NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2504

CYD HIGGINS

VERSUS

ALBERT RICHARD AND LIBERTY MUTUAL FIRE INSURANCE COMPANY

Judgment Rendered: June 12, 2009

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 546,389
The Honorable Timothy E. Kelley, Judge Presiding

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Charlotte A. Pugh **Pamela L. Ashman** **Baton Rouge, LA**	**Counsel for Plaintiff/Appellant,** **Cyd Higgins**
Keith S. Giardina **Baton Rouge, LA**	**Counsel for Defendants/Appellees,** **Albert Richard and Liberty Mutual Fire Insurance Company**

BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

Downing, J. concurs

WHIPPLE, J.

This matter is before us on appeal by plaintiff, Cyd Higgins, from a judgment of the trial court granting summary judgment in favor of defendants, Albert Richard and his homeowner insurer, Liberty Mutual Fire Insurance Company ("Liberty Mutual").

On October 30, 2005, plaintiff was present at the home of Albert Richard and was assisting him in converting a gutted bread truck into a hunting camp. The truck was located in Richard's driveway, which was somewhat sloped, where it was sitting on blocks. In order to enter and exit the truck, Richard constructed a box-type step made of plywood, consisting of a front, a top, and two sides, that sat on the concrete driveway and led to the interior steps of the bread truck. While exiting the truck to retrieve a piece of wood, plaintiff stepped onto the wooden step. The step collapsed, causing her to fall and sustain injuries. The following weekend, plaintiff fell again on the step while exiting the truck. After the second fall, Richard added a piece of wood to the bottom of the step for more support and stability. Once the truck was moved to the location where Richard hunts, Richard eventually burned the step and built new ones.

As a result of her injuries, plaintiff filed suit seeking damages against Richard and Liberty Mutual contending that the "makeshift step" was "inherently dangerous," that Richard had a duty to warn guests of its dangerous condition, and that Richard had breached his duty to provide for the safety of his guests.

The defendants filed a motion for summary judgment, contending that the step did not create an inherently dangerous condition, that plaintiff would be unable to prove at trial that the step created an inherently dangerous condition or defect creating an unreasonable risk of harm, and that they were not responsible for plaintiff's damages. Defendants further contended that, by her own testimony, plaintiff had previously exited and entered the truck 15 to 20 times with no

problem, and that plaintiff was the only person out of many who had entered the truck to fall on the step. In support of their motion for summary judgment, they offered the deposition testimony of Richard and plaintiff, along with a photograph of the step.

Plaintiff responded by filing an opposition to the motion for summary judgment. In her opposition, plaintiff contended that she was unable to have the step examined by an expert because Richard had destroyed the step by burning it after he had received notice of her claim. Plaintiff further contended that "due to the spoliation of this critical piece of evidence by [Richard]," an adverse presumption should be applied that it was defective and presented an unreasonable risk of harm.

After a hearing on May 5, 2008, the trial court granted the defendants' motion for summary judgment finding that "[t]here's no proof of a defect or unreasonably dangerous [condition]." A written judgment dismissing plaintiff's claims with prejudice was signed by the trial court on June 23, 2008. Plaintiff now appeals.

Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, i.e., whether there is any genuine issue of material fact and whether the movant is entitled to judgment as a matter of law. Samaha v. Rau, 2007-1726 (La. 2/26/08), 977 So. 2d 880, 882-883. In this case, we find that there are genuine issues of fact remaining, which can not be determined on the record before us, given the unresolved issue of the destruction of evidence and the presumption of spoliation.

The theory of "spoliation of evidence" alleged by plaintiff refers to an intentional destruction of evidence for the purpose of depriving opposing parties of its use. Quinn v. RISO Investments, Inc., 2003-0903 (La. App. 4th Cir. 3/3/04),

869 So. 2d 922, 926-927, writ denied, 2004-0987 (La. 6/18/04), 876 So. 2d 808. A failure of a litigant to produce evidence within his reach raises a presumption that evidence would have been detrimental to his case. Randolph v. General Motors Corporation, 93-1983 (La. App. 1st Cir. 11/10/94), 646 So. 2d 1019, 1026, writ denied, 95-0194 (La. 3/17/95), 651 So. 2d 276. The presumption of spoliation is not applicable when the failure to produce the evidence has a reasonable explanation. Allen v. Blanchard, 99-0277 (La. App. 1st Cir. 3/31/00), 763 So. 2d 704, 709. Where suit has not been filed and there is no evidence that a party knew suit would be filed when the evidence was discarded, the theory of spoliation of evidence does not apply. Quinn, 869 So. 2d at 927.

In support of her opposition to the motion for summary judgment, plaintiff countered with her own affidavit, wherein she attests "[t]hat at the time the step was burned by Mr. Richard, Mr. Richard knew that she had been injured on the step; knew she was seeking compensation from his homeowner's insurer and knew that the insurer was scheduled to inspect the step." The defendants have presented no evidence to counter or refute this allegation. Although Richard testified that his burning the steps was not "intentional," his good faith, or lack thereof, can not be determined without a trier of fact weighing the evidence and making credibility determinations regarding this essential item of proof in support or contravention of plaintiff's claims. As recognized in the jurisprudence, summary judgment is rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge, or good faith. Quinn, 869 So. 2d at 927. Thus, in cases where spoliation is alleged, summary judgment is not appropriate where the motive for destruction of evidence is disputed and where material issues of fact remain as to knowledge of a claim and the circumstances and motives surrounding the destruction of critical evidence. See Robertson v.

Frank's Super Value Foods, Inc., 2008-592 (La. App. 5th Cir. 1/13/09), ___ So. 2d ___.

Because we find a material issue of fact remains as to whether Richard had notice of this pending claim at the time he burned the step at issue, we find that the trial court erred in granting summary judgment on the limited record before it. Accordingly, the judgment of the trial court is reversed and this matter is remanded for further proceedings. We issue this opinion in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1B. Costs of this appeal are assessed against the defendants/appellees, Albert Richard and Liberty Mutual Fire Insurance Company.

REVERSED AND REMANDED.