

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1789

STEVE WAYNE POURCIAU, CHARLOTTE M. POURCIAU & STEVE WAYNE
POURCIAU ON BEHALF OF HIS MINOR CHILD, TAYLOR WAYNE POURCIAU

VERSUS

ECCO NINO, INC. d/b/a NINO'S RESTAURANT, ABC INSURANCE COMPANY,
WINGS THREE LA, L.L.C. D/B/A BUFFALO WILD WINGS GRILL & BAR,
DEF INSURANCE COMPANY, EQUITY ONE (LOUISIANA PORTFOLIO) LLC,
GHI INSURANCE COMPANY

Judgment rendered September 21, 2012.

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. C564575
Honorable R. Michael Caldwell, Judge

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OPELOUSAS, LA
AND
PAUL J. SCOPTUR
MILWAUKEE, WI

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McClendon, J. concurs and Assigns Reasons

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* * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

In this personal injury action, plaintiff-appellant, a service technician, allegedly slipped and fell while descending a service ladder affixed to the side of a commercial building. The instant appeal is one of two presently before this court that arise from the trial court's grant of summary judgments in favor of different defendants. For the following reasons, the trial court's grant of summary judgment in favor of Wings Three LA, LLC, d/b/a Buffalo Wild Wings Grill & Bar ("BWW") is hereby reversed and remanded for further proceedings.

FACTS

On March 1, 2007, plaintiff-appellant Steve Wayne Pourciau, a heating and air conditioning repairman, responded to a service call at the restaurant leased by defendant ECCO Nino, Inc. d/b/a Nino's Restaurant ("Nino's"), and located in the Bluebonnet Village Mall. The Bluebonnet Village Mall is a commercial strip shopping center owned by defendant Equity One, LLC ("Equity One"), and situated on Bluebonnet Boulevard in Baton Rouge, Louisiana.

The air conditioning unit that served Nino's was located on the roof of the shopping center and was accessible via a metal service ladder permanently affixed to the rear wall of the building. Said ladder was situated between the rear entrances of Nino's and an adjoining restaurant leased by defendant, BWW. In order to repair the unit, Mr. Pourciau backed his pickup truck into the service area behind BWW and ascended the service ladder to the roof. After removing a defective fan motor from the unit, Mr. Pourciau descended from the roof carrying the motor via the service ladder and returned along the same path to his truck.

After purchasing a new motor at a parts store, Mr. Pourciau returned to the shopping center about forty minutes later and parked his truck in the same location. Mr. Pourciau ascended the service ladder again with the new motor and performed the necessary repairs. The repairs took approximately fifteen minutes. While descending the ladder after repairing the fan, Mr. Pourciau claimed that one of his feet slipped from an upper rung causing him to fall approximately twenty feet to the concrete below.

Mr. Pourciau alleged that after his fall, he hobbled about ten feet to his truck, which was backed up into the service area behind the BWW restaurant. As he sat on the tailgate of his truck removing his boot, Mr. Pourciau noticed an oily residue on the soles of his boots. Mr. Pourciau further alleged that as a result of this fall, he suffered severe and debilitating injuries to his right foot. He thereafter underwent surgical procedures in March and December of 2007, to reconstruct his shattered heel.

ACTION OF THE TRIAL COURT

On February 28, 2008, a Petition for Damages was filed on behalf of Mr. Pourciau, his wife Charlotte M. Pourciau, and their minor child Taylor Wayne Pourciau (collectively, "Plaintiffs"), in the 19th Judicial District Court. Named as defendants therein were Nino's, BWW, and Equity One. Plaintiffs filed an Amended and Supplemental Petition on July 17, 2008, wherein they named AIG Insurance Services, Inc., GAB Robins North America, Inc.,¹ Travelers Insurance Company, and Fireman's Fund Insurance Company as additional defendants in this action.

On January 21, 2010, plaintiffs filed another Amended and Supplemental Petition wherein they named Griffin Industries, Inc. ("Griffin"), the provider of a grease disposal vat for discarded cooking oil at the BWW restaurant, as an additional defendant in this matter. Plaintiffs subsequently dismissed their claims against defendant Griffin with prejudice after Griffin filed a motion seeking a summary judgment.

In April 2011, co-defendants BWW, Nino's, and Equity One similarly sought dismissal of plaintiffs' claims against them through the filing of individual motions for summary judgment and adopted by reference the memorandum and exhibits filed by Griffin to support their motion for summary judgment. Following a hearing on May 9, 2011, the trial court granted BWW's motion for summary judgment and dismissed

¹ Plaintiffs later dismissed defendant GAB Robins North America, Inc. voluntarily through a motion and order signed on December 12, 2008.

plaintiffs' claims against BWW at plaintiffs' costs. From this judgment, plaintiffs now appeal.²

ISSUES PRESENTED ON APPEAL

In connection with their appeal in this matter, plaintiffs set forth the following issues for review and consideration by this court:

1. Whether BWW was the owner or custodian of a thing which caused the damage;
2. Whether the thing had a vice that created an unreasonable risk of harm;
3. Whether the ruin, vice, or defect of the thing caused the damage;
4. Whether BWW knew or, in the exercise of reasonable care, should have known, of the ruin, vice or defect; and
5. Whether the damage could have been prevented by the exercise of reasonable care.

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. **Gonzales v. Kissner**, 2008-2154, p. 4 (La. App. 1 Cir. 9/11/09), 24 So.3d 214, 217. 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); **Aucoin v. Rochel**, 2008-1180, p. 5 (La. App. 1 Cir. 12/23/08), 5 So.3d 197, 200, writ denied, 2009-0122 (La. 3/27/09), 5 So.3d 143.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before

² Following a hearing held on June 27, 2011, the trial court similarly granted the motions for summary judgment filed on behalf of co-defendants Nino's and Equity One and accordingly dismissed plaintiffs' claims against said defendants at plaintiffs' costs. Plaintiffs have also appealed from this judgment, which is addressed in our companion opinion in **Steve Wayne Pourciau, et al. v. Ecco Nino, Inc. et al.**, 2011 CA 2031 (La. App. 1 Cir. 8/23/12).

the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point 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. 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. La. Code Civ. P. art. 966(C)(2); **Robles v. ExxonMobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Boudreaux v. Vankerhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: 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.

A motion for summary judgment is rarely appropriate for disposition of a case requiring judicial determination of subjective facts such as intent, motive, malice, good faith, or knowledge. **Bilbo for Basnaw v. Shelter Insurance Company**, 96-1476, p. 5 (La. App. 1 Cir. 7/30/97), 698 So.2d 691, 694, writ denied, 97-2198 (La. 11/21/97), 703 So.2d 1312. Further, issues that require the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. **Granda v. State Farm Mutual Insurance Company**, 04-1722, pp. 4-5 (La. App. 1 Cir. 2/10/06), 935 So.2d 703, 707, writ denied, 06-0589 (La. 5/5/06), 927 So.2d 326. In addition, questions of negligence are generally inappropriate for disposition by summary judgment. **Stroder v. Horowitz**, 34,048, p. 4 (La. App. 2 Cir. 12/20/00), 775 So.2d 1175, 1178; **McGill v. Cochran Sysco Foods, Div. of Sysco Corp.**, 29,154, p. 2 (La. App. 2 Cir. 2/26/97),

690 So.2d 952, 953, writ denied, 97-0798 (La. 5/1/97) 693 So.2d 730; and **DeStevens v. Harsco Corp.**, 94-1183, p. 3 (La. App. 4 Cir. 3/16/95), 652 So.2d 1054, 1057.

ANALYSIS

In the present appeal, plaintiffs argue that BWW's decision to place a grease disposal vat on the far side of a service ladder leading to the roof forced BWW employees to transport discarded cooking oil across the rear service area leading to the ladder thereby creating an unreasonably dangerous condition. In their brief to this court, plaintiffs admit that they were unsuccessful in their efforts to have the hearing on summary judgment continued. Accordingly, plaintiffs did not file a memorandum in opposition to the summary judgment or exhibits until June 1, 2011, which was after both the May 9, 2011 hearing and oral ruling by the trial court granting summary judgment in favor of BWW and the subsequent issuance of a written judgment on May 23, 2011.

In support of its motion for summary judgment, BWW relied on excerpts from the deposition of its corporate representative Timothy Ward. Said deposition excerpts were previously filed into the record in connection with a motion for summary judgment filed by former defendant Griffin. In his deposition, Mr. Ward testified that on Tuesday, February 27, 2007, two days prior to Mr. Pourciau's alleged accident, he personally pressure-washed the entire rear service area including the service ladder. Mr. Ward stated that there was no grease, oil, or other foreign substances in the area after he had finished pressure-washing it. Mr. Ward also testified that it is customary for the managers of BWW to inspect the rear service area for safety hazards every 15 to 20 minutes. Mr. Ward further testified that BWW employees made trash deliveries to a dumpster behind the restaurant three to five times a day, while other employees delivered discarded cooking oil to Griffin's grease disposal vat in that same area at least once a day. Mr. Ward confirmed that it was the responsibility of each BWW employee to report and correct any potential hazards and that there were no reports of any grease or oil spills in the rear service area during the time in question.

Louisiana Civil Code articles 2317 and 2317.1 define the basis for delictual liability for defective things. In pertinent part, La. Civ. Code art. 2317.1 provides:

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 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, 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. La. Civ. Code art. 2317.1; **Granda**, 04-1722 pp. 5-6, 935 So.2d at 707-708.

In excerpts from his deposition that were previously filed into the record, BWW's corporate representative Timothy Ward acknowledged that BWW had custody and garde of the grease vat and the area where the accident occurred. Timothy Ward testified that he typically pressure-washed the rear service area twice each month. The last time he pressure-washed the area was two days before the accident and when he finished, it was free of grease. We observe the last time Mr. Ward was in that area or at the store was two days before the accident and, therefore, he had no personal knowledge of what the condition was on the day of the accident. Mr. Ward further testified that BWW employees take kitchen trash out to the dumpster located behind the restaurant three to five times a day and transport discarded cooking oil into the grease disposal vat located in the rear service area at least once a day. In addition to these assertions, Mr. Ward testified that BWW has a "Standard Operating Procedures Guide" that details employee guidelines and procedures as well as a "Heart of House" guide that outlines employee positions and responsibilities. Copies of both guides were introduced by plaintiffs in their opposition to summary judgment to show that BWW failed

to have a written policy relative to maintenance of the rear service area and, in particular, the adjacent service ladder. The record is devoid of copies of regular employee logs or checklists that might substantiate the date and time when safety inspections were conducted of the rear service area. There was no evidence introduced that the employees performed these alleged regular inspections. The plaintiff's deposition excerpts indicate that after he fell down the ladder, he noticed a greasy oily substance on his shoe and the grease vat near the ladder. The excerpts of the deposition of Daniel A. Payne, Jr., a potential witness, indicates he observed dirty concrete, and oil and grease, around this vat near the ladder on the day of the accident. The testimony of the plaintiff and Daniel A. Payne, Jr. creates material issues of fact.

After reviewing all of the evidence in the record, we conclude that there remain genuine issues of material fact as to whether the service area behind BWW presented an unreasonable risk of harm that could have been prevented through the exercise of reasonable care. Accordingly, BWW was not entitled to summary judgment as a matter of law.

DECREE

For the above and foregoing reasons, the trial court's grant of summary judgment in favor of defendant, Wings Three LA, LLC, d/b/a Buffalo Wild Wings Grill & Bar, is hereby reversed and this matter is remanded for further proceedings consistent with this opinion. All costs associated with this appeal shall be assessed against defendant, Wings Three LA, LLC, d/b/a Buffalo Wild Wings Grill & Bar.

REVERSED AND REMANDED.

STATE OF LOUISIANA

COURT OF APPEAL

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**STEVE WAYNE POURCIAU, CHARLOTTE M POURCIAU & STEVE WAYNE
POURCIAU ON BEHALF OF HIS MINOR CHILD,
TAYLOR WAYNE POURCIAU**

VERSUS

**ECCO NINO, INC. D/B/A NINO'S RESTAURANT, ABC INSURANCE
COMPANY, WINGS THREE LA, L.L.C. D/B/A WILD WINGS GRILL & BAR,
DEF INSURANCE COMPANY, EQUITY ONE (LOUISIANA PORTFOLIO)
LLC, GHI INSURANCE COMPANY**

McCLENDON, J., concurs and assigns reasons.

The majority, by requiring the defendant to produce copies of inspection logs to substantiate that employees performed inspections of the area where Mr. Pourciau's accident occurred, places a greater burden of proof on the defendant than is required by LSA-C.C.P. art. 966C(2). Rather, the defendant in this case, who does not bear the burden of proof at trial, is only required to "point out to the court that there is an absence of factual support for one or more elements essential" to plaintiffs' action. The defendant met its initial burden through the testimony provided by its corporate representative. At that point, the burden shifted to plaintiffs to produce factual evidence to establish that they would be able to satisfy their evidentiary burden of proof at trial. In this regard, plaintiffs introduced the deposition testimony of Mr. Pourciau concerning a greasy oily substance on his shoe and of Mr. Payne concerning oil and grease near the ladder on the day of Mr. Pourciau's accident. Accordingly, because genuine issues of material fact remain, I concur with the result reached by the majority.