

<b>CARL EDGEFIELD</b>	*	<b>NO. 2017-CA-1050</b>
<b>VERSUS</b>	*	<b>COURT OF APPEAL</b>
<b>AUDUBON NATURE INSTITUTE, INC., AUDUBON COMMISSION AND SCOTTSDALE INSURANCE COMPANY</b>	* * *	<b>FOURTH CIRCUIT STATE OF LOUISIANA</b>

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**LOBRANO, J. DISSENTS AND ASSIGNS REASONS.**

I respectfully dissent. For the reasons previously discussed in my prior dissent, *Edgefield v. Audubon Nature Inst., Inc.*, 17-1050 (La. App. 4 Cir. 9/12/18), \_\_\_ So. 3d \_\_\_, 2018 WL 4403983 (Lobrano, J., dissenting), I find that Plaintiff put forth sufficient evidence to establish the existence of genuine issues of material fact and that Defendants failed to point out to the court the absence of factual support for Plaintiff’s claim. I would reverse the granting of Defendants’ Motion for Summary Judgment.

In Plaintiff’s Original Brief On Rehearing, Plaintiff asserts that the district court erred by granting Defendants’ Motion for Summary Judgment for the following reasons: 1) the district court ignored Plaintiff’s testimony that the grease created an unreasonable risk of harm; 2) the district court ignored Plaintiff’s testimony about his fall; 3) the district court ignored Lucinda Greenwood’s testimony about how the Defendants’ employees worked to keep the area around the grease trap clean; and 4) the district court failed to consider the affidavit of Defendants’ employee on the Motion for New Trial.

Plaintiff asserts that his testimony sufficiently defeated Defendants’ Motion for Summary Judgment. A motion for summary judgment is properly granted if the pleadings, memorandum, depositions, answers to interrogatories, and admissions,

together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art 966 (A)(3); *Daniel v. Clarion Inn & Suites*, 2016-0760, p. 3 (La. App. 4 Cir. 2/22/17), 214 So.3d 38, 40. A review of the record reveals that Plaintiff demonstrated factual support to create genuine issues of material fact. If there is any doubt as to a dispute regarding a genuine issue of material fact it must be resolved against granting the motion for summary judgment and in favor of a trial on the merits. *Oubre v. Louisiana Citizens Fair Plan*, 2011-0097, pp. 20-21 (La. 12/16/11), 79 So. 3d 987, 1002; *Orleans Par. Sch. Bd. v. Lexington Ins. Co.*, 2011-1720, p.9 (La. App. 4 Cir. 8/22/12), 99 So.3d 723, 729.

Plaintiff, in his deposition and answers to interrogatories, testified that in his capacity as a deliveryman, he was delivering seafood to Defendants' restaurant, where he slipped on a greasy substance and fell. He further states that he told someone at Defendants' establishment that he had fallen, and the two men who witnessed the fall (one who was later discovered to be Johnny Polk) asked Plaintiff if he was "okay," and Plaintiff replied "no." Plaintiff asserts that he slipped on grease as a result of Defendants' grease removal process and grease trap, which Defendants had negligently maintained and placed on the pathway to the kitchen.

As set forth fully in my previous dissent, the deposition testimonies of Ms. Greenwood (kitchen supervisor) and Ms. Greco (manager) reveal that Defendants' employees were responsible for maintaining the grease trap and the pathway. Both establish that Defendants were responsible for the removal of grease and the degreasing and maintenance of the grease trap and pathway. Accordingly, evidence that Defendants placed the grease trap on the pathway, removed grease by way of the pathway, and maintained the grease trap and pathway on which the alleged hazard occurred is enough to qualify as presenting an unreasonable risk of

harm and/or having created a condition under La. R.S. 9:2800.6.<sup>1</sup> Therefore, I would reverse the granting of Defendants' Motion for Summary Judgment and remand the case to the district court.

Additional support for the reversal of the summary judgment is that Plaintiff's attorney was not afforded a fair opportunity to present his client's claim and complete discovery considering the unique circumstances of this case. Louisiana jurisprudence holds that parties must be given a fair opportunity to carry out discovery, but there is no requirement that summary judgment be delayed until discovery is complete. *Rivarde v. City Of New Orleans*, 2015-0655, p.7 (La. App. 4 Cir. 3/9/16), 190 So.3d 400, 404; *Davis v. Riverside Court Condo. Ass'n Phase II, Inc.*, 14-0023, p. 19 (La.App. 4 Cir. 11/12/14), 154 So.3d 643, 654 (citing *Thomas v. North 40 Land Development, Inc.*, 2004-0610, p. 31 (La.App. 4 Cir. 1/26/05), 894 So.2d 1160, 1179). The Louisiana Supreme Court has further explained that, "[t]he only requirement is that the parties be given a fair opportunity to present their claim. Unless plaintiff shows a probable injustice a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact." *Id.*, 2015-0655, p.7, 190 So.3d at 404-05 (quoting *Simoneaux v. E.I. du Pont de Nemours and Co.*, 483 So.2d 908, 913 (La.1986)).

When discovery is alleged to be incomplete, it is within the district court's discretion either to hear the summary judgment motion or to grant a continuance to allow for further discovery. *Roadrunner Transportation Sys. v. Brown*, 2017-0040, p.11 (La. App. 4 Cir. 5/10/17), 219 So. 3d 1265, 1272-73. The standard of review for a district court's choice to hear a motion for summary judgment or to grant a

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<sup>1</sup> See *Robinson v. Meaux*, 2009-374 (La. App. 3 Cir. 11/4/09), 23 So. 3d 1025, 1028 (where court found that there were numerous issues of material fact in dispute in a slip and fall suit, involving a grease trap at the alleged accident location, which precluded the defendant's dismissal via summary judgment).

continuance, in this procedural context, is an abuse of discretion standard. *Id.*; *Rivarde v. City of New Orleans*, 15-0655, p. 5 (La.App. 4 Cir. 3/9/16), 190 So.3d 400, 403.

“When addressing an adequate discovery claim, this [C]ourt has considered whether discovery has been hindered by a circumstance beyond an opponent’s control.” *Id.*, 2017-0040, p.13, 219 So.3d at 1274; *See Bourgeois v. Curry*, 2005-0211, p. 10 (La.App. 4 Cir. 12/14/05), 921 So.2d 1001, 1008. <sup>2</sup>

In the case *sub judice*, at the hearing on the Motion for Summary Judgment, Plaintiff’s attorney asked the district court to allow him more time to oppose the Motion for Summary Judgment.<sup>3</sup> Additionally, Plaintiff’s attorney noted that he “got back [in the case] about three weeks ago,” and that he has been “out of the case for about three years.” Plaintiff’s case was hindered by Plaintiff’s attorneys’ withdrawal from the case.<sup>4</sup> Plaintiff’s current attorney’s ability to conduct discovery was also hindered. Three weeks is not an adequate amount of time for a new attorney to properly prepare for a hearing on a Motion for Summary Judgment.<sup>5</sup>

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<sup>2</sup> *See Leake & Andersson, LLP v. SIA Ins. Co. (Risk Retention Grp.)*, 2003-1600, pp. 3-4 (La. App. 4 Cir. 3/3/04), 868 So.2d 967, 969 (citing *Doe v. ABC Corp.*, 2000-1905, pp. 10-11 (La. App. 4 Cir. 6/27/01), 790 So.2d 136, 143)(“Although the language of article 966 does not grant a party the absolute right to delay a decision on a motion for summary judgment until all discovery is complete, the law does require that the parties be given a fair opportunity to present their case”). Discovery issues in summary judgment cases are usually dealt with through a request for a continuance of the summary judgment hearing. However, any pleading showing a need for additional discovery, such as a motion for new trial, is allowed.

<sup>3</sup> Specifically, he requested, “So if the Court is tending to granting this motion, Judge, I would ask that you allow us to get an affidavit to put the plans in evidence so you can see all of the facts before you throw [Plaintiff’s] case out.” Further, at the end of the summary judgment hearing Plaintiff’s attorney asked, “ Judge can I point out one final thing?” to which the district court replied, “ No, I am not going to hear your surrebuttal.”

<sup>4</sup> *See Lamb v. Lamb*, 430 So. 2d 51, 54 (La. 1983) (where the Court held that given the peculiar circumstances of the case, a miscarriage of justice would result by depriving defendant of the opportunity to defend the case on the merits, finding that defendant was victimized by the neglect of her attorney and the district judge’s erroneous belief that she had neglected her legal affairs).

<sup>5</sup> The granting of the Motion for Summary Judgment and denial of the Motion for New Trial is unsettling in that the current attorney, only recently enrolled as counsel, was denied an

The district court abused its discretion in not granting Plaintiff's attorney additional time to oppose the summary judgment taking into consideration the hindering circumstances in this case, especially the fact that Plaintiff's attorney enrolled as counsel fifteen days before the August 18<sup>th</sup> Hearing. For the forgoing reasons, I find that the district court erred by granting the motion for summary judgment without an opportunity for adequate discovery by Plaintiff's current attorney.

Additionally, as set forth fully in my previous dissent, I find that the district court abused its discretion by summarily denying Plaintiff's Motion for New Trial. La.C.C.P. art. 1973 provides that a new trial may be granted in any case if there is good ground and necessitates an examination of the facts and circumstances in this case. When the district judge is convinced by his examination of the facts that the denial of a new summary judgment hearing would result in a miscarriage of justice, a new hearing should be ordered. *Warren v. Shelter Mut. Ins. Co.*, 2016-1647, pp.14-15 (La. 10/18/17), 233 So.3d 568, 579; *Hardy v. Kidder*, 292 So.2d 575, 579 (La.1973).

Recognizing that although our jurisprudence holds that district courts have discretion regarding the determination whether to grant a new summary judgment hearing, in the case *sub judice*, the district court should hold a proper contradictory hearing when an appellate record is necessary for a sufficient review. A proper application of La. C.C.P. art. 1973 necessitates a careful examination of the facts and circumstances to prevent the miscarriage of justice.<sup>6</sup>

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opportunity to effectively represent his client. While it is important to resolve cases efficiently, we should be mindful of "the time constraints and pressures imposed on lawyers by the exigencies of litigation practice." General Administrative Rules, Section 11.

<sup>6</sup> See *Smith v. All. Compressors*, 2005-855, pp.9-10 (La. App. 3 Cir. 2/1/06), 922 So.2d 674, 680-81 (where the court reasoned that a proper application of La. C. C. P. art. 1973 necessitates a careful examination of the facts and circumstances of each case to prevent the miscarriage of justice when a party is prejudiced by an attorney's error.).

A district court's summary denial of a motion for new trial alleging newly discovered evidence after a granting of a motion for summary judgment that dismisses a case in its entirety is quite different from a district court's summary denial of a motion of a new trial alleging newly discovered evidence after a recent trial on the merits. The former deprives litigants of their day in court and denies them a trial on the merits.<sup>7</sup>

In Plaintiff's Motion for New Trial and Memorandum in Support of a Motion for New Trial, Plaintiff documented the hindering circumstances that prevented him from locating Mr. Johnny Polk, an Audubon employee who witnessed the accident and corroborates Plaintiff's allegations, such as: (1) Plaintiff attorney was not involved in the case for two years and seven months, during which time little discovery and few depositions were taken; (2) when Plaintiff attorney returned to the case, he hired a private investigator to find the workers that were named in Ms. Greenwood's deposition, but the investigator was only able to determine that Mr. Polk might be in the New Orleans area; (3) all of Defendants' kitchen and wait staff Plaintiff sought to find were no longer living at the addresses supplied by Defendants, as they were displaced by Hurricane Katrina; and (4) Plaintiff was at the added disadvantage of just getting his file back from his previous law firm representation who had withdrawn almost at the same time that the Motion for Summary Judgment was filed, and without adequate time to gather and present his evidence. Plaintiff should have been allowed to present this evidence at a contradictory hearing in order to properly make an appellate record for a sufficient review.

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<sup>7</sup> Similarly, the summary denial of a motion for new trial pertaining to a recent denial of a motion for summary judgment does not deprive a litigant a trial on the merits as does the summary denial of a motion for new trial pertaining to a recent grant of a motion for summary judgment that dismisses a litigant's case in its entirety.