NOT DESIGNATED FOR PUBLICATION

DORA BRISBON	*	**NO. 2000-CA-1269**
VERSUS	*	**COURT OF APPEAL**
RHODES FUNERAL HOME, INC. AND THE LAFAYETTE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-10765, DIVISION "D"
Honorable Lloyd J. Medley, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *
ON REHEARING GRANTED

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)

MURRAY, J., DISSENTS WITH REASONS

Darleen M. Jacobs
Al A. Sarrat
JACOBS & SARRAT
823 St. Louis Street
New Orleans, LA 70112
COUNSEL FOR PLAINTIFF/APPELLEE

Geoffrey H. Longenecker
LONGENECKER & ASSOCIATES, LTD.
133 North Theard Street
P. O. Box 1296
Covington, LA 70434-1296

-AND-

Frans J. Labranche, Jr.
70154 Nancy Road
Mandeville, LA 70471-7916
COUNSEL FOR DEFENDANT/APPELLANT

AFFIRMED

On December 12, 2001, we rendered an original opinion herein affirming the trial court's judgment awarding $14,962.27 in damages in favor of plaintiff Ms. Dora Brisbon. Thereafter, on January 30, 2002, we granted an application for rehearing filed by plaintiff/appellee Ms. Brisbon and defendant/appellant Rhodes Funeral Home, Inc. Upon rehearing, we conclude that our original decision misapplied La. C.C. article 2317, and that under La. C.C. 2317.1, defendant is liable to plaintiff for the injuries she sustained as a result of a fall that occurred on the defendant's staircase.

A delictual action in our civil code begins with La. C.C. article 2315: "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." *Loescher v. Parr*, 324 So.2d 441, 445

(La. 12/8/75). This fundamental principle is explained further by La. Civ. Code art. 2317, which provides that we are not only responsible for damages occasioned by our own act, but also for damages "caused by the act of persons for whom we are answerable, or of things which we have in our custody." In 1996, our legislature appended a new article to La. C.C. article 2317, which states, in part:

> 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. (Emphasis Added)

La. C.C. article 2317.1. Thus, "although La.C.C. article 2317 has been traditionally framed as a strict liability article, with 2317.1's advent, 2317, in effect, actually implements a cause of action based on negligence principles." *Myers v. Dronet*, 2001-5, p.9 (La.App. 3 Cir. 6/22/01), 801 So.2d 1097, 1106. As such, consideration must be made of La. C.C. articles 2315, 2316, and 2317 in order to properly apply article 2317.1. *Id.*

Reading La. R.S. article 2317.1, together with La. R.S. article's 2317 and 2316, we find, as did the Third Circuit, that the plaintiff has the

following proof threshold:

(1) “Owner” or “custodian” of a “thing.”

(2) “Ruin,” “vice,” or “defect” of a thing.

(3) Cause-in-fact.

(4) Duty.

(5) Breach.

(6) Duty Risk analysis.

(7) Damages.

Myers,2001-5, at p. 10, 801 So.2d at 1106.

Our original opinion correctly found that Ms. Brisbon met her 2317.1 threshold of proving that: (1) defendant was the owner of Rhodes Funeral Home; (2) the defect in the carpeting presented an unreasonable risk of harm; (3) Ms. Brisbon’s injuries were caused by her fall; and (4) damages in the amount of $14,862.27. Now, in consideration of La. C.C. 2317.1, we must address whether Ms. Brisbon offered sufficient proof that the defendant had a duty, that he breached his duty, and that under a duty risk-analysis, there is an association between defendant’s duty and the involved risk of harm.

Duty

La C.C. article 2317.1’s language that the owner “knew or, in the

exercise of reasonable care, should have known of the ruin" and that the damage "could

have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care" signifies a "duty" in the negligence context. *Myers*, 2002-5, at p. 13,801 So.2d at 1108. Further, "a close reading of Article 2317.1 reveals that it imposes a two-prong duty upon the owner or custodian of a thing--a duty to identify the risks which the thing caused and a duty to exercise reasonable care in preventing damages." *Id*.

We will now address the first prong of the duty: whether defendant knew or, in the exercise of reasonable care, should have known that the staircase at issue created a risk of harm to others. As stated in our original opinion, Ms. Brisbon, Ms. Loretta Carter, and Ms. Virginia Wilson testified that they had problems with the steps either because of the carpet, or the fact that the steps were not level. Further, Mrs. Kathleen Astorga testified that the Abry Brothers, who are in the business of shoring up buildings that are unlevel, had checked the steps in question because of the building being "mudjacked" twenty years ago after a flood. We find this testimony, stated more thoroughly in our original opinion, is sufficient to find that Rhodes Funeral Home, in the exercise of reasonable care, should have known that a defective condition existed on the staircase.

The second prong of the duty imposed requires that the owner "exercise reasonable care in preventing the damages which the defect may cause others." *Myers*, 2001-5, at p. 13,801 So.2d at 1108. In making a determination of whether a defect or unreasonable risk of harm is present, "the jurisprudence notes that the defect must be of such a nature as to constitute a dangerous condition which would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances." *Jackson v. Gardiner*, 34,643, p. 5 (La.App. 2 Cir. 4/4/01), 34,690, 785 So.2d 981, 985 citing *Penton v. Schuster*, 98-1068 (La.App. 5 Cir. 3/30/99), 732 So.2d 597. As further stated in *Jackson*:

> The owner of a building cannot be held responsible for all injuries resulting from any risk posed by his building, only those caused by an unreasonable risk of harm to others. The duty which a landowner owes to persons entering his property is governed by a standard of reasonableness, and a potentially dangerous condition that should be obvious to all is not unreasonably dangerous. (Citations omitted)

Id. Accordingly, where a risk of harm is obvious, universally known and easily avoidable, the risk is not unreasonable.

In this case, the trial court made a factual determination that the stairway was carpeted, and that the plaintiff did in fact trip on the stairway. Whether the defect was in the carpet itself, or whether it was because the floors were unlevel, we nonetheless find that the stairway created a

dangerous condition - a condition that would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances. Accordingly, we find that Rhodes Funeral Home did in fact have a duty to plaintiff to protect her against a defective stairway.

Breach of Duty

Once the duty has been established, La. C.C. art. 2317.1 requires that the plaintiff prove that the owner "failed to exercise such reasonable care." In determining whether defendant breached a duty or, in other words, acted unreasonable, courts often use the "Learned Hand test," or the "risk-benefit balancing test." *Myers*, 2001-5, at p. 14, 801 So.2d at 1109. Under the Learned Hand test, the three factors that prescribe the amount of caution which a particular occurrence requires a person to take are: (1) the likelihood that the thing will injure others; (2) the seriousness of the injury if it occurs; and (3) the risk of harm balanced against the interest, which the person may sacrifice or the cost of the precaution which that person must undertake to avoid the risk. *Id.* In this case, the defective stairway posed a high likelihood of injury to those visiting the funeral home. We also find that the seriousness of injury resulting from a defective stairway is great. Additionally, we find that the costs associated with replacing the carpet, or leveling the floors, was relatively low, especially in lieu of the seriousness of

injury if it happens. Accordingly, we find that Rhodes Funeral Home did not "exercise reasonable care" when it failed to either replace the defective carpet, or repair the hidden defect [i.e. an unleveled floor], which the carpet may have covered.

Duty Risk-Analysis

After it is determined that the defendant has a duty, the analysis requires a determination of whether the duty protects the plaintiff against the particular risk involved. As the Supreme Court stated in *Roberts vs. Benoit:*

> In determining the limitation to be placed on liability for a defendant's substandard conduct--i.e., whether there is a duty-risk relationship--we have found the proper inquiry to be how easily the risk of injury to plaintiff can be associated with the duty sought to be enforced. Hill, supra. Restated, the ease of association inquiry is simply: "How easily does one associate the plaintiff's complained-of harm with the defendant's conduct? ... Although ease of association encompasses the idea of foreseeability, it is not based on foreseeability alone." *Crowe*, supra at 907. Absent an ease of association between the duty breached and the damages sustained, we have found legal fault lacking. *Hill*, supra; *Sibley v. Gifford Hill and Co., Inc*., 475 So.2d 315, 319 (La.1985); See also *Williams v. Southfield School, Inc*., 494 So.2d 1339, 1342 (La.App. 2d Cir.1986).

605 So.2d 1032, 1045 (La. 9/9/91).

In the instant case, we find an "ease of association" between Rhodes

Funeral Home's failure to exercise reasonable care in maintaining its stairway and Ms. Brisbon's injuries resulting from her fall on the stairway.

Upon rehearing, based on the above discussion, we affirm our original holding, which affirmed the trial court's judgment awarding $14,862.27 in damages in favor of Ms. Dora Brisbon.

AFFIRMED