NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0618

DEBORAH F. PARKER

VERSUS

OAKLEIGH APARTMENTS, LLC, MITCHELL MANAGEMENT, INC. OF ALABAMA, MITCHELL MANAGEMENT, INC. AND SCOTTSDALE INSURANCE COMPANY

Judgment Rendered: DEC 27 2013

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 586,598

Honorable Todd Hernandez, Judge

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Defendants – Oakleigh Apartments, LLC, Mitchell Management, Inc. of Alabama and Scottsdale Insurance Company

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

WELCH, J.

Plaintiff, Deborah Parker, appeals a summary judgment rendered in favor of defendants, Oakleigh Apartments, LLC, Mitchell Management, Inc. of Alabama, and Scottsdale Insurance Company (collectively referred to as defendants), dismissing her personal injury action with prejudice. We reverse.

BACKGROUND

On January 20, 2010, Ms. Parker filed this lawsuit against defendants, alleging that on February 12, 2009, while a tenant at Oakleigh Apartments in Baton Rouge, Louisiana, she tripped and fell on a step that had a protruding riser while descending the rear staircase at the apartment complex. It is undisputed that defendants own the Oakleigh Apartments and that Ms. Parker was descending the wooden staircase with her dog on a leash and was carrying her granddaughter. Ms. Parker claimed that the protruding riser constituted an unreasonably dangerous condition, rendering the defendants liable for allowing the condition to exist, for failing to inspect and discover it, and for failing to provide their tenants with a safe place to walk.

Defendants filed a motion for summary judgment, asserting that Ms. Parker could not establish the elements of a liability claim based on their ownership of the property under La. Civ. Code art. 2317.1. They asserted that Ms. Parker could not prove that the staircase presented an unreasonable risk of harm to her or that they knew, or should have known, of the alleged defective condition of the staircase. See **Leonard v. Ryan's Family Steak Houses, Inc.**, 2005-0775 (La. App. 1st Cir. 6/21/06), 939 So.2d 401, 404-405 (listing the elements of a negligence-based premises liability claim arising under La. Civ. Code art. 2317.1)

In support of the motion for summary judgment, defendants offered excerpts of the deposition testimony of Ms. Parker, along with Ms. Parker's admissions and answers to interrogatories. Therein, Ms. Parker described her accident as follows.

Ms. Parker was descending the rear staircase of the apartment complex while carrying her 1½ year old granddaughter with her right arm, was holding a retractable leash for her dog in her right hand, and was holding the railing with her left hand, which was too large for her hand to grasp. She stated that when she reached the fifth step, her right foot got caught on the riser, which was sticking out past the tread of the step, causing her foot to hyperextend at the ankle. Ms. Parker fell forward catching her foot on the next riser, which was also protruding past the tread, and fell to the bottom of the staircase, landing on her left knee. Ms. Parker, who had been living at the apartment complex for two years prior to the accident, stated that she never made any complaints about the rear stairs, did not notice any loose boards on the rear stairs, and was not aware of any other accidents on the staircase during that time

In further support of the motion, defendants offered their answers to interrogatories and requests for production. Defendants submitted The Oakleigh Service Request/Activity Report generated from February 1, 2008 through March 2, 2010. According to defendants, these documents prove that no complaints were made regarding the stairs or staircase in question. Defendants also attached an e-mail correspondence between Ladd Ehlinger, Ms. Parker's expert witness, and her attorney regarding building code violations. Lastly, defendants submitted the affidavit of Mackenzie Sanders, the regional manager of the Multifamily Management, Inc., who had access to all records of Oakleigh Apartments. Ms. Sanders attested that prior to Ms. Parker's alleged incident, no tenant, including Ms. Parker, had complained about or reported any condition regarding the staircase to Oakleigh Apartments. She further attested that no tenant, including Ms. Parker, requested that the stairs be repaired or reported any incidents or accidents involving the staircase. Ms. Sanders stated that no defects or potential problems with the stairs were ever detected or noted as a result of the site-manager's weekly

walk-through or the area manager's monthly walk-through of the apartment complex.

In opposition to the motion for summary judgment, Ms. Parker asserted that her cause of action is based on La. Civ. Code art. 2696, which provides for strict liability for lessors, not the negligence-based cause of action set forth in La. C.C. 2317.1. Thus, she argued that all of defendant's arguments regarding lack of knowledge on their part of the defective condition of the stairs were irrelevant. Ms. Parker further contended that there is a question of fact regarding whether the staircase was unreasonably dangerous and submitted the affidavit and deposition testimony of Ladd Ehlinger, her expert witness, in opposition to the motion for summary judgment.

In his affidavit, Mr. Ehlinger attested that he has a bachelor's degree in architecture and has been accepted numerous times in Louisiana courts as an expert in the field of architecture and structural analysis designs, as well as accident causation with regard to Life Safety and Building codes that apply to architecture. Mr. Ehlinger reviewed photographs of the accident scene, inspected the scene, met with Ms. Parker, and reviewed her deposition testimony, along with the codes applicable to the design and construction of the Oakleigh Apartments as of June 7, 1984. Mr. Ehlinger opined that three conditions of the staircase violated various building codes, made the staircase unreasonably dangerous, and contributed to Ms. Parker's fall. The first deficiency he found was a protruding riser on the stair on which Ms. Parker tripped and fell. According to Mr. Ehlinger, the riser board was not in the proper position so that the required amount of space above the tread below was not there and there was no room for Ms. Parker's foot, she hooked her toe on it, and fell. The second deficiency he cited was the lack of any handrail on the descending right side of the staircase. Third, Mr. Ehlinger opined that the handrail grip size on the left side of the rear staircase was too large

and not graspable. Mr. Ehlinger also cited the lack of maintenance on the stairs as violating numerous building codes. He opined that had the Oakleigh Apartments been in compliance with the applicable building codes, Ms. Parker's accident would not have happened.

In opposition to defendants' motion for summary judgment, Ms. Parker noted that defendants did not attach any affidavit or deposition to their motion for summary judgment to refute Mr. Ehlinger's expert opinion that the staircase was unreasonably dangerous.[1] Other evidence submitted by Ms. Parker in opposition to the motion for summary judgment included a copy of the written lease executed between herself and Oakleigh Apartments and a series of pictures purportedly depicting the condition of the steps. These pictures were identified by Ms. Parker as having been taken by her following the accident. Ms. Parker also submitted defendants' answers to interrogatories and excerpts of the deposition of Ron Calvaruso, who did maintenance work at the Oakleigh Apartments. Mr. Calvaruso stated that if he saw a riser, or "kick plate" protruding, he would have nailed it back in and would not have included that work in his repair invoices. He further testified that nails on the boards on the steps "back out" because the boards get banged up when people use dollies to carry washers and dryers up and down the stairs. His testimony indicated that he inspected the subject steps shortly after the accident. He indicated that he did not see anything on the rear staircase, where it had been reported that a woman had fallen, but when he "went to the front," he saw a few boards sticking out and nailed them back in. He also testified that after the accident, he was asked to remove all kick plates on all of the front and back steps in all buildings except #1, the building where Ms. Parker was a resident.

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[1] The pre-trial order, filed on March 7, 2012, lists two "may call" expert witnesses on liability for the defendants: Jerry Householder, an engineer, and Michael Frenzel, a safety expert. Defendants did not offer the testimony of either expert in support of their motion for summary judgment.

In further opposition to the motion for summary judgment, Ms. Parker submitted her affidavit and excerpts of her deposition. In her affidavit, Ms. Parker attested that she is right hand dominant and that it was her usual custom to take her dog, Vonnie, a chichaucha weighing approximately 16 pounds, out for a walk in the grassy area behind her apartment three times a day. When caring for her granddaughter, she would typically put a leash on the dog, hold it in her right hand, place her 20-pound grandchild on her right hip, and descend the stairs with her left hand on top of the handrail. Ms. Parker stated that on the morning in question, while descending the stairs with her granddaughter and her dog, her right foot caught on a protruding riser in the rear stairway of her apartment, causing her to fall. She attested that she was unable to grasp the handrail to keep her from falling down the stairs because it was too large for her hand, identifying the handrail as a 2x4 board mounted on another piece of lumber. She further attested that if there had been a graspable handrail on the right side of the staircase, she would have put her granddaughter on her left hip, the leash in her left hand, and used her right hand to descend the staircase. In her deposition, Ms. Parker testified that the protruding riser on the staircase was repaired soon after the accident. She testified that she called the office to report her accident the day after it happened. According to Ms. Parker, that day, or the next day, she heard work being done on the stairs. She looked out, saw the apartment manager and a repairman who was working on the front staircase, and told the manager that it was the back stairs on which she had fallen. She testified that the manager and repairman then went to the back staircase, and the repairman started "hammering those risers up."

Defendants filed a reply memorandum and offered further evidence in support of their motion for summary judgment. Therein, they acknowledged that Ms. Parker could pursue an action pursuant to La. Civ. Code articles 2696 and 2697; however, to prevail on such a claim, Ms. Parker still had to prove the

existence of a vice or defect that caused the damages. In the memorandum, defendants asserted that Ms. Parker had not set forth sufficient evidence to prove that an unreasonably dangerous condition existed at the time of the accident for these reasons: (1) Ms. Parker used the stairs daily but never complained that any risers were loose or protruding, nor did any other tenant; (2) the alleged defect was open and obvious; (3) Ms. Parker was descending the stairs with a toddler on her hip and a dog underfoot; (4) no repair requests had been made; (5) there were no prior accidents; (6) managers conducted walk-through inspections weekly and monthly and never noted any condition of the stairs; (7) maintenance personnel testified there was no protruding riser on the rear stairs at the time of the accident; and (8) a codal violation does not necessitate a finding of an unreasonably dangerous condition. In further support of their motion for summary judgment, defendants submitted excerpts of the deposition testimony of Mr. Calvaruso, wherein Mr. Calvaruso stated that he had not observed protruding risers in Building 1 (where Ms. Parker resided) from 2007 through early 2009. He also stated that prior to the accident, he was not aware of any problems with the staircase in question. Additionally, Mr. Calvaruso stated that prior to removing the risers on both the front and rear staircase in 2011 on the building in which Ms. Parker had resided, he had not done any repair work to the risers.

At the hearing on the motion for summary judgment, Ms. Parker moved to admit into evidence all fourteen exhibits attached to her opposition. Defendants objected to Mr. Ehlinger's affidavit to the extent that he opined that certain conditions of the staircase rendered it unreasonably dangerous, a legal conclusion defendants urged Mr. Ehlinger was not entitled to make. However, defendants made it clear that they were not challenging Mr. Ehlinger's qualifications as an expert witness. Defendants also objected to photographs attached to Ms. Parker's deposition. While agreeing that the photographs depicted the wooden staircase at

Oakleigh Apartments and that Ms. Parker stated that they were taken after the accident, defendants complained that Ms. Parker could not say exactly when the photographs were taken. Lastly, defendants objected to print-outs from court cases that were not published and certain portions of Ms. Parker's affidavit as calling for a legal conclusion and speculation on her part that but for the protruding riser, the accident would not have occurred. The trial court noted the objections, but ordered that all of Ms. Parker's exhibits be admitted for the purpose of arguing the motion.

The trial court took the matter under advisement and issued written reasons for ruling thereafter. The court did not address defendants' evidentiary objections in the written reasons for judgment. In the written reasons, the court concluded that La. C.C. art. 2696 applied to the case, rather than La. C.C. art. 2317.1. It ultimately found that Ms. Parker failed to prove the existence of an unreasonably dangerous defect and therefore could not meet her burden of proof at trial. In reaching this conclusion, the trial court observed that Mr. Calvaruso testified there was nothing wrong with the stairs and he never noticed a "protruding riser" as alleged and was never asked to repair such a condition. The court further stated that it could not rely on the affidavit testimony of Mr. Ehlinger to find that there was an "unreasonable risk of harm" and added that a code violation does not necessarily prove an unreasonably dangerous condition. Finally, the court stated that the staircase provided a social utility and a low risk of harm, noting that: (1) there were no prior complaints or accidents; (2) the alleged protrusion, if it in fact existed, was not intentional; and (3) Ms. Parker failed to exercise the proper standard of care while descending the stairs.

In this appeal, Ms. Parker assigns eleven errors to the trial court's granting of the motion for summary judgment. In these assignments of error, Ms. Parker essentially contends that the trial court erred in: (1) granting summary judgment when genuine issues of fact exist on the unreasonably dangerous element of her

cause of action; (2) applying the wrong standard of proof on the motion for summary judgment by requiring her to affirmatively prove the existence of an unreasonably dangerous condition; (3) refusing to accept Mr. Ehlinger's expert testimony when Louisiana law specifically permits an expert in a civil case to testify as to opinions on the ultimate issue to be decided by the trier of fact; (4) requiring her to prove knowledge when such is irrelevant to liability under La. C.C. art. 2696; (5) failing to consider the lack of a handrail on the staircase in determining that the stairs were not unreasonably dangerous; and (6) resolving factual issues on a motion for summary judgment by determining that the stairs were not inherently or unreasonably dangerous, that the stairs presented a low risk of harm, that she failed to exercise proper care under the circumstances, and that the alleged protrusion was not intentionally caused by the defendants, a matter which is not even relevant to liability under La. C.C. art. 2696.

DISCUSSION

Appellate courts review summary judgments *de novo* under the same criteria that governs the trial court's determination of whether a summary judgment is appropriate. **Thompson v. BGK Equities, Inc.**, 2004-2366 (La. App. 1st Cir. 11/4/05), 927 So.2d 351, 354, writ denied, 2005-2405 (La. 3/17/06), 925 So.2d 550. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). In a summary judgment proceeding, the moving party has the burden of proof. This burden requires the movant to point out to the court that there is an absence of factual support for one or more elements of the adverse party's claim. Thereafter, if the adverse party fails to provide factual support to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material

fact. La. C.C. P. art. 966(C)(2). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can only be seen in the light of the substantive law applicable to the case. **Bridgefield Casualty Insurance Company v. J.E.S., Inc.**, 2009-0725 (La. App. 1st Cir. 10/23/09), 29 So.3d 570, 573.

In their motion for summary judgment, defendants initially claimed that this case was governed by La. C.C. art. 2317.1, which provides for liability for the owner or custodian of a defective thing and requires a showing that the owner or custodian knew or should have known of the defect. However, in this appeal, they are not disputing the existence of a landlord/tenant or lessor/lessee relationship with Ms. Parker. For the purpose of the motion for summary judgment, we assume that all of Ms. Parker's claims arise from La. Civ. Code articles 2696 and 2697, which impose strict liability on the lessor for damages to a lessee caused by vices and defects in the thing leased. Louisiana Civil Code article 2696 provides that "[t]he lessor warrants the lessee that the thing is suitable for the purpose for which it was leased and that it is free from vices or defects that prevent its use for that purpose." The warranty extends to vices or defects that are not attributable to the fault of the lessee and also encompasses vices or defects that are not known to the lessor. La. C.C. arts. 2696 and 2697.

To prevail on a strict liability claim under La. C.C. art. 2696, the plaintiff must prove that the defendant had custody of the thing causing injury; that it contained a defect, that is, a condition creating an unreasonable risk of harm, and that the defective condition caused the plaintiff's injury. **Wells v. Norris**, 46,458 (La. App. 2nd Cir. 8/10/11), 71 So.3d 1165, 1169, writ denied, 2011-1949 (La. 11/18/11), 75 So.3d 465. Ms. Parker asserted that the staircase presented an unreasonable risk of harm to her because of the presence of a protruding riser over which she tripped, causing her to fall to the ground. Defendants contend that they

provided the trial court with overwhelming evidence to establish that reasonable persons could not find that the stairs contained a defect, which shifted the burden to Ms. Parker to prove that there was evidence to support a finding that the alleged defect created an unreasonably dangerous condition. They contend that the trial court correctly determined that Ms. Parker did not satisfy this burden, mandating that the motion for summary judgment be granted. We disagree.

In support of their claim that Ms. Parker could not show at trial that the staircase presented an unreasonable risk of harm to her, defendants insist that the protruding riser did not exist because no person, including Ms. Parker, complained about a protruding riser prior to the accident and no protruding riser had been discovered during routine inspections. Thus, they claim, there was no "harm" for them to prevent because there was no proof that a defect existed. To eliminate this possibility of harm, they assert that they would have to accurately foresee which, if any, step on the staircase in the entire complex may have been a potential danger and would be forced to replace all staircases, which would be cost prohibitive, and based on the absence of prior problems or accidents, completely unnecessary.

Most of the evidence submitted by the defendants on the motion for summary judgment related to the absence of prior complaints about problems or incidents on the staircase in question. Because the lessor's liability is based on his status as landlord and not his personal fault, the lessor's lack of knowledge of the defect is inconsequential. **Wells v. Norris**, 71 So.3d at 1169. Moreover, the absence of prior reports or injuries on the staircase in question, so heavily relied upon by defendants in support of their motion for summary judgment on the unreasonably dangerous element, is simply one of the many factors for the trier of fact to consider in a premises liability action. See **Broussard v. State of Louisiana, Office of State Buildings**, 2012-1238 (La. 4/5/13), 113 So.3d 175, 187

(stating that numerous appellate decisions have found an unreasonable risk of harm even where the plaintiff's injury was the first reported at a certain place).

The question of whether a thing presents an unreasonable risk of harm to others is a disputed issue of mixed fact and law or policy that is peculiarly a question for the jury or trier of fact. **Broussard**, 113 So.3d at 183. To aid the fact finder in making this unscientific, factual determination, the Supreme Court has adopted a risk-utility balancing test, wherein the fact-finder must balance the gravity and risk of harm against individual societal rights and obligations, the social utility of the thing, and the cost and feasibility of repair. **Broussard**, 113 So.3d at 184. Four pertinent factors are to be considered in conducting this balancing test: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of the harm, including 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. Whether a thing presents an unreasonable risk of harm is "a matter wed to the facts" and must be determined in light of the facts and circumstances of each particular case." **Broussard,** 113 So.3d at 183-84, citing **Dupree v. City of New Orleans**, 99-3651 (La. 8/31/00), 765 So.2d 1002, 1012.

In this case, defendants had to carry their initial burden as movers to point out that Ms. Parker will not be able to prove that the alleged defective conditions existed and that they posed an unreasonable risk of harm to her. It is questionable whether defendants met this burden by offering evidence centering on the lack of prior complaints or incidents regarding the staircase and by focusing on the manner in which Ms. Parker descended the stairs. These are only two of the multitude of factors that should be considered by the trier of fact in conducting the utility-risk balancing test. Even if we were to find that the burden of proof shifted to Ms. Parker on the motion, she clearly met that burden. Ms. Parker's burden on the

motion was to offer factual support sufficient to establish that she would be able to satisfy her evidentiary burden of proof at trial. Ms. Parker offered her testimony that she tripped over a protruding riser while descending the stairs, pictures she claimed showed the existence of the protruding riser, and the testimony of Mr. Calvaruso, who acknowledged that nails on the boards on the wooden stairs backed out when people used dollies to carry heavy items like washers and dryers up and down the stairs. Mr. Calvaruso's testimony indicated that he did not see anything wrong with the rear stairs when called out to inspect the staircase after the accident, but did find protruding boards on the front stairs and nailed them back in. However, Ms. Parker testified that she called the apartment's office on the day after she fell to report the accident, and that day or the next day, a repairman repaired the steps in question. According to Ms. Parker, she heard a repairman working on the steps and saw that he was fixing the steps on the front staircase. She went out and told the apartment manager, who was with the repairman, that she had fallen on the back steps. Ms. Parker testified that the manager and repairman then went to the back of the stairs and the repairman started hammering those risers up. Further, Ms. Parker's expert testified that three conditions of the staircase violated various building codes and contributed to her fall down the stairs. This testimony provided a basis from which the trier of fact could conclude that the protruding riser did exist on the day in question and that it and other deficiencies in the staircase presented an unreasonable risk of harm to Ms. Parker.

Under all of the circumstances of this case, whether the alleged deficiencies identified by Ms. Parker's expert existed and whether they presented an unreasonable risk of harm to Ms. Parker are factual questions that are not appropriate for resolution on summary judgment. In determining that the stairs did not present an unreasonable risk of danger to Ms. Parker, the trial court improperly made numerous factual determinations. On our *de novo* review of the evidence on

the motion for summary judgment, we find that genuine issues of material fact exist on the unreasonable risk of harm element of Ms. Parker's liability claim. Therefore, we hold that the trial court erred in granting defendants' motion for summary judgment.[2]

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed. The matter is remanded to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to defendants/appellees, Oakleigh Apartments, LLC, Mitchell Management, Inc. of Alabama, and Scottsdale Insurance Company.

REVERSED AND REMANDED; MOTION TO SUPPLEMENT DENIED AS MOOT.

[2] Ms. Parker filed a motion to supplement the appeal record with color copies of the black and white photographs submitted by her in opposition to the motion for summary judgment. We deny the motion as moot.