter to be retried by a jury.

The Prices maintain the trial court erred when it denied their motion for new trial. In their motion, they averred that there was "newly discovered evidence that was not brought out at the recent trial of this matter," relying on the comments of Coleman D. Brown, AIA, CSI, CCS, which suggested that the slope of the pedestrian aisle required use of a ramp "equipped with either handrails or floor furnish materials that contrast with adjacent floor finish materials."

Generally, the trial judge should grant a new trial when the trial court, in the exercise of discretion, is convinced by its examination of the facts that the judgment would result in a miscarriage of justice. The trial court has much discretion in determining whether to grant a motion for new trial. ***Notoco Indus., Inc. v. Powell***, 2001-1817, p. 4 (La. App. 1st Cir. 11/8/02), 835 So.2d 835, 838. A new trial shall be granted when the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial. La. C.C.P. art. 1972. Additionally, a motion for a new trial should be granted when the verdict is clearly contrary to the law and evidence and, in any case, if there is good ground therefor. La. C.C.P. arts. 1972 and 1973.

The Prices have neither alleged nor shown that Brown's conclusion could not, with due diligence, have been obtained before or during the trial so as to warrant a new trial on the basis of newly discovered evidence. And because the determination of whether the premises contain a defect that presents an unreasonable risk of harm is a question of fact that is supported by the evidence in this case, we cannot say that the jury's verdict was clearly contrary to the law and evidence. Accordingly, we find no abuse of discretion by the trial court in denying the Prices' motion for new trial.

The trial court judgment, dismissing the Prices' claims against Harden & Kimball, is affirmed by this memorandum opinion issued in compliance with La. URCA Rule 2-16.1.B. Appeal costs are assessed against plaintiffs-appellants, Barbara and Gerald Price.

AFFIRMED.