

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 2031

STEVE WAYNE POURCIAU, CHARLOTTE M. POURCIAU & STEVE WAYNE  
POURCIAU ON BEHALF OF HIS MINOR CHILD, TAYLOR WAYNE POURCIAU

VERSUS

ECCO NINO, INC. d/b/a NINO'S RESTAURANT, ABC INSURANCE COMPANY,  
WINGS THREE LA, L.L.C. D/B/A BUFFALO WILD WINGS GRILL & BAR,  
DEF INSURANCE COMPANY, EQUITY ONE (LOUISIANA PORTFOLIO) LLC,  
GHI INSURANCE COMPANY

Judgment rendered **AUG 23 2012**

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Appealed from the  
19th Judicial District Court  
in and for the Parish of East Baton Rouge, Louisiana  
Trial Court No. C564575  
Honorable R. Michael Caldwell, Judge

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GLORIA A. ANGUS  
OPELOUSAS, LA  
AND  
PAUL J. SCOPTUR  
MILWAUKEE, WI

JEFFREY P. ROBERT  
MANDEVILLE, LA

CHRISTIAN B. BOGART  
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BATON ROUGE, LA

ATTORNEYS FOR  
PLAINTIFFS-APPELLANTS  
STEVE WAYNE POURCIAU,  
CHARLOTTE POURCIAU & STEVE  
WAYNE POURCIAU ON BEHALF  
OF HIS MINOR CHILD, TAYLOR  
WAYNE POURCIAU

ATTORNEY FOR  
DEFENDANT-APPELLEE  
ECCO NINO, INC. d/b/a NINO'S  
RESTAURANT

ATTORNEYS FOR  
DEFENDANT-APPELLEE  
EQUITY ONE, LLC

*Handwritten signature and initials, possibly "J.P. Robert" and "G.A. Angus", with the date "8/23/12" and "JEW" written below.*

ALBERT D. GIRAUD  
BATON ROUGE, LA

ATTORNEY FOR  
DEFENDANT-APPELLEE  
WINGS THREE, LA, L.L.C., d/b/a  
BUFFALO WILD WINGS GRILL &  
BAR

\* \* \* \* \*

**BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.**

**PETTIGREW, J.**

In this personal injury action, the plaintiff, a service technician, allegedly slipped and fell while descending a ladder affixed to the side of a commercial building. The instant appeal is one of two presently before this court that arise from the trial court's grant of summary judgments in favor of different defendants. For the following reasons, the trial court's grant of summary judgment in favor of ECCO Nino, Inc. d/b/a Nino's Restaurant ("Nino's") and Equity One, LLC ("Equity One") is hereby affirmed.

On March 1, 2007, plaintiff-appellant Steve Wayne Pourciau, a heating and air conditioning repairman, responded to a service call at the restaurant leased by defendant, Nino's, and located in the Bluebonnet Village Mall. The Bluebonnet Village Mall is a commercial strip shopping center owned by defendant, Equity One, and situated on Bluebonnet Boulevard in Baton Rouge, Louisiana.

The air conditioning unit that served Nino's was located on the roof of the shopping center and was accessible via a metal service ladder permanently affixed to the rear wall of the building. Said ladder was situated between the rear entrances of Nino's and an adjoining restaurant leased by defendant Wings Three LA, LLC, d/b/a Buffalo Wild Wings Grill & Bar ("BWW"). In order to repair the unit, Mr. Pourciau backed his pickup truck into the service area behind BWW and ascended the service ladder to the roof. After removing a defective fan motor from the unit, Mr. Pourciau descended from the roof carrying the motor via the service ladder and returned along the same path to his truck.

After purchasing a new motor at a parts store, Mr. Pourciau returned to the shopping center about forty minutes later and parked his truck in the same location. Mr. Pourciau ascended the service ladder again with the new motor and performed the necessary repairs. The repairs took approximately fifteen minutes. While descending the ladder after repairing the fan, Mr. Pourciau claimed that one of his feet slipped from an upper rung causing him to fall approximately twenty feet to the concrete below.

Mr. Pourciau alleged that after his fall, he hobbled about ten feet to his truck, which was backed up into the service area behind the BWW restaurant. As he sat on the tailgate of his truck removing his boot, Mr. Pourciau noticed an oily residue on the soles of

his boots. Mr. Pourciau further alleged that as a result of this fall he suffered severe and debilitating injuries to his right foot. He thereafter underwent surgical procedures in March and December of 2007, to reconstruct his shattered heel.

On February 28, 2008, a Petition for Damages was filed on behalf of Mr. Pourciau, his wife Charlotte M. Pourciau, and their minor child Taylor Wayne Pourciau (collectively, "Plaintiffs"), in the 19<sup>th</sup> Judicial District Court. Named as defendants therein were Nino's, BWW, and Equity One. Plaintiffs filed an Amended and Supplemental Petition on July 17, 2008, wherein they named AIG Insurance Services, Inc., GAB Robins North America, Inc.,<sup>1</sup> Travelers Insurance Company, and Fireman's Fund Insurance Company as additional defendants in this action.

On January 21, 2010, plaintiffs filed another Amended and Supplemental Petition wherein they named Griffin Industries, Inc. ("Griffin"), the provider of a grease disposal vat for discarded cooking oil at the BWW restaurant, as an additional defendant in this matter. Plaintiffs subsequently dismissed their claims against defendant Griffin with prejudice after Griffin filed a motion seeking summary judgment.

In April 2011, co-defendants BWW, Nino's, and Equity One similarly sought dismissal of plaintiffs' claims against them through the filing of individual motions for summary judgment. Following a hearing held on June 27, 2011, the trial court granted the motions for summary judgment filed on behalf of co-defendants Nino's and Equity One and accordingly dismissed plaintiffs' claims against said defendants at plaintiffs' costs. From this judgment, plaintiffs now appeal.<sup>2</sup>

In connection with their appeal in this matter, plaintiffs contend that the trial court erred in granting summary judgment in favor of Nino's and Equity One as there remained material issues of fact relative to Nino's and Equity One's knowledge of the vice, control over the premises, and failure to warn.

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<sup>1</sup> Plaintiffs later dismissed defendant GAB Robins North America, Inc. voluntarily through a motion and order signed on December 12, 2008.

<sup>2</sup> The trial court, following an earlier hearing on May 9, 2011, previously granted BWW's motion for summary judgment and dismissed plaintiffs' claims against BWW at plaintiff's costs. Plaintiffs have similarly appealed from that judgment, which is addressed in our companion opinion in **Steve Wayne Pourciau, et al. v. Ecco Nino, Inc. et al.**, 2011 CA 1789 (La. App. 1 Cir. \_\_\_/\_\_\_/\_\_\_).

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. **Gonzales v. Kissner**, 2008-2154, p. 4 (La. App. 1 Cir. 9/11/09), 24 So.3d 214, 217. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Aucoin v. Rochel**, 2008-1180, p. 5 (La. App. 1 Cir. 12/23/08), 5 So.3d 197, 200, writ denied, 2009-0122 (La. 3/27/09), 5 So.3d 143.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse 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. P. art. 966(C)(2); **Robles v. ExxonMobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Boudreaux v. Vankerhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725,729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482, p. 3 (La. App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830.

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A motion for summary judgment is rarely appropriate for disposition of a case requiring judicial determination of subjective facts such as intent, motive, malice, good faith, or knowledge. **Bilbo for Basnaw v. Shelter Insurance Company**, 96-1476, p. 5 (La. App. 1 Cir. 7/30/97), 698 So.2d 691, 694, writ denied, 97-2198 (La. 11/21/97), 703 So.2d 1312. Further, issues that require the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. **Granda v. State Farm Mutual Insurance Company**, 04-1722, pp. 4-5 (La. App. 1 Cir. 2/10/06), 935 So.2d 703, 707, writ denied, 06-0589 (La. 5/5/06), 927 So.2d 326. In addition, questions of negligence are generally inappropriate for disposition by summary judgment. **Stroder v. Horowitz**, 34,048, p. 4 (La. App. 2 Cir. 12/20/00), 775 So.2d 1175, 1178; **McGill v. Cochran Sysco Foods, Div. of Sysco Corp.**, 29,154, p. 2 (La. App. 2 Cir. 2/26/97), 690 So.2d 952, 953, writ denied, 97-0798 (La. 5/1/97), 693 So.2d 730; and **DeStevens v. Harsco Corp.**, 94-1183, p. 3 (La. App. 4 Cir. 3/16/95), 652 So.2d 1054, 1057.

Louisiana Civil Code articles 2317 and 2317.1 define the basis for delictual liability for defective things. In pertinent part, La. Civ. Code art. 2317.1 provides:

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.

Thus, to establish liability based on ownership of a thing, the plaintiff must show that (1) the defendant was the owner or custodian of a thing which caused the damage, (2) the thing had a ruin, vice, or defect that created an unreasonable risk of harm, (3) the ruin, vice, or defect of the thing caused the damage, (4) the defendant knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect, (5) the damage could have been prevented by the exercise of reasonable care, and (6) the defendant failed to exercise such reasonable care. La. Civ. Code art. 2317.1; **Granda**, 04-1722 pp. 5-6, 935 So.2d at 707-708.

In the present appeal, plaintiffs argue that defendants Equity One, Nino's, and BWW shared custody or garde over the service ladder and its surrounding area. In their brief to this court, plaintiffs cite **Dupree v. City of New Orleans**, 99-3651, pp. 7-8 (La. 8/31/00), 765 So.2d 1002, 1009, for the proposition that the principle of garde is much broader than ownership, and that multiple parties may have garde of the same thing. In **Dupree**, our supreme court referenced its earlier opinion in **Doughty v. Insured Lloyds Insurance Company**, 576 So.2d 461, 464 (La. 1991), and stated that custody or garde of the thing causing injury is a fact-driven determination. **Dupree**, 99-3651 p. 7, 765 So.2d at 1009. The supreme court in **Dupree** further stated:

In attempting to define a test for determining who has custody or garde of a thing, we have set forth several general principles to assist the trier-of-fact. Most notably we have stated that in determining whether a thing is in one's custody or garde, courts should consider (1) whether the person bears such a relationship as to have the right of direction and control over the thing; and (2) what, if any, kind of benefit the person derives from the thing.

**Dupree**, 99-3651 p. 8, 765 So.2d at 1009 [Citations omitted].

With these principles in mind, we now evaluate the evidence in the record before us to determine whether Equity One and/or Nino's had garde over the service ladder and its surrounding area on the date of Mr. Pourciau's alleged accident.

In the instant case, Equity One had a valid lease with BWW, and in Section 7.2 and in Exhibit C of the lease agreement, subparts H and K, BWW agreed to indemnify and hold Equity One harmless from any liability arising from defects in the premises. Additionally, La. R.S. 9:3221<sup>3</sup> requires that plaintiffs demonstrate that Equity One had knowledge of a defect in its premises or should have known that its lessees failed to act reasonably to prevent a defect.

In granting summary judgment in favor of Nino's and Equity One, the trial court, concluded:

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<sup>3</sup> Louisiana Revised Statutes 9:3221 provides, in pertinent part, as follows:

[T]he owner of premises leased under a contract whereby the lessee assumes responsibility for their condition is not liable for injury caused by any defect therein to the lessee or anyone on the premises who derives his right to be thereon from the lessee, unless the owner knew or should have known of the defect or had received notice thereof and failed to remedy it within a reasonable time.

The grease was dumped there by [BWW]. [BWW] cleaned it up, had procedures for reviewing or checking the area for possible unsafe conditions. No evidence that [Nino's] created the condition. No evidence that Equity One created the condition. No evidence that Equity One had knowledge. . . . No showing that [Nino's] dumped grease there. No showing that they had any duty to make any inspection or have any knowledge of the condition there. And there has been no proof to show any constructive or actual knowledge or creation of the condition by either of these defendants. Accordingly, the motion for summary judgment for both of these defendants is granted, and [plaintiffs'] claims dismissed as to these defendants.

We find that the record supports the trial court's grant of summary judgment in favor of defendants, Nino's and Equity One, as plaintiffs have failed to establish a genuine issue of material fact that would preclude summary judgment.

Upon review of the record in this matter, we find the trial court properly granted the motion for summary judgment filed by defendants, Nino's and Equity One. All costs associated with this appeal are assessed against plaintiffs, Steve Wayne Pourciau, his wife, Charlotte M. Pourciau, and their minor child, Taylor Wayne Pourciau.

**AFFIRMED.**