NOT DESIGNATED FOR PUBLICATION

FRANCIS M. VERCHER	*	**NO. 2002-C-1060**
VERSUS	*	**COURT OF APPEAL**
INTRACOASTAL TUBULAR SERVICES, INC., ET AL.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-15159, DIVISION "M"
Honorable C. Hunter King, Judge
* * * * * *
Chief Judge William H. Byrnes III
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(Court composed of Chief Judge William H. Byrnes III, Judge Charles R. Jones, Judge Patricia Rivet Murray)

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WRIT GRANTED; JUDGMENT REVERSED IN PART AND RENDERED

We grant the supervisory writ application of the relator-defendant, Hub City Iron Works, Inc., in order to review that portion of the trial court's judgment of May 23, 2002, denying relator's motion for summary judgment, whereby the relator sought to have the respondent-plaintiff, Francis Vercher's, claim for punitive damages under La. C. C. art. 2315.3 dismissed.

Appellate courts review summary judgment *de novo*, using the same criteria applied by the trial courts to determine whether the summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 c/w 99-2257, (La. 2/29/2000), 755 So.2d 226, 230; *Johnson v. State/University Hosp.*, 2001-1972 (La.App. 4 Cir. 1/16/02), 807 So.2d 367, 369. Summary judgments are favored. LSA-C.C.P. art. 966 A(2). Summary judgment should be rendered where there are no genuine issue of material fact and the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966 B. If the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant'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 pint out to the court that there is an absence of factual support for one or more of

such essential elements. LSA-C.C.P. art. 966 C(2). Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. *Id.* A material fact is one whose existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Smith v. Our Lady of the Lake Hosp. Inc., 93-2512 (La. 7/5/94), 639 So.2d 730. The supporting documentation submitted by the parties should be scrutinized equally, and there is no longer any overriding presumption in favor of trial on the merits. *Independent Fire Ins Co., supra,* 755 So.2d at 231; *Johnson, supra* .

During respondent's approximately nineteen years of employment by Intracoastal Tubular Company (ITCO) and Alpha Technical Services, Inc. (ALPHA) he cleaned and inspected oilfield tubing. Initially, this work was done by hand. Later respondent's employers purchased automated pipe racks manufactured by relator to assist in the refurbishing operations. This device, known as a "reamer" or "rattler" in the industry, is a mechanical brushing machine that removes salt scale and rust from the pipe.

Respondent alleges that the oilfield pipe was contaminated with radioactive material, which was released with the dust created in the refurbishing process. In 1994, respondent was diagnosed with chronic

myelogenous leukemia. He alleges that he contracted the disease as a result of his exposure to the radioactive dust. Respondent initially filed suit against his employers and various oil companies. In respondent's third amended petition he asserted a claim against relator, the manufacturer of the pipe-cleaning device. Respondent claims relator is also liable for punitive damages pursuant to La. C.C.P. art. 2315.3.

Louisiana Civil Code article 2315.3 provides:

> In addition to general and special damages, exemplary damages may be awarded, if it is proved that plaintiff's injuries were caused by the defendant's wanton or reckless disregard for public safety in the storage, handling, or transportation of hazardous or toxic substances. As used in this Article, the term hazardous or toxic substances shall not include electricity.

In order to obtain an award of exemplary or punitive damages, the plaintiff must satisfy four elements:

1) The defendant's conduct must be wanton or reckless.

2) The defendant's wanton or reckless conduct must create a danger to the public.

3) The defendant's wanton or reckless conduct must occur in the storage, handling, or transportation of hazardous or toxic substances.

4) The plaintiff's injury must be caused by the defendant's wanton or reckless conduct consisting of all of these elements.

Billiot v. B. P. Oil Co., 93-1118, p. 25-26 (La. 9/29/94), 645 So.2d 604, 617-

618, *reversed on other grounds, Adams v. J.E. Merit Cons., Inc.*, 97-2005 (La. 5/19/98), 712 So.2d 88.

The only facts pled by respondent relate to the manufacture of the cleaning device. The petition does not allege that relator stored, handled or transported hazardous or toxic substances. Therefore, the plaintiff fails **as a matter of law** to state a cause of action against the relator for punitive or exemplary damages, a fact that this Court may notice on its motion.

Relator contends that summary judgment is further warranted on the issue of punitive or exemplary damages **as a matter of fact** because it never stored, handled or transported the hazardous substance in question. In support, relator cites *In re New Orleans Train Car Leakage Fire Litigation*, 95-2710 (La. App. 4 Cir. 3/20/96), 671 So.2d 540, wherein this Court found that the manufacturer of a the tank car from which the hazardous substance leaked could not be liable for exemplary damages because it did not store, handle or transport the hazardous substance. This Court discussed what it means to "store, handle, or transport" a hazardous substance, and concluded "the use for which a thing is designed is not the pertinent question in deciding the applicability of La. C.C. art. 2315.3."

Respondent contends that his case can be distinguished because he was the "end-user" of the pipe-cleaning machine, whereas in *In Re New*

Orleans Train Car Leakage Fire Litigation the injured parties were neighbors of the train yard where the explosion occurred. Respondent argues further that because relator delivered and set up the machines in question it exercised control over them and is therefore liable.

However, this court also held in *In Re New Orleans Train Car Leakage Fire Litigation* that, Phillips, the company that originally owned the tank and who performed maintenance on the defective gasket that caused the leakage was also entitled to summary judgment because performing maintenance did not constitute storage, handling, or transporting the hazardous substance. This court noted that Phillips did not have possession or control of the hazardous substance. Similarly, we find that the delivery and installation to another of machines that manufacture a hazardous substance does not constitute the storage, handling, or transporting of a hazardous substance.

La. C.C. art. 2315.3 is penal in nature and, therefore, must be strictly construed. *In Re New Orleans Train Car Leakage Fire Litigation, supra.* Additionally, as this Code Article was repealed by the Legislature in 1996 after only a few years on the books, it can hardly be argued that there is any public policy reason to construe the language liberally in favor of recovery. There is no policy reason to expand upon the language in La. C.C. art 2315.3

in order to create a special category of “end user” claimants.

In *Dumas v. Angus Chemical Company*, 31-398 (La. App. 2 Cir. 12/9/98), 728 So.2d 434, plaintiffs sought exemplary damages against Glitsch Inc. Glitsch designed and caused to be manufactured two distillation columns used by a petrochemical plant for the production of nitromethane, a substance used for making fuel for racecars. Under certain conditions nitromethane is easily detonated and is more explosive than TNT. The *Dumas* plaintiffs asserted that a nitromethane line was heated by fire causing the two distillation columns to explode, resulting in the damages claimed by the plaintiffs. Plaintiffs argued that *In Re New Orleans Train Car Leakage Fire Litigation* could be distinguished on the basis that it is sufficient if the defendant engaged in wanton or reckless disregard for public safety "in connection with" the storage, handling or transporting of the hazardous substance, regardless of who might be doing the storing, handling, or transporting. The plaintiffs in *Dumas* contended "'the bad actor and the store, handler, or transporter of the hazardous substance need not be one and the same.'" *Id*., 31-398 at p. 6, 728 at 438. The court found the argument to be without merit stating:

> We reject the plaintiffs' assertion that *In re New Orleans Train Car Leakage Fire Litigation, supra*, fails to support Glitsch's claim for partial summary judgment and we reject the distinction the plaintiffs attempt to draw between the manufacturer in *In re New Orleans Tank Car Leakage Fire*

> *Litigation, supra*, and Glitsch. Both manufacturers designed an instrumentality by which others stored, handled, or transported hazardous or toxic substances. However, the use for which a thing is designed is not the pertinent question in deciding the applicability of La. C.C. art. 2315.3.

Id. 31-398 at p. 9, 728 at 439; *accord Strauch v. Gates Rubber Company*, 879 F.2d 1282 (5th Cir.1989) (manufacturer of synthetic gage hose used by others to transport a hazardous substance was not engaged in storage, handling, or transportation of a hazardous substance). Federal jurisprudence also establishes that in order to come within the purview of the statute a defendant must be "engaged" in the storage, handling, or transportation of hazardous substances. *See id*., and *Wiltz v. Mobil Oil Exploration and Producing, N.A., Inc.*, 702 F.Supp. 607, 608 (W.D. La.1989) ("Implicit in storing, handling or transporting is the requirement that the hazardous substance be in the possession or control of a person who then handles or otherwise deals with that substance."

The plaintiffs in *Dumas v. Angus Chemical Company* further argued that because Glitsch continued to be involved with the tanks by going to the plant after the tanks were installed, observing the distilling process and submitting specific instructions to the plant on the continued operation of the chemical process they could be found liable. The record established that after the system was installed and started up by others, an employee of

Glitsch visited the Angus plant, observed the operation and made suggestions for improving the operation. The court found that through the one visit to the plant by an employee, Glitsch did not have possession or control over the distillation column that exploded.

Here, respondent argues that relator exercised control over the machines it manufactured. Respondent submitted deposition testimony that reflects that Hub City had an employee present to observe the machine being put together. He stated that he went there to make sure that the machine was being assembled properly and "that it functioned the way he wanted it to function." Respondent adds that relator charged ITCO for the cost of assembling the machine and installation of the dust collection system. He notes further that relator supplied a one-year warranty for the pipe-cleaning machine.

The facts presented by respondent do not establish a significant distinction between Hub City's conduct and that of any product manufacturer. Warranty, assembly and installation are all closely associated with manufacturing and do not constitute control. Furthermore, establishing some element of control of the machine is insufficient without demonstrating that the party had any dealings with the substance itself. *See In re New Orleans Train Car Leakage Fire Litigation,* 95-2710 at p. 9, 671

So.2d at 547-548 and *Galjour v. General American Tank Car Corporation*, 769 F.Supp. 953, 956 (E.D. La.1991) with respect to the absence of liability under art. 2315.3 for the owner of the tank car, GATC.

Respondent cites *Cobb v. Sipco Services & Marine, Inc*., 1998 WL 57072 (WESTLAW E.D. La. February 2, 1998). This unreported case will not be considered by this Court.

Relator's motion for summary judgment firmly establishes the absence of support for an essential element of respondent's claim for punitive damages, i.e., that it stored, handled or transported a hazardous material, and respondent failed to produce factual support sufficient to demonstrate that he could establish his evidentiary burden at trial. The district court erred in denying the motion for summary judgment.

For the foregoing reasons, the that portion of the judgment of the trial court denying relator's motion for summary judgment is reversed and judgment is rendered in favor of relator, Hub City Iron Works, Inc., dismissing the claim of the respondent, Francis M. Vercher, against relator at respondent's cost.

WRIT GRANTED; JUDGMENT REVERSED IN PART AND RENDERED