

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**NO. 2015 CA 1529**

**LAINA DUTTON**

**VERSUS**

**MICHAEL P. COX, XTREME NUTRITON, L.L.C.  
AND ALLSTATE INSURANCE COMPANY**

*Judgment Rendered:* **APR 15 2016**

\*\*\*\*\*

**Appealed from the  
19th Judicial District Court  
In and for the Parish of East Baton Rouge  
State of Louisiana  
Case No. 627164**

**The Honorable Timothy E. Kelley, Judge Presiding**

\*\*\*\*\*

**Kevin R. Duck  
Lafayette, Louisiana**

**Counsel for Plaintiff/Appellant  
Laina Dutton**

**Christopher P. Lawler  
Metairie, Louisiana**

**Counsel for Defendants/Appellees  
Michael P. Cox, Xtreme Nutrition,  
L.L.C., and Allstate Insurance  
Company**

\*\*\*\*\*

**BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.**

## **THERIOT, J.**

In this personal injury case, the plaintiff-appellant appeals a judgment rendered by the Nineteenth Judicial District Court in favor of the defendants-appellees. The trial court granted the defendants' motion for summary judgment and ordered the dismissal of the plaintiff's claims with prejudice after finding that the plaintiff had not presented evidence sufficient to establish that she could bear her burden of proving negligence at trial. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL BACKGROUND**

This dispute arises from an accident that occurred in Baton Rouge, Louisiana, in December of 2012. The plaintiff-appellant, Laina Dutton, claims that she was injured when she fell off of a ladder at the business site of Xtreme Nutrition, L.L.C. At the time of the accident, Ms. Dutton had a personal relationship with the owner of Xtreme Nutrition, Michael P. Cox, who had decided to close down his business. Ms. Dutton volunteered to help vacate the building where Xtreme Nutrition had been located. She was not an employee of Xtreme Nutrition, nor was she paid for her assistance. While helping clean out the building on December 30, 2012 – without instruction or guidance from Mr. Cox – Ms. Dutton ascended a ladder that had been set up by Mr. Cox in order to remove a banner that was hanging from the wall of the building. When she had reached the third or fourth rung of the ladder, Ms. Dutton fell backwards off of the ladder, hitting her back and the left side of her body.

On December 26, 2013, Ms. Dutton initiated this lawsuit by filing a petition for damages against the defendants-appellees, Mr. Cox, Xtreme Nutrition, and Allstate Insurance Company, the liability insurer for Mr. Cox and Xtreme Nutrition. Ms. Dutton alleged that she had sustained personal

injuries as a result of the accident that had occurred at Xtreme Nutrition. Ms. Dutton claimed that she had gone to the business as a guest of Mr. Cox and had fallen off the ladder as a result of Mr. Cox's failure to properly erect, balance, and place the ladder; failure to monitor the placement of the ladder; failure to hold the ladder; failure to warn of the risk of injury; and inattentiveness. Ms. Dutton asserted she had sustained injuries to her left elbow, forearm, upper arm, lower back, and lumbar spine. She prayed for an appropriate award of special and general damages.

Following pre-trial discovery, the defendants moved for summary judgment. The defendants requested the trial court dismiss Ms. Dutton's suit with prejudice, arguing that she could not present evidence sufficient to bear her burden of proving negligence at trial. In support of their motion for summary judgment, the defendants pointed to Ms. Dutton's deposition testimony, wherein she acknowledged that she had used the ladder previously without issue and was unaware of any defective condition with the ladder. The defendants argued that Ms. Dutton had presented no positive evidence tending to establish why she fell off the ladder. They noted that Ms. Dutton admitted she did not ascend the ladder upon the instruction of Mr. Cox, and argued there was no positive evidence that Mr. Cox had negligently set up the ladder in an unstable manner.

Ms. Dutton opposed the defendants' motion for summary judgment. She argued there were genuine issues of material fact that precluded granting summary judgment in favor of the defendants. Ms. Dutton averred that the only reasonable explanation for the fall and her resulting injuries was that Mr. Cox had failed to erect the ladder properly. Furthermore, Ms. Dutton argued that Mr. Cox admitted in his deposition testimony he failed to

properly erect or balance the ladder for Ms. Dutton and placed one leg of the ladder on a runner portion of an adjacent desk prior to her fall.

In response to Ms. Dutton's opposition, the defendants objected to portions of the deposition testimony introduced and cited by Ms. Dutton. The defendants filed a motion to strike those statements wherein Mr. Cox testified regarding the placement and stability of the ladder. The defendants explained that the complained-of testimony did not reflect Mr. Cox's recollection of facts, but instead concerned Mr. Cox's speculation and conjecture regarding what could have happened on the date in question. The defendants argued that Mr. Cox's speculation was not valid evidence on a motion for summary judgment and could not support a finding of genuine issues of material fact.

On June 1, 2015, the trial court held a hearing on the defendants' motion for summary judgment and motion to strike. Following arguments of counsel, the trial court granted the defendants' motion to strike, reasoning the challenged portions of Mr. Cox's deposition testimony constituted improper "guess work" and "speculation." Additionally, the trial court granted the defendants' motion for summary judgment, finding that Mr. Cox did not owe Ms. Dutton a duty with respect to his placement of the ladder.

On July 29, 2015, the trial court signed a written judgment granting the defendants' motion to strike and motion for summary judgment and ordering the dismissal of Ms. Dutton's suit with prejudice. Ms. Dutton now appeals.

#### **ASSIGNMENTS OF ERROR**

Ms. Dutton presents three assignments of error on appeal:

1. The trial court erred in striking the testimony of Mr. Cox that set forth admissions of fault, including admissions by Mr. Cox that he undertook the duty to erect a ladder so the plaintiff could climb to

assist him in removing items from the wall; admission that he erected the ladder in an area filled with debris; admission that he placed the ladder on the leg of the desk resulting in the plaintiff falling from the ladder and suffering injuries resulting in surgery, admissions that were based upon Mr. Cox's recollection, perception, and surrounding circumstances, as speculative testimony.

2. The trial court erred wherein it failed to find that Mr. Cox had a duty to erect the ladder that was used by the plaintiff where the undisputed facts are that Mr. Cox undertook a duty when he erected the ladder and then allowed the plaintiff to climb the ladder to assist him in removing a banner from his wall.
3. The trial court erred by failing to construe, in favor of the respondent in opposition to the motion for summary judgment, reasonable factual inferences drawn from the evidence, including admission by Mr. Cox that he undertook the duty to erect a ladder so the plaintiff could climb to assist him in removing items from the wall; admission that he erected the ladder in an area filled with debris; admission that he placed the ladder on the leg of the desk resulting in the plaintiff falling from the ladder and suffering serious injuries resulting in surgery, admissions that were based upon Mr. Cox's recollection, perception, and surrounding circumstances, that would create a genuine issue of material fact for a reasonable objective person as to whether or not the defendant was negligent in erecting the ladder from which the plaintiff fell.

### **STANDARD OF REVIEW**

Louisiana Code of Civil Procedure art. 966(B)(2)<sup>1</sup> provides that a motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, admitted for the purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).

---

<sup>1</sup> Louisiana Code of Civil Procedure art. 966 was amended and reenacted by 2015 La. Acts, No. 422, § 1, with an effective date of January 1, 2016. The amended version of Article 966 does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act; therefore, we refer to the former version of La. C.C.P. art. 966 in this case.

According to La. C.C.P. art. 966(C)(2), the burden of proof on a motion for summary judgment is on the moving party. However, if the moving party will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the moving party's burden 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. Thereafter, the adverse party must produce factual support sufficient to establish that it will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. *Id.*

The grant or denial of a motion for summary judgment is reviewed by this court *de novo*. Thus, we ask the same questions as the trial court in determining whether summary judgment is appropriate: 1) whether there is any genuine issue of material fact, and 2) whether the mover is entitled to judgment as a matter of law. See **Barrow v. Brownell**, 05-1627 (La. App. 1 Cir. 6/9/06), 938 So.2d 118, 121.

### **DISCUSSION**

Ms. Dutton contends that the trial court erred by granting summary judgment in favor of the defendants. She argues that the trial court erred by granting the defendants' motion to strike portions of Mr. Cox's deposition testimony, by failing to interpret the evidence in the light most favorable to her, and by finding that Mr. Cox did not owe her a duty with respect to the placement and stability of the ladder.

We will first consider whether the trial court properly granted the defendants' written motion to strike under La. C.C.P. art. 966(F)(3). The controlling version of Article 966(F) states, in pertinent part:

(2) Evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with Subparagraph (3) of this Paragraph. Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion....

(3) Objections to evidence in support of or in opposition to a motion for summary judgment may be raised in memorandum or written motion to strike stating the specific grounds therefor. Any such memorandum or written motion to strike shall be served pursuant to Article 1313 within the time limits provided in District Court Rule 9.9.

When a written objection to evidence cited in support or opposition to a motion for summary judgment is timely made under La. C.C.P. art. 966(F)(3), the objection functions like an oral objection to evidence offered at trial, adjusted to fit pre-trial procedures. See Citron v. Gentilly Carnival Club, Inc., 14-1096 (La. App. 4 Cir. 4/15/15), 165 So.3d 304, 312 n.8 (quoting William R. Forrester, Jr., **2013 Changes to Code of Civil Procedure: Recent Amendments Create Evidentiary Traps for the Unwary**, 61 La. B.J. 98, 99 (2013)).

Generally speaking, the trial court is granted broad discretion in making evidentiary rulings. The trial court's determinations will not be disturbed on appeal absent a clear abuse of discretion. See Emery v. Owens-Corp., 00-2144 (La. App. 1 Cir. 11/9/01), 813 So.2d 441, 448, writ denied, 02-0635 (La. 5/10/02), 815 So.2d 842. Where a party asserts the trial court erred in permitting or excluding evidence, we must consider whether the challenged evidentiary ruling was erroneous and whether the error prejudiced the defendant. If not, a reversal is not warranted. **Emery**, 813 So.2d at 449 (citing La. C.E. art. 103). See also Brown v. Associated Ins. Consultants, 95-1451 (La. App. 1 Cir. 4/4/96), 672 So.2d 324, 329,

writ denied, 96-1106 (La. 6/7/96), 674 So.2d 970. The party challenging the trial court's evidentiary ruling bears the burden of proving that the error had a substantial effect on the outcome of the case when compared to the record in its totality. See Emery, 813 So.2d at 449.

In this case, the trial court granted the defendants' motion to strike and excluded portions of Mr. Cox's testimony that it interpreted as improper "guess work" and "speculation." The record fully supports the trial court's judgment. The cited portions of Mr. Cox's testimony were elicited in response to questioning regarding what "could have" happened on the day in question. Mr. Cox did not admit his negligence in the challenged portions of his deposition testimony, but instead reflected upon "possibilit[ies]" regarding the placement of the ladder and Ms. Dutton's accident. The trial court did not err by excluding such speculative testimony.

Having found that the trial court correctly granted the defendants' motion to strike, we now turn to the merits of the trial court's ruling on the motion for summary judgment. Ms. Dutton's claims sound in negligence. In an action to recover damages for injuries caused by another's negligence, the plaintiff has the burden of proving the defendant's negligence by a preponderance of the evidence. Most negligence cases are resolved by employing the duty-risk analysis, which considers the following five elements: 1) whether the defendant had a duty to conform his conduct to a specific standard (the duty element); 2) whether the defendant's conduct failed to conform to the appropriate standard (the breach element); 3) whether the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); 4) whether the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and 5) whether the plaintiff was

damaged (the damages element). **Broussard v. Voorhies**, 06-2306 (La. App. 1 Cir. 9/19/07), 970 So.2d 1038, 1042-43, writ denied, 07-2052 (La. 12/14/07), 970 So.2d 535.

The threshold question in any duty-risk analysis is whether the defendant owed a duty to the plaintiff. **Cusimano v. Wal-Mart Stores, Inc.**, 04-0248 (La. App. 1 Cir. 2/11/05), 906 So.2d 484, 487. Whether a duty is owed is a question of law. In deciding whether to impose a duty in a particular case, the court must make a policy decision in light of the unique facts and circumstances presented. The inquiry is whether the plaintiff has any law – statutory, jurisprudential, or arising from general principles of fault – to support his or her claim. **Lemann v. Essen Lane Daiquiris, Inc.**, 05-1095 (La. 3/10/06), 923 So.2d 627, 633.

In the matter *sub judice*, the evidence before the trial court on the motion for summary judgment proved that Ms. Dutton ascended the ladder on her own accord, without instruction or guidance from Mr. Cox, and while his attention was diverted elsewhere. In opposition to the defendants' motion for summary judgment, Ms. Dutton was unable to present evidence tending to establish that the ladder was defective or that Mr. Cox knew or should have known she would ascend the ladder outside of his presence. We find that, before Ms. Dutton voluntarily took it upon herself to climb the ladder, she was in a better position than Mr. Cox to assess the ladder's stability, positioning, and safety, as well as to determine whether the ladder needed to be repositioned or braced before use. Under these circumstances, Mr. Cox did not owe a duty to Ms. Dutton. See **Lawrence v. Sanders**, 49,966 (La. App. 2 Cir. 6/24/15), 169 So.3d 790, 796, writ denied, 15-1450 (La. 10/23/15), 179 So.3d 601 (finding no duty where plaintiff was injured after falling off a ladder, reasoning plaintiff was in a better position to verify

the ladder's safety and was free to refuse to use the ladder or to ask for assistance). See also Rainey v. Steele, 10-2154 (La. App. 1 Cir. 8/17/11), 2011 WL 3629360, \*5 (unpublished), writ denied, 11-2013 (La. 11/18/11), 75 So.3d 466 (finding no duty to warn plaintiff of the risk of falling off a ladder due to loose carpeting where plaintiff's work was not supervised and where plaintiff was in a better position to guard against the particular risk of harm). Based upon the evidence, we find that the trial court properly granted the defendants' motion for summary judgment and ordered the dismissal of the plaintiff's claims with prejudice. Ms. Dutton's assignments of error lack merit.

#### **CONCLUSION**

For the foregoing reasons, the trial court's judgment is affirmed. All costs of this appeal are assessed against the plaintiff-appellant, Laina Dutton.

**AFFIRMED.**