NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 2217

TIMOTHY PARSONS

VERSUS

SHOLAND, LLC, D/B/A SHONEY'S RESTAURANT

Judgment Rendered: AUG 29 2014

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 2010-16426

Honorable Richard A. Swartz, Jr., Judge

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BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

GUIDRY, J.

A restaurant patron appeals a summary judgment dismissing his suit for alleged injuries he sustained when the leg on the chair in which he was seated broke, causing the chair to partially collapse beneath him.

FACTS AND PROCEDURAL HISTORY

On December 27, 2009, Timothy Parsons, escorting the young sons of a former girlfriend, went to a Shoney's Restaurant located on Gause Boulevard in Slidell, Louisiana. While at the restaurant, Mr. Parsons selected a chair, and after sitting in the chair, the chair collapsed beneath him. After inspecting the chair, it appeared that the weld attaching the right, front leg to a cross beam on the chair had broken.

On October 8, 2010, Mr. Parsons filed a petition for damages against Sholand, LLC, doing business as Shoney's Restaurant, but he later amended the petition to add as defendants Shoney's USA, Inc., Shoney's Louisiana, LLC,[1] and Michigan Tube Swagers and Fabricators, Inc. (MTS SEATING), the alleged manufacturer of the broken chair. Thereafter, Mr. Parsons filed a partial motion to dismiss his claims against Sholand, LLC without prejudice, which was granted by the trial court. Shoney's Louisiana filed an answer to Mr. Parsons' suit, generally denying any liability for his injuries and later filed a motion for summary judgment, asserting that Mr. Parsons would be unable to prove that it knew or should have known that there was a problem with the chair, that the weld on the chair was going to fail, or that the particular model of the chair was not suitable for restaurant use. At the initial hearing on the motion for summary judgment, the trial court continued the matter in order to grant the plaintiff additional time in which to conduct discovery. Following the reconvened hearing, the trial court considered

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[1] In their answers to the plaintiff's supplemental and amended petitions, Shoney's USA, Inc. denied that it was the owner or operator of the Shoney's restaurant located on Gause Boulevard in Slidell, Louisiana, but Shoney's Louisiana, LLC admitted that it was the operator of the restaurant in its answer to the plaintiff's second supplemental and amended petition.

the evidence and arguments presented, took the matter under advisement, and subsequently granted summary judgment in favor of Shoney's Louisiana, which judgment the plaintiff now appeals.

APPLICABLE 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. Johnson v. Evan Hall Sugar Cooperative, Inc., 01-2956, p. 3 (La. App. 1st Cir. 12/30/02), 836 So. 2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for 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. La. C.C.P. art. 966(B)(2). An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. George S. May International Company v. Arrowpoint Capital Corporation, 11-1865, p. 4 (La. App. 1st Cir. 8/10/12), 97 So. 3d 1167, 1170.

The mover bears the burden of proving that he is entitled to summary judgment. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. See La. C.C.P. art. 966(C)(2). If the non-moving party fails to produce contrary factual support sufficient to establish it will be able to satisfy the evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Whether a particular fact in dispute is "material" for summary judgment purposes is viewed in light of the substantive law applicable to the case. MB Industries, LLC v. CNA Insurance Company, 11-0303, p. 15 (La. 10/25/11), 74 So. 3d 1173, 1183.

In this case, Mr. Parsons has alleged that he was injured by a defective thing, a chair, owned or possessed by Shoney's Louisiana. As such, the principles of La. C.C. art. 2317.1 is the applicable substantive law, which statute 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. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

The concept of constructive knowledge under La. C.C. art. 2317.1 imposes a reasonable duty to discover apparent defects in the thing in the defendant's *garde* or legal custody. Broussard v. Voorhies, 06-2306, p. 9 (La. App. 1st Cir. 9/19/07), 970 So. 2d 1038, 1045, writ denied, 07-2052 (La. 12/14/07), 970 So. 2d 535.

DISCUSSION

Mr. Parsons contends that summary judgment[2] was improperly granted in this matter because a genuine issue of material fact exists as to whether an inspection of the chair, consistent with the manufacturer's recommendation, would have revealed a problem with the weld on the leg of the broken chair. Additionally, Mr. Parsons contends that the trial court erred in failing to find that *res ipsa loquitur* applied to preserve his suit against summary judgment.

In moving for summary judgment, Shoney's Louisiana pointed out that Mr. Parsons would be unable to prove that it knew or should have known that the chair used by Mr. Parsons contained a defect, namely, a broken or cracked weld. In support of its contention, Shoney's Louisiana offered the deposition testimony of

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[2] The evidence submitted in conjunction with the summary judgment hearing consisted of excerpts from the depositions of Mr. Parsons, Lakeisha Waller, the waitress who served Mr. Parsons on the date of the accident, and Kem Briscoe, Jr., the assistant manager on duty at the Shoney's restaurant on the date of Mr. Parsons' accident. Additional evidence submitted was the petition and amended petitions filed by Mr. Parsons, an affidavit from Mr. Parsons, discovery responses from Mr. Parsons and MTS SEATING, and photographs of the broken chair and of notices attached underneath chairs similar to the broken chair found at the Shoney's restaurant.

Mr. Parsons and Lakeisha Waller, the waitress who served Mr. Parsons on the date of the accident.

Mr. Parsons stated he did not notice any problems with the chair prior to sitting in it and that the chair did not appear to be unstable. As he explained, "When I first sat on it[,] there was nothing wrong with the chair. It caught me at a surprise. If I would have felt something, I could have caught myself." He said the problem with the chair was not obvious to him. After the initial chair he sat in collapsed, Mr. Parsons was given another chair, which was the same type of chair as the broken one; he did not have any problems with the second chair.

Ms. Waller acknowledged that the photograph of the broken chair was pretty much the type of chair used in the dining room where Mr. Parsons was seated at the time of the accident. She indicated that she had never had a problem with a chair of that type nor had any experience with such a chair breaking before. She explained that she performed the following cleaning of the dining room chairs on a weekly basis: "[y]ou wipe the seat, you wipe the back of the chair where all the cushion at, you wipe the leg parts ... whatever there needs to be wiped, you wipe that." When asked if she ever noticed if any of the chairs were unstable or had a broken leg while cleaning, Ms. Waller replied "[w]e would have known if it was - - any one of them chairs was.... because you're pulling them out and you wiping them. You might even sit in one while you're doing the other one. We'll know." Regarding the broken chair, Ms. Waller opined, "I think the chair was fine until he [Mr. Parsons] sat in it." When asked if she inspected anything under the chair for the welding points, she again replied, "[t]hey was all fine until he sat in it."

As far as Ms. Waller knew, there had not been any accidents at the restaurant involving the chairs in the dining room, and she indicated that they never had another chair have any kind of problem the entire time she worked at Shoney's. When asked if she knew if a decision had ever been made to pull a chair

off the floor, she replied that the only chairs that she had seen removed from the dining room were chairs where the padded upholstery was "busted" or "ripped."[3]

In opposing the motion for summary judgment, Mr. Parsons primarily relied on evidence, which the manufacturer of the broken chair had provided, of customer instructions recommending inspection of all points of attachments on the chair for broken or cracked welds. We disagree with Mr. Parsons' assertion that Shoney's Louisiana's failure to show that it complied with the manufacturer's maintenance instructions was sufficient to create a genuine issue of material fact as to whether Shoney's Louisiana should have known that the chair was defective.

As shown in photographs, attached to the underside of a chair (identified as being identical to the broken chair and others used in the Shoney's restaurant) is a notice declaring in part: "Check all welded or braze points. If broken or cracked weld or braze is found, remove product from service and call customer service at the factory. This is part of standard maintenance upkeep and should be done at regular intervals (recommended every 30 days)."[4] The modifying statement "if" in the instructions indicates that cracks or breaks in a chair's welds might be visible upon inspection, but the instructions do not definitively indicate that a crack or break in the chair used by Mr. Parsons would have been visible or discoverable on mere inspection. The instructions, at the most, establish the possibility that a cracked or broken weld on the chair used by Mr. Parsons might have been apparent, but it falls short of establishing that Mr. Parsons met his burden of

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[3] MTS SEATING also submitted a memorandum and evidence in support of Shoney's Louisiana's motion for summary judgment to point out that the plaintiff had "failed to make any evidentiary showing whatsoever of a pre-existing defective condition in the subject chair at the time he sat on it." Attached to the memorandum submitted by MTS SEATING were excerpts from the deposition of Kem Briscoe, Jr., the assistant manager on duty at the Shoney's restaurant at the time of Mr. Parsons' accident. At the time of the accident, Mr. Briscoe had been working for Shoney's as an assistant manager for about two years, and during that time, he said he had no prior experiences of a leg breaking or similar problems with the type of chair that Mr. Parsons had been using.

[4] All of the language quoted is not visible in the photograph of the notice submitted; however, the language quoted is as it appears in the trial court's reasons for judgment and in the plaintiff's brief on appeal.

showing sufficient evidence that a broken or cracked weld on the chair was apparent.

In a slip and fall case applying La. R.S. 9:2800.6, the court in Babin v. Winn-Dixie Louisiana, Inc., 00-0078, pp. 5-6 (La. 6/30/00), 764 So. 2d 37, 40 (per curiam) recognized that the burden on the non-moving plaintiff to defeat summary judgment on the issue of constructive notice is to make a positive showing of evidence creating a genuine issue as to the existence of the condition prior to the accident, not the mere possibility. See Mansoor v. Jazz Casino Company, LLC, 12-1546, p. 1 (La. 9/21/12), 98 So. 3d 795 (per curiam). By Mr. Parsons' own testimony and that of Ms. Waller, Shoney's Louisiana established that there was no apparent indication of a problem with the chair prior to Mr. Parsons sitting on it. See Thompson v. Nelon's Fast Foods, Inc., 42,825, p. 5 (La. App. 2d Cir. 1/23/08), 974 So. 2d 835, 838. Thus, we find no error in the trial court's determination that there is no genuine issue of material fact, as Mr. Parsons failed to produce contrary factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial.

Mr. Parsons alternatively contends that the trial court erred in failing to find that the doctrine of *res ipsa loquitur* should apply. *Res ipsa loquitur* is a rule of circumstantial evidence that applies when the facts suggest that the negligence of the defendant is the most plausible explanation of the injury. Modicue v. State Farm Fire and Casualty Company, 47,444, p. 3 (La. App. 2d Cir. 9/26/12), 106 So. 3d 579, 582. Generally, it may be applied when three requirements are met: (1) the circumstances surrounding the accident are so unusual that, in the absence of other pertinent evidence, there is an inference of negligence on the part of the defendant; (2) the defendant had exclusive control over the thing causing the injury; and (3) the circumstances are such that the only reasonable and fair conclusion is that the accident was due to a breach of duty on the defendant's part. Broussard, 06-2306

at p. 6, 970 So. 2d at 1043. The doctrine permits, but does not require, the trier of fact to infer negligence from the circumstances of the event. Cangelosi v. Our Lady of the Lake Regional Medical Center, 564 So. 2d 654, 665 (La.1989)(on rehearing).

Considering all the evidence presented pursuant to our *de novo* review of this matter, we find no error in the trial court's refusal to apply the doctrine of *res ipsa loquitur*. Specifically, Mr. Parsons failed to introduce any evidence regarding the weight bearing capacity of the chair. We note that Mr. Parsons testified that he weighed 375 pounds at the time of the accident. Therefore, Mr. Parsons' weight arguably makes it unlikely that the only plausible reason for the chair's collapse was Shoney's Louisiana's negligence. See Modicue, 47,444 at p. 3, 106 So. 3d at 582. Moreover, as previously observed, La. C.C. art. 2317.1 requires proof that Shoney's Louisiana had knowledge, either actual or constructive, that the chair was defective, such that application of the doctrine under the requirements of the law and the facts of this case is questionable. See Mayes v. Wausau Underwriters Ins. Co., 12-465, p. 15 (La. App. 3d Cir. 12/12/12), 104 So. 3d 785, 795. Thus, we reject Mr. Parsons' alternative contention.

CONCLUSION

For the foregoing reasons, we affirm the summary judgment in favor of Shoney's Louisiana, dismissing the plaintiff's claim for injuries due to the collapse of a chair in its restaurant. All costs of this appeal are assessed to the plaintiff, Timothy Parsons.

AFFIRMED.