

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2021 CA 0412

DEBORAH SIMON

VERSUS

CENTURYLINK, INC. AND LIBERTY MUTUAL INSURANCE
COMPANY

Judgment Rendered: DEC 22 2021

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 666552

Honorable Nadine Ramsey, Judge Presiding

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Greenwich Insurance Company

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BEFORE: WHIPPLE, C.J., PENZATO, AND HESTER, JJ.

HESTER, J.

Plaintiff appeals a summary judgment that dismissed her claims seeking recovery for injuries she sustained when she fell into a reflecting pool at a place of business. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

On February 22, 2017, around 5:00 a.m., Ms. Deborah Simon arrived at the headquarters for CenturyLink, Inc. in Monroe, Louisiana, with a group of nurse assistants to perform health screenings of the CenturyLink employees. When Ms. Simon arrived, she walked from the parking lot to the CenturyLink building and waited in the courtyard near a double door entrance for approximately ten to fifteen minutes for the security guard to let her and her co-workers inside the building. Once she was in the building, she went to the front desk to check in and obtain her visitor's badge. After Ms. Simon received her badge, she headed back to her car to drive to the area where the health screenings were to take place. She exited a different single door, took two steps, and fell into a 2 ½ foot deep reflecting pool adjacent to the walkway.

After her fall, Ms. Simon filed suit against CenturyLink, and its insurer Greenwich Insurance Company, as well as the owner of the property, the Industrial Development Board of the Parish of Ouachita, Louisiana, Inc.¹ (the defendants). In her petition, she contended that the defendants created a defective condition by placing an unguarded and unprotected reflecting pool in the courtyard, and the defective condition caused her to fall and sustain bodily injuries.

The defendants filed a motion for summary judgment contending that Ms. Simon cannot meet her burden of proving that the condition of the premises was defective since it conformed with applicable standards and codes. Additionally, the

¹ Initially, Ms. Simon filed suit against Liberty Mutual Insurance Company, but she amended her petition to replace Liberty Mutual with Greenwich and to add the Industrial Development Board of the Parish of Ouachita, Louisiana Inc. as a defendant.

defendants contended that the area of the reflecting pool was readily visible and therefore “open and obvious” under the risk-utility inquiry. In support of their motion for summary judgment, the defendants attached the deposition of Ms. Simon; the “Affidavit” of their expert, Mr. James R. Danner Jr.; and CenturyLink’s answers to interrogatories and request for production of documents.

Ms. Simon opposed the defendants’ motion for summary judgment attaching to the opposition a pleading from the landscape architect, Edge Group, Inc., the case management schedule, CenturyLink’s responses to requests for admissions, her deposition, and the affidavit of her expert, Mark E. Williams.

The defendants’ motion for summary judgment came before the trial court for a hearing on November 30, 2020. At the conclusion of the hearing, the trial court granted the motion stating, “the owner did not have knowledge and necessarily would not have had knowledge of the defect. So I’m going to grant the motion for summary judgment in favor of CenturyLink.” In conformance with its ruling, the trial court signed a judgment on December 29, 2020 granting the defendants’ motion for summary judgment and dismissing Ms. Simon’s claims against the defendants. It is from this judgment that Ms. Simon appeals.

LAW AND ANALYSIS

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. **Jones v. Anderson**, 2016-1361 (La. App. 1st Cir. 6/29/17), 224 So.3d 413, 417. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(A)(3). A “genuine” issue is a triable issue, which means that an issue is genuine if reasonable persons could disagree; if on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on

that issue. A fact is “material” when its existence or nonexistence may be essential to plaintiff’s cause of action under the applicable theory of recovery. **Kasem v. State Farm Fire & Cas. Co.**, 2016-0217 (La. App. 1st Cir. 2/10/17), 212 So.3d 6, 13. 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. Code Civ. P. art. 966(A)(4).

The burden of proof rests on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover’s burden on the motion does not require him to negate all essential elements of the adverse party’s claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party’s claim, action, or defense. The burden is then on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. Code Civ. P. art. 966(D)(1).

Appellate courts review evidence *de novo* under the same criteria that govern the trial court’s determination of whether summary judgment is appropriate. **Crosstex Energy Services, LP v. Texas Brine Company, LLC**, 2017-0895 (La. App. 1st Cir. 12/21/17), 240 So.3d 932, 936, writ denied, 2018-0145 (La. 3/23/18), 238 So.3d 963. Thus, appellate courts ask the same questions: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. **Crosstex Energy Services, LP**, 240 So.3d at 936. Because it is the applicable substantive law that determines materiality, whether a particular issue in dispute is material can be seen only in light of the substantive law applicable to the case. **Jones**, 224 So.3d at 417.

The owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. La. Civ. Code arts. 2317, 2317.1, and 2322. The owner of a building is not responsible for all injuries resulting from any risk posed by his building, but, rather, only for those injuries caused by an unreasonable risk of harm to others. **Broussard v. State through, Office of State Buildings**, 2012-1238 (La. 4/5/13), 113 So.3d 175, 183.

A plaintiff seeking to establish liability based on the allegation of a defective thing must prove that: (1) the property which caused the damage was in the “custody” of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. **Smith v. The Runnels Schools, Inc.**, 2004-1329 (La. App. 1st Cir. 3/24/05), 907 So.2d 109, 112.

Courts have developed a risk-utility balancing test to determine whether a condition is unreasonably dangerous, wherein the trier of fact balances the gravity and the risk of harm against the individual and societal utility and the cost and feasibility of repair. **Bufkin v. Felipe’s Louisiana, LLC**, 2014-0288 (La. 10/15/14), 171 So.3d 851, 856. The four pertinent factors to be considered in the risk-utility balancing test are: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of 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 social utility or whether the activities are dangerous by nature. **Bufkin**, 171 So.3d at 856.

Regarding the second prong of the risk-utility inquiry, a defendant generally does not have a duty to protect against that which is obvious and apparent. An alleged hazard is considered obvious and apparent if it is open and obvious to everyone who may potentially encounter it. **Bufkin**, 171 So.3d at 856. The open

and obvious inquiry thus focuses on the global knowledge of everyone who encounters the defective thing, not the victim's actual or potentially ascertainable knowledge. **Minix v. Pilot Travel Centers, LLC**, 2018-1197 (La. App. 1st Cir. 5/31/19), 277 So.3d 810, 813-814, writ denied, 2019-1074 (La. 10/8/19), 280 So.3d 149.

In this case as previously noted, the defendants' motion for summary judgment set forth two issues: first, whether the condition of the reflecting pool was defective creating an unreasonable risk of harm, and second, whether the reflecting pool was open and obvious under the second prong of the risk/utility analysis.²

In support of their position that the reflecting pool was not defective, the defendants attached an unsigned and unnotarized "Affidavit" of their expert, Mr. Danner. Approximately two months after the defendants filed their motion for summary judgment, and after Ms. Simon opposed the motion for summary judgment, the defendants filed into the record a signed affidavit of Mr. Danner. The signed affidavit appears in the record as "exhibit B" but is not attached to any other pleadings. Furthermore, the signed affidavit is not the same as the unsigned affidavit originally filed in support of the defendants' motion for summary judgment as one contains eleven paragraphs and one contains thirteen paragraphs. Under current La. Code Civ. P. art. 966(D)(2), we may consider only those documents specifically filed in support of or in opposition to the defendants' motion for summary judgment, even

² While the trial court granted summary judgment based on the CenturyLink's knowledge of the alleged defect, the defendants did not move for summary judgment on the knowledge element and did not challenge Ms. Simon's ability to prove they had knowledge of the defective condition. Louisiana Code of Civil Procedure article 966(F) provides that summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. Therefore, our *de novo* review is limited to those issues raised by the defendants. See Wilson v. Two SD, LLC, 2015-0477 (La. App. 1st Cir. 12/23/15), 186 So.3d 159, 162, writ denied, 2016-0306 (La. 4/8/16), 191 So.3d 588; see also Daigrepoint v. Shardan, Inc., 2019-1083 (La. App. 1st Cir. 10/14/20) 2020 WL 6058576, *3. The defendants did attach to their motion CenturyLink's response to Ms. Simon's interrogatories, which stated, "there have been no prior incidents similar to that alleged by plaintiff." However, the defendants included the interrogatory responses as evidence that the area was not defective rather than as evidence that CenturyLink had no knowledge of the alleged defect. Furthermore, the absence of other reported incidents is a factor to be considered, not an absolute bar to recovery. See Calcagno v. Kuebel, Fuchs Partnership, 2001-691 (La. App. 5th Cir. 11/14/01), 802 So.2d 746, 750.

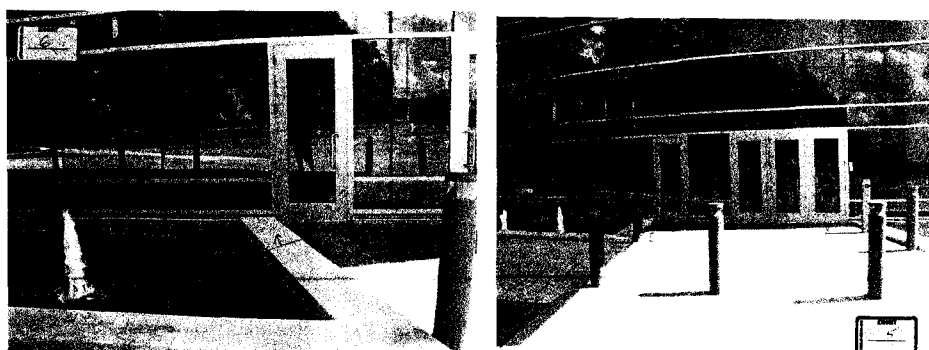
if those documents appear elsewhere in the record. La. Code Civ. P. art. 966(D)(2) & see Comments - 2015, comment (k); **Huggins v. Amtrust Insurance Company of Kansas, Inc.**, 2020-0516 (La. App. 1st Cir. 12/30/20), 319 So.3d 362, 366. An unsigned affidavit is not admissible in support of, or in opposition to, a motion for summary judgment. See **Robertson v. Doug Ashy Building Materials, Inc.**, 2010-1552 (La. App. 1st Cir. 10/4/11), 77 So.3d 339, 350 n.16, writs denied, 2011-2468, 2011-2430 (La. 1/13/12), 77 So.3d 972, 973. Because the unsigned document is not proper summary judgment evidence and we are unable to consider the affidavit later filed into the record, the defendants cannot rely on the affidavit of Mr. Danner in support of their motion for summary judgment. See La. Code Civ. P. art. 966(A)(4).

The defendants also attached the deposition of Ms. Simon to their motion for summary judgment. In her deposition, Ms. Simon described the morning of the February 22, 2017 incident. She said she arrived at the CenturyLink building around 5:00 a.m., while it was still dark outside, and waited in a courtyard for someone to let her in and obtain her visitor's badge. Ms. Simon described exiting the building from a different door closer to the parking lot to return to her car to drive to the area where the health screenings were to take place. She said after opening the door, she turned toward the parking lot to take the quickest route to her car because it was cold outside. Ms. Simon explained that she took two steps and fell directly into the reflecting pool hitting her hand on the bottom of the reflecting pool and she was "all the way under."

Ms. Simon stated that when she fell "it was pitch black---dark." She said that there were no exterior lights illuminated on the building, on the surrounding bollards, or in the reflecting pool. She also said that inside the building there was only a "little light the security guard had when you stay up over-the-counter." Ms. Simon explained that she could not see the reflecting pool and said she could not see anything.

Ms. Simon acknowledged that she had been to the CenturyLink facility “at least -- about three or four times” including the night before, but said she had never been in the area of the reflecting pool where she fell nor exited through the door she used the day of the fall.

Attached to Ms. Simon’s deposition were pictures of the area where she fell taken during daylight hours. The pictures depict the close proximity of the reflecting pool to the door Ms. Simon exited the day of the fall. The pictures also show that the barrier between the sidewalk and the reflecting pool was low.



Considering the proper summary judgment evidence submitted by the defendants, the defendants failed to meet their burden as movers of pointing out the absence of factual support for one or more elements essential to Ms. Simon’s claim. During her deposition, Ms. Simon stated several times that it was completely dark when she fell. She said there was no lighting in the area of the reflecting pool, and she took only two steps after exiting the door before falling into the reflecting pool. During daylight hours, the reflecting pool may have been open and obvious; however, we must consider the particular conditions faced by Ms. Simon when she fell, including most importantly that, it was 5:30 a.m., predawn in February. Under the totality of the circumstances, considering the pictures depicting the close proximity of the reflecting pool to the door and the low barrier between the sidewalk and the reflecting pool with the unrebutted testimony of Ms. Simon that it was “pitch black” and there was no lighting in the area of the reflecting pool when she fell, reasonable persons could disagree on whether these conditions created an

unreasonable risk of harm and/or were open and obvious. Therefore, the defendants did not demonstrate the absence of a genuine issues of material fact as to whether the conditions of the reflecting pool at the time Ms. Simon fell were defective. Since the defendants failed to meet their initial burden of proof, the burden never shifted to Ms. Simon to show support for her claim. See La. Code Civ. P. art. 966(D)(1). Therefore, we find that the trial court erred in granting the motion for summary judgment in favor of the defendants.

CONCLUSION

For the foregoing reasons, we reverse the December 29, 2020 judgment of the trial court granting the defendants' motion for summary judgment. All costs of this appeal are assessed equally against defendants-appellees, CenturyLink Inc., Greenwich Insurance Company, and the Industrial Development Board of the Parish of Ouachita, Louisiana, Inc.

REVERSED AND REMANDED.