NOT DESIGNATED FOR PUBLICATION

CHERYL MOORE, KIM WATTINGEY AND HENRY MARTIN	*	**NO. 2002-CA-1144**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
KENILWORTH/KAILAS PROPERTIES AND COLONY INSURANCE COMPANY	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-18727, DIVISION "N"
Honorable Ethel Simms Julien, Judge
* * * * * *
Judge David S. Gorbaty
* * * * * *

(Court composed of Chief Judge William H. Byrnes, III, Judge Dennis R. Bagneris, Sr., Judge David S. Gorbaty)

BYRNES, C.J., CONCURS WITH REASONS

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REVERSED

The defendants/third party plaintiffs, Kailas Properties and Colony Insurance Company, seek review of the trial court's judgment granting a summary judgment in favor of third party defendant, Dr. Dion Armstrong. Kailas Properties and Colony Insurance Company contend that the trial court erred when it determined that there were no genuine issues of material fact. For the following reasons, we reverse.

The plaintiffs, Cheryl Moore, Kim Wattigney, both employees of Dr. Armstrong, and Henry Martin, a patient, sued Kailas Properties and Colony Insurance Company for injuries they sustained when ceiling tiles fell from a building owned by Kailas Properties and insured by Colony Insurance Company. Plaintiffs alleged that the ceiling tiles fell as a result of the air conditioning system leaking water in the ceiling and walls. Kailas Properties and Colony Insurance Company filed a third party demand against Dr. Dion Armstrong d/b/a Armstrong Family Clinic, the lessee of the property where the plaintiffs were allegedly injured, alleging that Armstrong was liable to them under the indemnity provision of the lease. Armstrong

filed a motion for summary judgment arguing that he was not liable to Kailas Properties and Colony Insurance Company as Kailas Properties was responsible for maintaining and repairing the air conditioning and that Kailas Properties knew of the air conditioning problem for approximately one month before the accident occurred. After a hearing on the motion for summary judgment, the trial court rendered judgment on January 24, 2002, granting Armstrong's motion for summary judgment and dismissing Kailas Properties and Colony Insurance Company's third party demand against Armstrong. Kailas Properties and Colony Insurance Company appeal the granting of the motion for summary judgment arguing that there are genuine issues of material fact concerning Armstrong's negligence in failing to warn of the dangerous condition and take precautions to protect patients from a dangerous condition.

The relevant lease provisions provide:

> Maintenance:
> * * * * *
> (c) The Tenant shall give the Landlord prompt notice of any needed repairs to plumbing, heating or air conditioning, or electrical lines located in, servicing or passing through the Leased Premises. Following the notice, the Landlord shall make the appropriate repairs with due diligence and at its expense, unless the repairs were necessitated by damage or injury attributable to the Tenant, its servants, agents, employees, invitees or licensees. In that event, the Tenant shall bear the expense of the repairs.
> * * * * *
> Liability:
> 10. The Tenant shall indemnify and hold the Landlord, its

> agents, servants, and employees harmless from and against all claims, damages, losses and expenses, including all reasonable attorney fees, resulting in bodily injury, disease or death, or to injury to or destruction of tangible property, other than the Building, including loss of use, other than claims, damages, losses and expenses resulting from the sole negligence of Landlord, its agents, servants or employees.

The lease provisions place the responsibility for repairing the air conditioning system on Kailas Properties and further provide that Armstrong had no responsibility to indemnify Kailas for Kailas' own negligence. Thus, Armstrong could not be liable to Kailas for any damages occasioned by the "sole negligence" of Kailas, its agents, servants or employees. However, Armstrong would be liable to indemnify Kailas for any damages it would be required to pay if the damages were occasioned by the negligence of Armstrong and his employees.

Armstrong argued in his motion for summary judgment that Kailas was solely responsible for the injuries sustained by the plaintiffs. He contended that Kailas had notice of the problem and failed to repair it. Cheryl Moore and Kim Wattigney, plaintiffs and Armstrong's employees, testified in their depositions that Kailas had been informed numerous times, beginning a month before the accident, that the air conditioning system was leaking water. Tina Kovacs, a representative of Kailas, acknowledged that she had received complaints about the air conditioning system from several

first floor tenants, including Dr. Armstrong, from the beginning of May of 1998 to the middle of June 1998. While Kailas sent out maintenance people on several occasions, the problem was never solved. Dr. Armstrong sent a letter to Kailas dated June 1, 1998, stating that the "A.C. in the back of our office is leaking water into the clinic and the ceiling tiles have busted through."

Kailas and Colony Insurance Company opposed the motion for summary judgment on the basis that while Armstrong did not have to indemnify them for their own negligence, he was liable to them for his negligence. They argued that Armstrong was negligent for failing to take precautions and warn employees and patients of the alleged dangerous condition. Kailas and Colony Insurance Company relied upon the deposition of Kim Wattigney who acknowledged that the area was often wet and she and other employees would have to mop the area. Dr. Armstrong recognized in his letter to Kailas that the condition created a "serious hazard." Dr. Armstrong did not produce any evidence that he and/or his employees warned patients of the hazard or took any precautions to avoid injuries. In fact, the alleged accident occurred as the two employees and a patient were in the area where the leaking had occurred.

An owner of a business who permits the public to enter his

establishment has a duty to exercise reasonable care to protect those who do enter. This duty extends to keeping the premises safe from unreasonable risks of harm or warning persons of known dangers. *Rodriguez v. New Orleans Public Serv., Inc.*, 400 So.2d 884 (La.1981); *Bordelon v. Pelican State Mutual Insurance Company*, 599 So.2d 511, 513 (La.App. 3 Cir.1992).

In the case at bar, Dr. Armstrong had the responsibility to take some type of action to protect his patients and/or warn them of the dangerous condition. If Dr. Armstrong breached this duty and the breach caused the injuries to the plaintiffs, then Dr. Armstrong would be liable to Kailas and Colony Insurance Company for his proportionate share of liability to the plaintiffs. Causation is a factual determination that, in this case, will turn on the credibility of the witnesses. *Theriot v. Lasseigne*, 93-2661 (La. 7/5/94), 640 So.2d 1305.

Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. art. 966. Article 966 was amended in 1996, but the burden of proof remains with the mover to show that no genuine issue of material fact exists. If the mover will not bear the burden of proof at trial, his burden on the

motion does not require him to negate all essential elements of the plaintiff's claim, but rather to point out that there is an absence of factual support for one or more elements essential to the claim. La. Code Civ. Proc. art. 966 C (2); *Fairbanks v. Tulane University*, 98-1228 (La.App. 4 Cir. 3/31/99), 731 So.2d 983. After the mover has met its initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La. Code Civ. Proc. art. 966 C(2); *Smith v. General Motors Corp.*, 31-258 (La.App. 2 Cir. 12/9/98), 722 So.2d 348. If the non-moving party fails to meet this burden, there is no genuine issue of material fact and the mover is entitled to summary judgment. La. Code Civ. Proc. art. 966; *Schwarz v. Administrators of Tulane Educational Fund*, 97-0222 (La.App. 4 Cir. 9/10/97), 699 So.2d 895. Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate.

Dr. Armstrong was correct in his argument that he is not contractually bound to indemnify Kailas and Colony Insurance Company for their own negligence. However, Dr. Armstrong is contractually bound to indemnify Kailas and Colony Insurance Company for any damages those parties pay to plaintiffs as a result of his own negligence and that of his employees. Kailas

and Colony Insurance Company produced evidence to support their argument that Dr. Armstrong was negligent in failing to take precautions and/or warn of the dangerous condition. Thus, Kailas and Colony Insurance Company successfully rebutted Armstrong's motion for summary judgment, showing that there are genuine issues of material fact.

We find that the trial court erred when it granted Armstrong's motion for summary judgment. Accordingly, the trial court's judgment is reversed.

REVERSED