MICHAEL M. ROUX	NO. 19-CA-75
VERSUS	FIFTH CIRCUIT
TOYOTA MATERIAL HANDLING, U.S.A., INC.; TOYOTA INDUSTRIAL EQUIPMENT MANUFACTURING, INC.; AND SCOTT EQUIPMENT COMPANY, L.L.C.	COURT OF APPEAL STATE OF LOUISIANA

ON APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST, STATE OF LOUISIANA
NO. 65,318, DIVISION "C"
HONORABLE J. STERLING SNOWDY, JUDGE PRESIDING

October 23, 2019

JOHN J. MOLAISON, JR.
JUDGE

Panel composed of Judges Marc E. Johnson,
Stephen J. Windhorst, and John J. Molaison, Jr.

AFFIRMED

JJM
MEJ
SJW

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MOLAISON, J.

Appellants seek review of the granting of a summary judgment and dismissal of a defendant in this personal injury matter. For the reasons that follow, the judgment of the trial court is affirmed.

PROCEDURAL HISTORY

On August 26, 2013,[1] plaintiff/appellant, Michael M. Roux, filed a petition for damages in the 40th Judicial District Court for the Parish of St. John the Baptist alleging that he sustained severe injuries while operating a forklift, in the scope of his employment, that was manufactured by Toyota Industries[2] and sold to his employer, Pinnacle Polymers, L.L.C. ("Pinnacle"), by Louisiana retailer Scott Equipment Company, L.L.C. ("Scott"). Mr. Roux asserted in his petition that Scott had sold the forklift in question to Pinnacle more than four years prior to the accident and provided periodic maintenance and service on the vehicle.[3] Mr. Roux also alleged that Scott was a manufacturer of the forklift under the Louisiana Products Liability Act because it labeled the forklift as its own product. Specifically, Mr. Roux claimed that Scott was liable because of the forklift's unreasonably dangerous design, an unreasonably dangerous construction or composition, failure to provide an adequate warning, and for breach of an express warranty.

On November 26, 2013, Scott filed an answer to Mr. Roux's petition for damages that denied the allegations and affirmatively plead fault, negligence, and contributory negligence on the part of Mr. Roux and Pinnacle. On October 26,

[1] The petition itself indicates that the pleading had previously been fax filed on August 22, 2013.
[2] The separate Toyota companies listed as defendants were: Toyota Industries North America, Inc; Toyota Material Handling, U.S.A., Inc.; Toyota Material Handling North America, Inc., and; Toyota Industrial Equipment Manufacturing, Inc. The record indicates that the Toyota defendants were dismissed with prejudice pursuant to a consent judgment dated January 7, 2015.
[3] The vehicle alleged to have been defective was a forklift being used as a towing vehicle, and not the forklift Mr. Roux was driving at the time of his injuries.

2015, Commerce and Industry Insurance Company, the worker's compensation provider for Pinnacle, filed a petition for intervention, which was granted on that same date.

Upon the completion of discovery, Scott filed a motion for summary judgment on December 5, 2016, setting forth two claims: that it was not an apparent manufacturer of the forklift at issue, and it did not have an independent duty as a seller to warn of alleged defects. A hearing on Scott's motion was held on June 28, 2017,[4] and on August 22, 2017,[5] the trial court granted summary judgment in favor of Scott. On October 17, 2017, the trial court signed a final judgment that dismissed Scott with prejudice. On September 17, 2017, the trial court issued an order that granted Mr. Roux a devolutive appeal.[6] On October 27, 2017, the trial court issued an order that granted Commerce and Industry Insurance Company a devolutive appeal from the summary judgment in favor of Scott.[7]

FACTS

The following facts are not in dispute. On January 16, 2012, Mr. Roux was injured while operating a forklift in the course of his employment with Pinnacle, when a co-worker attempted to tow Mr. Roux's forklift after it became stuck in grass. Mr. Roux's injuries were caused when the towing strap of the co-worker's forklift uncoupled and struck Mr. Roux. The co-worker's forklift was manufactured by Toyota, and sold to Pinnacle by Scott on December 27, 2007.

ASSIGNMENTS OF ERROR[8]

On appeal, Mr. Roux raises the following assignments of error:

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[4] At the hearing on that date, the trial court determined that Scott was not a manufacturer, Pinnacle was a sophisticated user of forklifts, and the alleged defect in the forklift was open and obvious.
[5] The ruling on that date included the trial court's additional finding that Scott did not have a duty to warn Pinnacle of an alleged defect in the forklift.
[6] On December 1, 2017, the trial court signed a second order granting Mr. Roux a devolutive appeal.
[7] On December 27, 2017, the trial court signed a second order granting Commerce and Industry Insurance Company a devolutive appeal.
[8] We note that while Mr. Roux designates seven assignments of error on appeal, he does not specifically brief assignments 3, 6, and 7.

1. Whether the trial court committed error in granting the Motion for Summary Judgment of Defendant/Appellee Scott Equipment Company, dismissing the Petition of Plaintiff/Appellant with prejudice.

2. Whether the trial court committed error in failing to acknowledge, or in disregarding the expert testimony of Plaintiff's expert, Steve Robichaux.

3. Whether the trial court committed error in failing to recognize the defect or hazardous nature of the forklift to be its design and construction which allows the towpin to be removed and separated from the forklift, so as to allow this component part of the product to be damaged beyond use or misplaced, thereby both promoting and permitting misuse of the product by way of replacement of the authorized towpin with some other improvised object.

4. Whether the trial court committed error by failing to acknowledge the claims of the Plaintiff against Defendant/Appellee based upon the general law of negligence arising from its contractual duties as the repairers and maintainers of the forklifts, in addition to duties arising from the Louisiana Product Liability Act.

5. Whether the trial court committed error in granting Summary Judgment in consideration of the substantial and numerous issues genuine issues of material fact in question before the Court.

6. Whether the trial court committed error in finding that Pinnacle, the employer of the Plaintiff Appellant, is a sophisticated user of forklifts.

7. Whether the trial court committed error in failing to recognize that Defendant/ Appellant Scott had previously realized and exercised its duty to warn other customers of the danger of a missing forklift towpin, but failed to do so with the Plaintiff/Appellant or his co-workers.

On appeal, Commerce and Industry Insurance Company adopts Mr. Roux's assignments of error.

LAW AND ANALYSIS

According to La. C.C.P. art. 966(3), "[a]fter an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." 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, and is favored and designed to secure the just, speedy, and inexpensive determination of every action. *Populis v. State Dep't of Transportation & Dev*., 16-655 (La. App. 5 Cir. 5/31/17), 222 So.3d

975, 979, *writ denied*, 17-1106 (La. 10/16/17), 228 So.3d 753, *quoting Pouncy v. Winn-Dixie La., Inc.*, 15-189 (La. App. 5 Cir. 10/28/15), 178 So.3d 603, 605. A material fact is one that potentially insures or prevents recovery, affects a litigant's ultimate success, or determines the outcome of a lawsuit. *Id.* at 980. An issue is genuine if it is such that reasonable persons could disagree. If only one conclusion could be reached by reasonable persons, summary judgment is appropriate, as there is no need for a trial on that issue. *Id*.

The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions. La. C.C.P. art. 966(4). The initial burden is on the mover to show that no genuine issue of material fact exists. *Pouncy*, *supra*. If the moving party will not bear the burden of proof at trial, the moving party must only point out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. *Id*. The adverse party must then produce factual support to establish that he will be able to satisfy his evidentiary burden of proof at trial. *Id*. If the adverse party fails to do so, there is no genuine issue of material fact, and summary judgment should be granted. Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Lincoln v. Acadian Plumbing & Drain, LLC*, 17-684 (La. App. 5 Cir. 5/16/18), 247 So.3d 205, 209, *writ denied*, 18-1074 (La. 10/15/18), 253 So.3d 1302.

In the instant case, Scott argued in its motion for summary judgment that the following facts were undisputed: The forklift in question was manufactured by Toyota and purchased from Scott by Pinnacle on December 27, 2007. On that date, the units were accompanied by Scott salesman Jerry Trascher. Trasher provided Pinnacle with the Toyota Operator's and Owner's Manual, which was not

created by or contributed to by Scott, and directed Pinnacle's representative to refer to the manual with any questions. Specifically, Trascher pointed out to Pinnacle both the maintenance section of the manual and the safety section. Pinnacle acknowledges that it never communicated to Scott that the forklifts were operating on unimproved surfaces, nor was Pinnacle advised by Scott to use one forklift to tow another forklift. Pinnacle, with no input from Scott, provided Mr. Roux with its own in-house forklift training.

Mr. Roux regularly operated forklifts at Pinnacle since he began his employment there in 2009. As a precondition to operating the forklifts, Mr. Roux was required to complete Pinnacle's in-house forklift safety training program. Following Mr. Roux's accident, Pinnacle's investigation concluded that causes of the accident were Mr. Roux driving on an unimproved surface, getting stuck and attempting to remove the forklift in manner that was unsafe."[9] Pinnacle's Safety and Health Procedures Guide states, " If for any reason a fork truck becomes immobile in one of the areas described above no attempt shall be made to remove the forklift without on site management involvement. The onsite crane would be the primary method to free the forklift from its stuck position."

Conversely, in opposing Scott's motion for summary judgment, the appellants argued below that opinion of its expert, Steve Robichaux, created genuine issues of material fact.[10] Robichaux's report concluded, in summary, that "Scott Equipment Company knew or should have known of the defective condition or nature of the forklift, because the defect that was in question was open, obvious,

[9] The record shows that, on the forklift used as a towing vehicle, the original towpin had been removed by an unknown party and replaced with an eyebolt and nut.

[10] We note that the original version of Robichaux's report included in Mr. Roux's opposition to the motion for summary judgment was not signed, nor was a signed affidavit attached to it. The record shows that Scott verbally objected to the inclusion of the report on both a "technical" and substantive basis. La. C.C.P. art. 966(D)(2) provides that "The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made." However, the trial court has the discretion to allow the late-filing of affidavits in opposition to summary judgment. *Phillips v. Lafayette Parish Sch. Bd.*, 10-373 (La. App. 3 Cir. 12/08/10), 54 So.3d 739. It is not clear from the record, however, if, or to what extent, the trial court relied upon Robichaux's report in granting Scott's motion for summary judgment.

and discoverable by simple inspection." Robichaux further opined that Scott Equipment employees clearly had actual prior knowledge that towpins were important components of the forklift and that missing towpins render the forklift dangerous and defective and subject to misuse by the replacement by the use of an unauthorized device in the place of the specifically designed towpin. The appellants also asserted that Scott had held itself out to be a manufacturer because it had affixed on these forklifts a decal or identification label which included their name, Toyota's name, and four of Scott's twenty-one locations' phone numbers.[11] Appellants concluded that by labeling the forklift as a Scott product, Scott assumed the role of the manufacturer and the liability which accompanies that status pursuant to Louisiana Products Liability Act. Appellants argued that Scott, as a seller, was presumed to have knowledge of the product's defects based upon a simple inspection and are accordingly required to warn the user of inherent vices or defects in the product and had a legal duty to warn the user (Pinnacle and its employees) of the importance of the drawbar/towpin. Appellants concluded that as service and maintenance technicians, Scott had a duty to observe and report missing drawbars/towpins to Pinnacle.

The trial court's ruling

As noted above, in granting Scott's motion for summary judgment the trial court made four determinations: 1) Scott was not a manufacturer of the forklift in question or an apparent manufacturer;[12] 2) Pinnacle was a sophisticated user of forklifts; 3) The condition of the towpin was open and obvious, and; 4) In the absence of evidence that Scott had actual or constructive knowledge of a defect, it did not fail in any duty to notify Pinnacle.

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[11] There is no evidence in the record to support appellant's assertion that Scott held itself out to be a manufacturer of the forklifts. To the contrary, the only name visible on photos of the forklifts in question, which were attached as evidence, is "Toyota."

[12] With respect to the trial court's finding that Scott was not a manufacturer of the forklifts, it does not appear that appellants contest this issue on appeal. In fact, Mr. Roux's appellate brief concedes that the "forklifts in question were manufactured by Toyota."

In its reasons for judgment, the trial court initially stated:

> [i]t is important to note that both Pinnacle's designation as a sophisticated user and the missing drawbar's classification as an open and obvious defect negate any duty to warn that might ordinarily exist.

A sophisticated user is defined as one who is "familiar with the product," *Hines v. Remington Arms Co., Inc*., 94-455 (La.12/8/94), 648 So.2d 331, 337, or as one who "possesses more than a general knowledge of the product and how it is used." *Asbestos v. Bordelon, Inc*., 96-525 (La. App. 4 Cir. 10/21/98), 726 So.2d 926, 955. As a result of their familiarity with a product, sophisticated users are presumed to know the dangers presented by the product; hence, there is no duty to warn them. *Hines*, 648 So.2d 331. *Nearhood v. Anytime Fitness-Kingsville*, 15-308 (La. App. 3 Cir. 11/4/15), 178 So.3d 623, 626, *writ denied*, 16-0211 (La. 4/15/16), 191 So.3d 1035.

As noted above, while appellants assign as error the trial court's finding that Pinnacle and/or Mr. Roux were sophisticated users of forklifts, they have failed to brief this assignment on appeal. Pursuant to Rule 2-12.4(B)(4) of the Uniform Rules, Courts of Appeal, all specifications or assignments of error must be briefed, and the appellate court may consider as abandoned any specification or assignment of error that has not been briefed. Accordingly, we will not address this assignment of error.

The appellants also do not contest the trial court's finding that the alleged defect was open and obvious. To the contrary, appellants twice concede this point.[13] If the facts of a specific case show that the complained-of condition should be open and obvious to all, the condition is not unreasonably dangerous and the defendant may not owe a duty to the plaintiff. *Pitre v. Louisiana Tech*

[13] In Mr. Roux's appellate brief, he states, "Indeed, Plaintiff agrees that the defective and dangerous nature of the forklift and its component part, the drawbar, was open and obvious and Plaintiff argued this position at the hearing." Mr. Roux further provides, "In his unrebutted report, Mr. Robichaux further indicated that Scott Equipment knew or should have known of the defective condition and nature of the forklift because it was open and obvious and could be determined upon any of the multiple simple inspections which Scott made or should have made of the forklifts."

University, 95–1466 (La.5/10/96), 673 So.2d 585, 591. Generally, a defendant has no duty to protect against an open and obvious hazard. *Eisenhardt v. Snook*, 08–1287 (La.3/17/09), 8 So.3d 541, 544. In order for a defect to be considered open and obvious, the danger created by that defect must be apparent to all comers. *Broussard v. State ex rel. Office of State 1064 Bldgs*., 12–1238 (La.4/5/13), 113 So.3d 175, 192. If the complained-of condition should be obvious to all, then it may not be unreasonably dangerous. *Id*. at 188. The focus on whether an alleged defect is open and obvious is "on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge." *Id.*

In the instant case, the record shows that Pinnacle's own safety policy did not provide for one forklift to tow another forklift that had become stuck. More importantly, Mr. Roux himself acknowledged in his deposition testimony that if he knew an eyebolt had been used in Mr. Horn's forklift to rig this nylon strap that he would have objected because he knew that was inappropriate.

The last aspect of the trial court's ruling pertained to Scott's constructive knowledge of the alleged defect and what responsibility, if any, it owed to Pinnacle. The trial court found Scott to be a non-manufacturing seller and, accordingly, applied the related standard that Scott was not liable in tort to Mr. Roux absent a showing that it knew or should have known of the defect in the product and failed to declare it.

A nonmanufacturing seller is not required to inspect the product prior to the sale to determine the possibility of any inherent vices or defects. *Id*. If the facts of a particular case show that the complained of condition should be obvious and apparent to all, the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff. *Pitre v. Louisiana Tech University*, 95-1466 (La. 5/10/96), 673 So.2d 585, 591 (citations omitted). *Babino v. Jefferson*

Transit, 12-468 (La. App. 5 Cir. 2/21/13), 110 So. 3d 1123, 1126. [T]here is no duty to warn sophisticated users of the dangers, which they may be presumed to know about because of their familiarity with the product. *Asbestos v. Bordelon,* Inc., 96-0525 (La. App. 4 Cir. 10/21/98), 726 So. 2d 926, 955, *decision clarified on reh'g* (Dec. 9, 1998).

In its reasons for judgment, the trial court found that there was no evidence that the forklift was defective at the time it was sold and delivered to Pinnacle. Further, it found no evidence that Scott Equipment employees were aware of a missing drawbar and improvised pieces attached to the specific forklift in question.

> Here, as that no evidence has been provided to indicate when the drawbar was removed and when the improvised piece was installed, this court cannot determine how long the improvised piece was in place. Without such a time line, there is no evidence to support the allegation that Scott Equipment had constructive knowledge of the defect.

Finally, the trial court concluded that, without evidence that Scott had actual or constructive knowledge of a defect, it did not fail in its duty to warn under Louisiana law.

In the instant case, appellants argue that Scott knew or should have known that the forklift and its component parts were unreasonably dangerous, in that the towpin was not captive or otherwise attached to the forklift so as to prevent it from being lost or misplaced, and ultimately replaced with an improvised and inadequate object, thus resulting in injury." However, as noted by the trial court, there is no evidence in the record to suggest that the alleged defect existed at the time the forklift left Scott's control and did not arise some time during the four years the forklift was in Pinnacle's possession. In addition, no evidence was introduced showing an actual time or date as to when Scott knew that the drawbar became missing and/or had been replaced with the improvised eyebolt and nut. This includes an absence of evidence that Scott knew or should have known about

the towpin on the particular forklift at issue because of the general vehicle maintenance and repairs it performed on Pinnacle's premises.[14]

In a similar case, *Weber v. Caterpillar Mach. Corp*., 542 So.2d 544, (La. Ct. App.), *writ denied,* 548 So.2d 332 (La. 1989), *and writ denied*, 548 So.2d 334 (La. 1989), a forklift operator was killed during his employment after falling out of the vehicle because the doors of the forklift had been removed at some point by fellow employees. The family of the forklift operator thereafter filed a lawsuit alleging, in part, that the seller, Boyce Machinery Corporation, was liable for the accident on the basis that it should have foreseen that a user of the forklift would remove the doors and cause a safety hazard. In finding that the seller of the machinery could not be held liable under the facts, this Court reasoned:

> Boyce Machinery sold the forklift manufactured by Caterpillar to Bayou Steel. Boyce had no input into the design, testing, or manufacture of the forklift. Prior to delivery to Bayou Steel, Boyce checked the machine to insure it operated according to design specifications. Boyce delivered the machine with the doors in place. At some unspecified time Bayou Steel personnel removed the doors. Although Boyce personnel occasionally serviced the machine, nothing in the record indicates Boyce was aware the doors were periodically removed by Bayou Steel personnel.
>
> The record is devoid of evidence that Boyce was aware of prior accidents similar to the present. Boyce cannot be charged with forecasting that at some point a buyer might decide to remove the doors and proceed to do so in the absence of contrary warnings. As discussed supra, the responsibility for such foresight lies with the manufacturer. The "defect" in the forklift was not discoverable by simple inspection; thus, there is no legal basis for imposing liability on Boyce.

Id. at 553.

Similarly, in the instant case, appellants no longer argue that Scott was a manufacturer of the forklift at issue. There is also no evidence in the record that Scott knew that the towpin had been removed and improperly replaced by Pinnacle's employees. Accordingly, under the facts presented, we find no error in

[14] In fact, Scott's assertion that maintenance or repairs they performed on Pinnacle's forklifts "were done on a 'purchase order' basis to address 'specific issue[s]'" versus a routine maintenance and inspection contract went unanswered by Pinnacle.

the trial court's ruling that Scott owed no duty to warn Pinnacle of an alleged defect.

CONCLUSION

After our *de novo* review of the record, we find that the record supports the trial court's determination that Pinnacle was a sophisticated user of forklifts, even to the extent that it was able to provide its own operation and safety training to its employees, including Mr. Roux. On appeal, the appellants now concede that the alleged defect which caused the injury was open and obvious. Scott's status as a non-manufacturing seller, which is also not contested, would at most have imposed a duty to warn only if it had actual or constructive knowledge of a defect. There is no evidence in the record before us that Scott had knowledge of an alleged defect, either at the time it sold the forklifts to Pinnacle, or in the years that followed. Finally, as we found in *Weber, supra*, it is not reasonable under the facts of this case, as suggested by appellants, to impose a duty on Scott based on the premise that it should have forecast improper usage of the forklift by Pinnacle employees.

Accordingly, for the foregoing reasons, the trial court's granting of Scott's motion for summary judgment is affirmed.

AFFIRMED

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **OCTOBER 23, 2019** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

MARY E. LEGNON
INTERIM CLERK OF COURT

19-CA-75

E-NOTIFIED

40TH DISTRICT COURT (CLERK)
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