STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2021 CA 0462

BEATRICE GREEN McDOWELL

VERSUS

ROBERT E. FELDMAN, M.D. AND
THOMAS H. HEITMAN

Judgment Rendered: DEC 22 2021

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On Appeal from the
19th Judicial District Court
Parish of East Baton Rouge, State of Louisiana
Trial Court No. 669822

The Honorable Donald R. Johnson, Judge Presiding

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BEFORE: LANIER, WOLFE, AND BURRIS,[1] JJ.

[1] The Honorable William J. Burris, retired, is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

WOLFE, J.

In this slip and fall case, plaintiff appeals a summary judgment dismissing her negligence suit against defendants. For the following reasons, we affirm.

BACKGROUND

On June 5, 2017, plaintiff, Beatrice Green McDowell, was taking her boyfriend's seven-year-old grandchild for a doctor visit at Dr. Robert E. Feldman's office in Baton Rouge, Louisiana. Dr. Feldman and Thomas H. Heitman are the owners of the land and building where Dr. Feldman has operated his medical clinic since 1964. To access the patient's entrance to the clinic, it is necessary to traverse a brick walkway and ascend some brick steps. While holding the child's hand with her left hand and the child's medicine in her right hand, Ms. McDowell proceeded up the steps. Before reaching the top she felt her feet sliding. Ms. McDowell attempted to catch the railing, but her hand slipped and she fell, injuring herself. After the fall, Ms. McDowell felt "something slimy" and she noticed "something green" on the steps that appeared to be a "fungus" or "mold." She did not see anything green or slimy before she started up the steps, as she was conversing with the child and not paying attention to anything on the steps.

On May 29, 2018, Ms. McDowell filed a negligence suit against Dr. Feldman and Mr. Heitman ("the owners"), for their alleged failure to maintain the clinic premises in a safe condition. Ms. McDowell sought damages for her physical and mental pain and suffering, as well as medical expenses. The owners answered the petition, generally denying all of the allegations except to admit their status as owners. After deposing Ms. McDowell, the owners filed a motion for summary judgment, asserting that Ms. McDowell could not establish liability, because she had conceded that she had no evidence that the owners had actual or constructive knowledge of any hazard or dangerous condition on the entrance steps to the clinic. The owners further maintain that they were not aware that Ms. McDowell fell on the

steps until they were served with her lawsuit. Additionally, the owners claim that there have been no other slip and fall accidents on the premises involving the exterior walkway, entrance steps, and/or railing. Ms. McDowell opposed the motion, arguing that the owners in the exercise of reasonable care, should have known of the mold and mildew on the steps, which was clearly unreasonably dangerous. Following a hearing on the owners' motion, the trial court signed a judgment on January 25, 2021, granting the motion for summary judgment and dismissing Ms. McDowell's suit. Ms. McDowell appeals.

DISCUSSION

Summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action. The procedure is favored and shall be construed to accomplish these ends. La. Code Civ. P. art. 966(A)(2). After an opportunity for adequate discovery, 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. La. Code Civ. P. art. 966(A)(3). Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Marrero v. I. Manheim Auctions, Inc.**, 2020-0878 (La. App. 1st Cir. 2/19/21), 321 So.3d 406, 409.

The burden of proof rests with the mover. La. Code Civ. P. art. 966(D)(1). However, if the mover will not bear the burden of proof at trial on the matter before the court on the motion, the mover's burden does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must 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. Thereafter, if the adverse party fails to produce factual evidence sufficient to establish the existence of a genuine issue of material fact, the mover is entitled to summary judgment as a

matter of law. La. Code Civ. P. art. 966(D)(1); **Batiste v. Erin Covington, LP**, 2019-0261 (La. App. 1st Cir. 12/11/19), 291 So.3d 710, 714. Although factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, mere conclusory allegations, improbable inferences, and unsupported speculation will not support a finding of a genuine issue of material fact. **Guillory v. The Chimes**, 2017-0479 (La. App. 1st Cir. 12/21/17), 240 So.3d 193, 195.

Whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Larson v. XYZ Insurance Company**, 2016-0745 (La. 5/3/17), 226 So.3d 412, 417. In this matter, the damage claims of Ms. McDowell are based on the alleged negligence of the owners of the medical clinic, who are not considered a "merchant" under the merchant premises statute. See La. R.S. 9:2800.6(C)(2). Nevertheless, every act that causes damage to another obliges him by whose fault it happened to repair it. La. Civ. Code art. 2315(A). Furthermore, La. Civ. Code art. 2317.1 provides that 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." However, there is no duty to protect against an open and obvious hazard. See **Broussard v. State ex rel. Office of State Bldgs.**, 2012-1238 (La. 4/5/13), 113 So.3d 175, 184. If the condition should have been obvious to all, the condition may not be unreasonably dangerous. **Id**.

Here, in order to establish that the owners of the medical clinic are liable for her alleged injuries, Ms. McDowell must prove: (1) the owners had custody of the entrance steps; (2) the entrance steps were defective because they had a condition that created an unreasonable risk of harm; (3) the owners of the medical clinic had

actual or constructive notice of the defect and failed to take corrective measures within a reasonable time; and (4) the defect was a cause in fact of the alleged damages. See **Fontenot v. Patterson Insurance**, 2009-0669 (La. 10/20/09), 23 So.3d 259, 267-268. Ms. McDowell's failure to meet any one of these essential elements defeats her claim against Dr. Feldman and Mr. Heitman.

Our *de novo* review of the record reveals no evidence that Dr. Feldman or Mr. Heitman, or any staff at the medical clinic, had actual or constructive notice of the presence of slimy mold on the entrance steps to the clinic. Constructive knowledge may be shown by facts demonstrating the defect or condition existed for such a period of time that it would have been discovered and repaired had the owner exercised reasonable care. **Everett v. Nicholls State University**, 2019-0930 (La. App. 1st Cir. 2/26/20) (unpublished), 2020 WL 913737, at *2.

In support of their motion for summary judgment, the owners offered evidence, through the affidavit of Dr. Feldman, that there were no prior complaints about any hazardous condition on the entrance steps to the medical clinic and there were no other accidents involving the entrance steps and/or railing. Also, Dr. Feldman attested to the fact that the owners had not been made aware of Ms. McDowell's fall until they were served with the lawsuit a year after the alleged incident occurred. Additionally, the owners relied on excerpts from Ms. McDowell's deposition testimony, wherein she admitted that she did not know what caused her to fall and that she did not see anything on the steps prior to her fall. The owners also highlight Ms. McDowell's admission that she did not have any evidence that anyone at the medical clinic knew about a hazardous condition on the entrance steps.

In her opposition to the owners' motion, Ms. McDowell pointed to different excerpts in her deposition testimony. She stated that a few days after she fell, she went back and saw the "green stuff" in the area where she slipped. Ms. McDowell

admitted that she was not really paying attention to what was on the steps when she fell, because she was talking to the child. The affidavit of Ms. McDowell's boyfriend, Charley Dunn, Jr., was attached to the opposition, but his statement only indicates that he arrived at the scene while Ms. McDowell was being attended to by emergency medical personnel. The affidavit does not mention any reference to the condition of the entrance steps nor whether the owners of the medical clinic knew of a dangerous or hazardous condition on the steps and/or railing.[2]

At the hearing on the motion for summary judgment, the trial court questioned whether Ms. McDowell had any expert testimony about the growth of slime and the longevity of it, as well as the reasonableness of the growth. Counsel for Ms. McDowell stated that the trial court could take judicial notice that slime grows over a period of time, not overnight. But there was no evidence that the owners knew or should have known of the existence of slime on the steps, where the alleged slime was located on the steps, or how long the slime had been there given the amount that was allegedly present. Ms. McDowell was required to make a showing of the existence of slime on the steps prior to her fall and to establish that the slime existed over a sufficient length of time that the owners should have discovered it with reasonable diligence and corrected the problem. See **Everett**, 2020 WL 913737 at *3.

[2] Mr. Dunn's affidavit referenced a video that he took with his cell phone while emergency medical personnel assisted Ms. McDowell, but the appellate record does not contain a copy of the referenced video. However, in the owners' reply memorandum in support of their motion, there are copies of four pictures captured from the referenced video. Ordinarily, photographs are not permissible summary judgment evidence, unless they are properly authenticated by an affidavit or deposition to which they are attached. See La. Code Civ. P. art. 966 – 2015 Comments, Comment (c). However, Ms. McDowell did not object to the still photos embedded in the owners' reply memorandum. Thus, under La. Code Civ. P. art. 966(D)(2), the court "shall consider any documents to which no objection is made" to determine if any evidentiary value should be given to the documents. **Jones v. La. Med. Ctr. and Heart Hosp.**, 2020-0551 (La. App. 1st Cir. 12/30/20), 2020 WL 7770927 *1, n.1. In any event, in those pictures, the area where Ms. McDowell is lying face down on the steps appears to be dry and not covered with mold or mildew.

Because the record reveals an absence of factual support for the essential element of actual or constructive knowledge of a hazardous condition by the owners of the medical clinic or anyone affiliated with the clinic, we find that the trial court did not err in granting summary judgment in favor of the owners. Furthermore, since there is an absence of evidence to meet Ms. McDowell's burden of proof regarding knowledge, we need not consider whether the evidence created an issue of fact as to any other element of her negligence action. See **Guillory**, 240 So.3d at 197 n.2. Unsupported speculation does not warrant a finding of a genuine issue of material fact. **Id.** at 195. It takes more than mere argument of a possibility to raise a genuine issue of fact. See **Talbert v. Restoration Hardware, Inc.**, 2017-0986 (La. App. 1st Cir. 5/31/18), 251 So.3d 532, 539, writ denied, 2018-1102 (La. 10/15/18), 253 So.3d 1304; see also **Hawkins v. Fowler**, 2011-1495 (La. App. 1st Cir. 5/2/12), 92 So.3d 544, 547-548, writ denied, 2012-1449 (La. 10/8/12), 98 So.3d 860. We find that Ms. McDowell's self-serving testimony was not corroborated by evidence that Dr. Feldman and Mr. Heitman knew or should have known of the existence of slimy mold or mildew on the steps leading to the entrance of the medical clinic. Therefore, Dr. Feldman and Mr. Heitman are entitled to summary judgment as a matter of law.

CONCLUSION

The summary judgment in favor of Robert E. Feldman, M.D., and Thomas H. Heitman, dismissing Beatrice Green McDowell's claims against them is affirmed. All costs of this appeal are assessed to plaintiff-appellant, Beatrice Green McDowell.

AFFIRMED.