NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1358

JESSE PIERRE[1] AND WANDA PIERRE, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, JESSICA PIERRE AND AMANDA PIERRE

VERSUS

AUDUBON INSURANCE COMPANY, MAURICE K. AND LOIS ROWELL JAMES

DATE OF JUDGMENT: February 20, 2008

ON APPEAL FROM THE THIRTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER 143,374), PARISH OF TERREBONNE
STATE OF LOUISIANA

HONORABLE TIMOTHY C. ELLENDER, JUDGE

* * * * * *

Howard L. Marcello Houma, Louisiana	Counsel for Plaintiffs/Appellees Jessie and Wanda Pierre
John W. Waters, Jr. David E. Walle New Orleans, Louisiana	Counsel for Defendants/Appellants Maurice and Lois James and Audubon Insurance Company

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

Parro, J., concurs.

Disposition: REVERSED.

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[1] Apparently the correct spelling of Mr. Pierre's first name is "Jessie."

KUHN, J.

Defendants-appellants, Maurice and Lois James and their homeowners insurance company, Audubon Insurance Company, appeal the trial court's judgment that concluded they were liable to plaintiff-appellee, Jessie Pierre, for the damages he sustained when he fell through the particle board flooring in the attic of the Jameses' home and sustained personal injuries. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

Pierre was a member of Reverend Maurice James' congregation for over 15 years. Although he was a tugboat captain by trade, Pierre told Reverend James that he had worked in home repair for his father, and soon after began doing construction-type work for the church and at the parsonage in which the Reverend lived with his wife. When the Jameses moved into their house at the end of 2003, Pierre undertook odd construction jobs at the rate of $10 per hour.

On July 19, 2004, Pierre was in the attic of the Jameses' house, attempting to snake wire down an outside wall into the garage. Below, in the garage, the Reverend was to assist Pierre; he was to grab the wire and pull it through the wall.

When Pierre initially entered the attic, he specifically noticed the particle board flooring and noted that it was attached to the joists. He did not observe anything wrong with it and the 228-pound man determined it was "walkable."

Pierre walked across the particle board flooring to the edge of the attic of the sloped-roof house where an existing electrical source was located in the top plate. He planned "to stuff that electrical wire down in a hole that had an existing wire in it; maybe two." In order to access the hole, Pierre had to get on his knees to position himself and then flatten out his body. Because Pierre was unsuccessful in his

attempts to drop the wire through the hole, he decided to slide out of his close-space location. He went down into the garage and, using a flashlight, looked up into the hole to determine if something was obstructing the wire's passage. Because Pierre could see the end of the wire, he decided he would go back into the attic and try to drop the wire through again.

Entering the attic, Pierre again successfully traversed the particle board flooring to the edge of the attic where the hole was located. Bracing himself on a rafter, Pierre positioned himself as he had before and slid back into the close-space location. Pierre reached over the hole, "kind of rolled to the right, a little bit," and fell through the floor. He landed in the garage, a short distance from where the Reverend was standing.

Although he rested for awhile, Pierre returned to the attic and finished the job. But later, he began to experience pain in his buttocks and groin area. He drove himself to the hospital, where he was diagnosed with broken ribs and injuries to the left side of his body.

Pierre subsequently filed this lawsuit and a bench trial was held. A portion of the trial was conducted at the Jameses' house, where the trial judge observed the scene of the accident. Concluding that the particle board flooring created an unreasonably dangerous condition in the attic and that the Jameses failed to warn Pierre of that dangerous condition, the trial court rendered a judgment against the defendants, awarding total damages of $156,334. Fault was apportioned 25% to Pierre and 75% to the Jameses. The defendants appeal.

The issues raised by the defendants are: (1) whether the particle board flooring as used in the attic created an unreasonable risk of harm; and (2) whether

the Jameses knew or should have known of that condition so as to support the imposition of liability.

DISCUSSION

The owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. He must discover any unreasonably dangerous condition on the premises and either correct the condition or warn potential victims of its existence. ***Bozeman v. Scott Range Twelve Ltd. Partnership***, 03-0903, p. 5 (La. App. 1st Cir. 4/2/04), 878 So.2d 615, 619.

The basis for liability based on ownership or custody of a thing is established in La. C.C. arts. 2315, 2316, 2317, and 2317.1. ***See Granda v. State Farm Mut. Ins. Co.***, 04-1722, p. 5 (La. App. 1st Cir. 2/10/06), 935 So.2d 703, 707-08, ***writ denied***, 06-0589 (La. 5/5/06), 927 So.2d 326. In particular, La. C.C. art. 2317.1 provides, in pertinent part:

> 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 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.

Thus, in order to establish such liability, the plaintiff must show that (1) the defendant was the owner or custodian of a thing which caused the damage, (2) the thing had a ruin, vice, or defect that created an unreasonable risk of harm, (3) the ruin, vice, or defect of the thing caused the damage, (4) the defendant knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect, (5) the damage could have been prevented by the exercise of reasonable care, and (6) the defendant failed to exercise such reasonable care. ***Leonard v. Ryan's Family***

Steak Houses, Inc., 05-0775, p. 3 (La. App. 1st Cir. 6/21/06), 939 So.2d 401, 404-05.

In this case, Reverend James testified that he had ownership and custody of the attic. It is the trial court's finding that the particle board flooring as used in the attic created an unreasonable risk of harm that the defendants challenge.

Whether a condition is unreasonably dangerous requires consideration of: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. ***Hutchinson v. Knights of Columbus, Council No. 5747***, 03-1533, p. 10 (La. 2/20/04), 866 So.2d 228, 235. The degree to which a danger may be observed by a potential victim is a factor in the determination of whether the condition is unreasonably dangerous. ***Hutchinson***, 03-1533 at p. 9, 866 So.2d at 235. A premises owner is not liable for an injury that results from a condition which should have been observed by the individual in the exercise of reasonable care or which was as obvious to a visitor as it was to the owner. ***Id.*** Manifest error/clearly wrong is the proper standard of review to be applied in cases involving findings of unreasonable risks of harm or unreasonably dangerous defects. ***Reed v. Wal-Mart Stores, Inc.***, 97-1174, pp. 3-5 (La. 3/4/98), 708 So.2d 362, 364.

Pierre introduced no evidence -- expert or other -- explaining what particle board is or why its use in the attic of the Jameses' house was unreasonably dangerous. In his oral reasons for the judgment, the trial judge stated:

> The Court, was very, very much helped by me going out there, myself, because number one, when I walk there and I know there has been an

> accident out there already, so I am probably -- my senses are probably keener because I know that something dangerous happened up there. And I walked on the particle board that was left up there, but I made sure I stepped in the joists. And then, I also got on my knees, and while still having some of my weight on the joists, tested the elasticity, I guess you could say, of the particle board -- and it did give way somewhat. That's why you don't have particle board in the floor of your house.
>
> ... the piece that I knelt on, it was not solid, it gave way. It gave way, and I could presume that if I laid a certain way on it that it could possibly break through.
>
> ... [Pierre] gets up there just like I did; and initially walks on the joists, and then slowly put a little bit more weight, like I did on my knees; puts more weight on the particular panel -- and then decides, 'well, hey, this stuff seems to be good. But, it is flexible and he ... should have kept close watch on the flexibility of this board, and tested it before he laid on it.

Other than the trial judge's personal observation and opinion on the quality of the board, the record is devoid of anything showing the characteristics or quality of particle board. It was the trial judge's personal observation that served as a basis for his finding that the particle board "did give way" and "is flexible."

The Reverend peered into the attic and saw the flooring but did not elaborate on what he saw; he did not walk on the particle board. Pierre testified that he found nothing wrong with the flooring and that he was able to walk on it. Jules Baudoin, an insurance adjuster who investigated the claim, was about the same weight as Pierre on July 28, 2004, when he visited the Jameses' attic. He did not see any indication that the particle board had been wet or that any foreign matter had been on it. Baudoin looked for but found no evidence of an area of water or staining in the attic. He entered the Jameses' attic through the attic door, had no difficulty traversing the attic to the general vicinity of the work site, and was able to walk on the particle board flooring putting his full weight on it. Baudoin testified, "It was

solid." Thus, the collective testimony of the witnesses introduced into evidence established that Pierre and Baudoin were able to walk on the particle board and that neither detected anything wrong with the flooring. The trial judge's observation that the particle board "did give way" and "is flexible" was made about two and a half years after Pierre fell into the Jameses' garage. It was not evidence, and should not have been considered or appropriately given as an opinion in the reasons for judgment.

Pierre, who had experience in construction-type work and had been in the attic earlier that day for another project he had done for the Jameses, clearly was better able to observe any potential dangers that the use of the particle board flooring may have created. His testimony was that he observed none and proceeded to walk on the particle board without regard to any potential vulnerability it may have created because of its use as flooring in the attic.

Without the trial judge's opinion, the record is devoid of any evidence to support a finding that the particle board as used in the Jameses' attic was unreasonably dangerous. Thus, lacking a reasonable factual basis to support it, this conclusion by the trial court is manifestly erroneous. And since the record does not establish that the particle board flooring created an unreasonably dangerous condition in the attic, the Jameses had no duty to correct the condition or to warn Pierre. ***See Stone v. Hebert***, 99-1394, p. 6 (La. App. 5th Cir. 5/17/00), 762 So.2d 220, 222.[2] Accordingly, the trial court's conclusion that the defendants are liable to

[2] Since the record fails to establish an unreasonably dangerous condition existed in the attic, it is unnecessary to address whether Pierre sustained his burden of proving the Jameses had actual or constructive knowledge of the particle board flooring; therefore, a discussion of that issue is pretermitted.

Pierre is clearly wrong, and its judgment awarding damages is reversed.

DECREE

For these reasons, the trial court's judgment is reversed, and Jessie Pierre's lawsuit is dismissed with prejudice at his costs.

REVERSED.