NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2006 CA 1245

JAMES F. FISHER

VERSUS

GULF COAST RHEUMATOLOGY ASSOCIATES (A PROFESSIONAL MEDICAL CORPORATION), PHILLIP SEDRISH, M.D., MARIELISA S. SEDRISH, M.D., AND ST. TAMMANY HOSPITAL SERVICE DISTRICT NO. 2 D/B/A SLIDELL MEMORIAL HOSPITAL AND MEDICAL CENTER, AIM INTERIOR CONTRACTORS, INC., AIM CONSTRUCTION CORPORATION AND AIM CONSTRUCTION, INC.

Judgment rendered May 4, 2007.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 2002-11631
Honorable Reginald T. Badeaux, III, Judge

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* * * * * *

BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

Downing dissents and assigns reasons.

PETTIGREW, J.

In this case, plaintiff, James F. Fisher, challenges the trial court's judgment granting summary judgment in favor of defendant, AIM Interior Contractors, Inc. ("AIM"), and dismissing, with prejudice, his claim for damages. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 2, 2001, Mr. Fisher, owner of Alarm and Computer Services, was providing services to Gulf Coast Rheumatology Associates ("Gulf Coast") and Drs. Phillip Sedrish and Marielisa S. Sedrish at Gulf Coast's offices, located in Slidell, Louisiana. Gulf Coast had recently leased an office suite from St. Tammany Hospital Service District No. 2, d/b/a Slidell Memorial Hospital and Medical Center ("Slidell Memorial"), and was in the process of moving in and setting up its office. AIM had been hired by Slidell Memorial to work on several of the office suites in the hospital. According to the record, Mr. Fisher had previously worked on Gulf Coast's telephone systems and returned on the day of the accident to deliver an invoice for payment. Once he arrived at Gulf Coast, Tamera Neill, Gulf Coast's office manager, advised him that BellSouth had not completed its work on the inside telephone line and would not be able to return to Gulf Coast until the following week. Ms. Neill then asked Mr. Fisher if he could run the line through the building's suspended ceiling into their offices so that they would have working telephones.

As Mr. Fisher did not go to Gulf Coast with the intention of working in Gulf Coast's ceiling space, he did not bring his ladder with him on the day in question. Thus, according to Mr. Fisher, Ms. Neill provided him with a six-foot aluminum ladder owned by AIM in order to assist him in running the telephone line. Mr. Fisher did not know who the ladder belonged to, but assumed Ms. Neill had authority to give it to him to use. Mr. Fisher proceeded to climb the ladder, remove the ceiling tiles, and pull the telephone wire over the suspended ceiling. According to Mr. Fisher, he had been up and down the ladder twice before it collapsed, causing him to fall and injure his wrist.

As a result of the injuries he sustained, Mr. Fisher filed the instant claim for damages against Gulf Coast[1] and AIM alleging negligence and/or strict liability for providing him with a defective ladder.[2] In response to Mr. Fisher's petition for damages, AIM filed a motion for summary judgment alleging that there was no genuine issue of material fact and that it was entitled to judgment as a matter of law. Noting the absence of evidence in the record that AIM knew of any defect in the ladder, or even that the ladder was in fact defective, AIM asserted that Mr. Fisher was unable to establish several essential elements of his claim. Thus, AIM concluded, summary judgment was warranted. Attached to its motion for summary judgment were the deposition of Mr. Fisher and the deposition of Eric Deblanc, a painter who was working for AIM at the time of the accident in question.

Mr. Fisher filed an opposition to AIM's motion for summary judgment, alleging a "multitude of contested issues of material fact" that "turn on credibility determinations." Thus, Mr. Fisher argued, summary judgment was not appropriate. In support of his position, Mr. Fisher introduced his deposition, Mr. Deblanc's deposition, Ms. Neill's deposition, and AIM's answers to the interrogatories propounded by Mr. Fisher.

AIM's motion for summary judgment proceeded to a hearing on December 20, 2005. After hearing arguments from the parties and considering the applicable law and evidence in the record, the trial court granted AIM's summary judgment, dismissing, with prejudice, Mr. Fisher's claim for damages. A judgment in accordance with the court's findings was signed on December 20, 2005. It is from this judgment that Mr. Fisher has appealed, arguing that the trial court erred in granting summary judgment in favor of AIM. Mr. Fisher assigned the following specifications of error with regard to AIM:

> 1. The District Court erred in finding that the ladder being used by Mr. Fisher at the time of his accident/injuries was not defective;

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[1] Mr. Fisher has separately appealed the trial court's judgment in favor of Gulf Coast. See our unpublished decision in **Fisher v. Gulf Coast Rheumatology Assoc.**, 2006-1246 (La. App. 1 Cir.), also decided this same date.

[2] Mr. Fisher also named Drs. Phillip and Marielisa S. Sedrish and Slidell Memorial as defendants in his suit. In a judgment rendered October 19, 2004, the trial court granted summary judgment in favor of Slidell Memorial, dismissing Mr. Fisher's claim against it with prejudice. With regard to the Drs. Sedrish, they filed a voluntary petition for Chapter 7 Bankruptcy.

2. The District Court erred in failing to find that liability could be imposed on AIM as the owner of the defective ladder pursuant to the 1996 amendment of ... Louisiana Civil Code ... art. 2317.1;

3. The District Court erred in failing to find that the analysis set forth by the Third Circuit Court of Appeals in *Myers v. Dronet*, 801 So.2d 1079 (La. App. 3 Cir. 2001) was applicable in this case;

4. The District Court erred in failing to find that AIM ... breached [its] duty to exercise reasonable care as the owner ... of the ladder in question at the time of Mr. Fisher's accident/injuries;

5. The District Court erred in failing to find there is a genuine issue of material fact concerning whether an adverse inference should be applied against AIM for disposal of the ladder at issue subsequent to Mr. Fisher's accident/injuries;

6. The District Court erred in failing to find genuine issues of material fact precluded summary judgment *in toto* in these proceedings.

SPOILATION OF THE EVIDENCE

On appeal, Mr. Fisher argues that he is entitled to an adverse inference arising from AIM's disposal of the ladder at issue because AIM had knowledge of his accident and the involvement of the destroyed ladder. In support of his adverse inference argument, Mr. Fisher cites **Bourgeois v. Bill Watson's Investments, Inc.**, 458 So.2d 167 (La. App. 5 Cir. 1984), and **Randolph v. General Motors Corp.**, 93-1983 (La. App. 1 Cir. 11/10/94), 646 So.2d 1019, writ denied, 95-0194 (La. 3/17/95), 651 So.2d 276. While it is true that the failure of a litigant to produce evidence within his reach raises a presumption that the evidence would have been detrimental to his case, this presumption is not applicable when the failure to produce the evidence is adequately explained. **Randolph**, 93-1983 at 12, 646 So.2d at 1027.

In the instant case, deposition testimony of John Lindsey, owner of AIM, established that he took the ladder in question out of a dumpster after Mr. Fisher's fall and brought it to his yard, intending to cut the bottom rungs off of the ladder to make a four-foot ladder out of it.

Q. When did you first see the ladder that Mr. Fisher was allegedly using at the time of the accident after it occurred, if you ever saw it after it occurred?

A. When I brought my dump trailer home. I was looking at what was in it, and I saw the ladder in it.

Q. Now, can you tell me in terms of the day of the accident how long after the accident that was?

A. No. It could have been -- I don't know. It could have been a couple of days, maybe Monday. I don't know. I mean, not Monday. The day after the 4th of July.

. . . .

Q. At the time that you saw the ladder in the 14-foot dump trailer, did you already know that that was the ladder that Mr. Fisher allegedly fell off of?

A. Yeah. I knew that that was the ladder that got bent. So I took it out. I was going to cut it off and make a four-foot ladder out of it, but I set it by the tree and left it there and never did. So finally I threw it away.

Q. How long after the accident did you throw it away?

A. I don't recall exactly. Maybe --

Q. Days? Weeks? Months?

A. Months. It was sitting out there for months, and I was cleaning out the yard and got tired of it being there, decided I wasn't going to fool with cutting it off and threw it away.

Q. Did you take any pictures of the ladder before you threw it away?

A. No. Because I had no idea I was going to be into this mess.

Thus, as Mr. Lindsey had an explanation as to what happened to the ladder in question, we find Mr. Fisher is not entitled to an adverse inference as a matter of law. Accordingly, Mr. Fisher's argument to the contrary is without merit.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. **Johnson v. Evan Hall Sugar Co-op., Inc.**, 2001-2956, p. 3 (La. App. 1 Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Thomas**

v. Fina Oil and Chemical Co., 2002-0338, pp. 4-5 (La. App. 1 Cir. 2/14/03), 845 So.2d 498, 501-502.

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. An appellate court thus asks whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482, p. 3 (La. App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830. The initial burden of proof is on the moving party. However, on issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof on the motion is satisfied by pointing out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. Code Civ. P. art. 966(C)(2). **Thompson v. BGK Equities, Inc.**, 2004-2366, p. 6 (La. App. 1 Cir. 11/4/05), 927 So.2d 351, 354-355, writ denied, 925 So.2d 550, 2005-2405 (La. 3/17/06). Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. **Robles v. Exxonmobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

In **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512, pp. 26-27 (La. 7/5/94), 639 So.2d 730, 750-751, the Louisiana Supreme Court set forth the following parameters for determining whether an issue is genuine or a fact is material.

> A "genuine issue" is a "triable issue." More precisely, "[a]n issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. Summary judgment is the means for disposing of such meretricious disputes." In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. "Formal allegations without substance should be closely scrutinized to determine if they truly do reveal genuine issues of fact."
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> A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. "[F]acts are material if they potentially insure or preclude

> recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute." Simply put, a "material" fact is one that would matter on the trial on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. (Citations omitted.)

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Foreman v. Danos and Curole Marine Contractors, Inc.**, 97-2038, p. 7 (La. App. 1 Cir. 9/25/98), 722 So.2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So.2d 637.

Louisiana Civil Code articles 2315 and 2316 provide the basic codal foundation for delictual liability for intentional torts and negligence in our state. Louisiana Civil Code articles 2317 and 2317.1 define the basis for delictual liability for defective things.[3] In pertinent part, Article 2317.1 provides as follows:

> 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, to establish liability based on ownership or custody of a thing, 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,[4] or defect that created an unreasonable risk of harm,[5] (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. La. Civ.

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[3] The 1996 legislation enacting La. Civ. Code art. 2317.1, effective April 16, 1996, abolished the concept of strict liability governed by prior interpretations of La. Civ. Code art. 2317. See **Dennis v. The Finish Line, Inc.**, 99-1413, 99-1414, p. 5 n.8 (La. App. 1 Cir. 12/22/00), 781 So.2d 12, 20 n.8, writ denied, 2001-0214 (La. 3/16/01), 787 So.2d 319. A more appropriate term now for liability under Articles 2317 and 2317.1 might be "custodial liability," but such liability is nevertheless predicated upon a finding of knowledge or constructive knowledge. See **Rogers v. City of Baton Rouge**, 2004-1001, p. 5 (La. App. 1 Cir. 6/29/05), 916 So.2d 1099, 1102.

[4] The term "vice" has been defined in the jurisprudence as an unreasonable risk of injury (or harm) to another. See **Loescher v. Parr**, 324 So.2d 441, 446-447 (La. 1975).

[5] See **Moory v. Allstate Ins. Co.**, 2004-0319, p. 8 (La. App. 1 Cir. 2/11/05), 906 So.2d 474, 480-481, writ denied, 2005-0668 (La. 4/29/05), 901 So.2d 1076; **Higginbotham v. Community Christian Academy, Inc.**, 2003-0462, pp. 7-9 (La. App. 1 Cir. 12/31/03), 868 So.2d 765, 769-770.

Code art. 2317.1; **Granda v. State Farm Mut. Ins. Co.**, 2004-2012, p. 5 (La. App. 1 Cir. 2/10/06), 935 So.2d 698, 702.

On appeal, Mr. Fisher maintains there are a multitude of contested issues of material fact (the bulk of which turn on credibility determinations) that would preclude the granting of summary judgment in favor of AIM. Mr. Fisher notes the following pertinent questions that remain unanswered concerning the accident:

> (1) How did [he] obtain the ladder which collapsed on July 2, 2001?
>
> (2) Was the ladder defective as a result of improper use/maintenance?
>
> (3) Did the ladder have a weight restriction on it and, if so, what was that restriction?
>
> (4) What was the condition of the ladder at the time of the accident?
>
> (5) How did the accident occur?

On the other hand, AIM argues that because Mr. Fisher cannot establish several essential elements of his cause of action, summary judgment was warranted. AIM notes that Mr. Fisher presented no evidence that it either knew or should have known of a defect, if any, in the ladder. Moreover, AIM maintains that Mr. Fisher offered no evidence that any defect in the ladder presented an unreasonable risk of harm. We agree.

According to the evidence in the record, the ladder was owned by AIM and used primarily by AIM employees. In fact, Eric Deblanc testified that when the ladder was not in use, it was kept with AIM's other equipment locked in a storage suite. Moreover, the record is void of any evidence that the ladder was defective. Rather, the evidence established that at the time of the accident, the aluminum ladder was only a few weeks old. The deposition testimony established that while the ladder had a weight rating of 200 pounds, Mr. Fisher weighed approximately 235 pounds at the time of the accident. Moreover, Mr. Deblanc had used the ladder on numerous occasions prior to the day of the accident and never had any trouble with the ladder or noticed any defects. In fact, even Mr. Fisher testified that he had been up and down the ladder two times before the accident with no problem. He described the ladder as "newer looking" and as being in

"fairly decent shape." Mr. Fisher also indicated that the ladder "[s]eemed stable enough to pull wire."

Following our exhaustive review of the record and based on the facts and circumstances of this case, we conclude that AIM carried its burden of proof on the motion for summary judgment. Further, we note that in opposition to AIM's motion for summary judgment, Mr. Fisher failed to produce factual evidence sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial, i.e., that the ladder in question had a defect that created an unreasonable risk of harm, that AIM knew or should have known of the defect, and that the defect caused his injuries. See La. Code Civ. P. art. 966(C)(2). Accordingly, there were no genuine issues of material fact remaining as to AIM's liability. Summary judgment in favor of AIM was warranted.

CONCLUSION

For the above and foregoing reasons, we find no error in the trial court's judgment granting AIM's motion for summary judgment and dismissing, with prejudice, Mr. Fisher's claim for damages. Thus, we affirm the trial court's judgment in accordance with Uniform Rules--Courts of Appeal, Rule 2-16.1B and assess all appeal costs against plaintiff-appellant, James F. Fisher.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 1245

JAMES F. FISHER

VERSUS

GULF COAST RHEUMATOLOGY ASSOCIATES (A PROFESSIONAL MEDICAL CORPORATION), PHILLIP SEDRISH, M.D., MARIELISA S. SEDRISH, M.D., AND ST. TAMMANY HOSPITAL SERVICE DISTRICT NO. 2 D/B/A SLIDELL MEMORIAL HOSPITAL AND MEDICAL CENTER, AIM INTERIOR CONTRACTORS, INC., AIM CONSTRUCTION CORPORATION AND AIM CONSTRUCTION, INC.

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DOWNING, J., dissents and assigns reasons.

A non-defective ladder should not collapse with normal use. Res ipsa loquitur should apply here and the defendant should have the burden of proving that the ladder was not defective.

We have fact pleading in Louisiana. Although not argued, if plaintiff was given a ladder that was labeled below his weight limit then this would be a comparative negligence case. If plaintiff was given a ladder with the warnings removed then this would be a comparative negligence case.

In any event, there are factual disputes which should be resolved at trial and summary judgment is inappropriate.