

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2012 CA 0341**

**JUDITH C. MERWIN**

**VERSUS**

**DOUGLAS G. AND ELIZABETH ANN BENZER SPEARS**

*RHP by [initials]*  
*JEW*

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**On Appeal from the 21st Judicial District Court  
Parish of Tangipahoa, Louisiana  
Docket No. 2008-0001813, Division "H"  
Honorable Zorraine M. Waguespack, Judge Presiding**  
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**BEFORE: PARRO, HUGHES,<sup>1</sup> AND WELCH, JJ.**

Judgment rendered APR 10 2013

*Hughes, J. - concurs.*

<sup>1</sup> Justice Jefferson D. Hughes III is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.

**PARRO, J.**

Plaintiff challenges the summary judgment granted by the trial court in favor of the defendants, Douglas G. and Elizabeth Ann Benzer Spears, dismissing the plaintiff's claim against them. For the reasons that follow, we reverse and remand.

**FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

In May 2007, Judith C. Merwin and her live-in companion, Dragan Petrovic, began living in a home owned by Mr. and Mrs. Spears (the Spears) pursuant to a lease agreement. On July 11, 2007, Ms. Merwin purchased the home and the underlying tract of land from the Spears. Ms. Merwin also obtained a homeowner's insurance policy from Farmers Insurance Exchange (Farmers)<sup>2</sup> to provide coverage for the property.

Shortly after purchasing the home, Ms. Merwin and Mr. Petrovic each left for their assignments aboard separate ships as merchant marines.<sup>3</sup> At the times they left, the home was in good physical working order, and neither one had noticed any water leaking or smelled any musty or moldy odor in the house. However, when Mr. Petrovic returned to the house on September 11, 2007, upon concluding his employment as a merchant marine, he immediately noticed that the carpets in the house were saturated with water, and he smelled a strong odor of mildew and mold. He then called Ms. Merwin while she was still at sea to inform her of the damages. Ms. Merwin subsequently reported the water leak and damage to Farmers.

Ms. Merwin finally returned home from her assignment on September 25, 2007. The next day, Farmers' adjuster, John Wesley Page, Jr., inspected the home and concluded that the water leak was a "slow leak" that had predated the policy. Ms. Merwin then hired her own inspector, Danny Jackson, who was able to determine the source of the leak by removing a portion of the sheetrock in the master bathroom, revealing a leak in which water sprayed out of a pipe found inside the wall. Mr. Page

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<sup>2</sup> The petition originally incorrectly named this defendant as Farmers Insurance Group; however, the parties later filed a joint motion to substitute Farmers Insurance Exchange as the proper party defendant.

<sup>3</sup> Mr. Petrovic left for his assignment on July 26, 2007, and Ms. Merwin left on July 28, 2007.

then returned to the home for a second inspection; however, despite being made aware of Mr. Jackson's findings, Mr. Page continued to maintain that the leak was a slow leak that had predated the policy. Based on Mr. Page's findings, Farmers denied coverage with reference to certain exclusions under the policy.

Thereafter, Ms. Merwin filed a petition for redhibition and damages, naming the Spears and Farmers as defendants. In the petition, Ms. Merwin alleged that the property had redhibitory defects at the time of the sale that rendered the home completely useless for its intended purpose and that the Spears knew or should have known of these defects. Therefore, she requested a rescission of the sale and a return of the purchase price, plus an award of attorney fees. In the alternative, she requested a reduction in the purchase price.

Ms. Merwin further alleged that Farmers was liable for the damages to the home caused by the water leak, as well as additional damages for lost wages, mental anguish, living expenses, and damages to the personal contents of the home. Ms. Merwin further contended that Farmers' failure to pay pursuant to the policy constituted bad faith on its part.

Farmers and the Spears each filed motions for summary judgment, which were denied by the trial court after separate hearings.<sup>4</sup> Thereafter, Crawford Engineering, LLC (Crawford Engineering) and American Leak Detection conducted various inspections of Ms. Merwin's home and its plumbing system on behalf of Farmers and ultimately determined that the leak in the home was, "more likely than not, sudden and accidental, occurred during the absence of the homeowner, and caused damages to the lower interior finishes of the home[,] including baseboards, laminated wood flooring, carpet, wood door trim[,] and wall paneling." After receiving the results of these inspections, Farmers unconditionally tendered two sums of money to Ms. Merwin

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<sup>4</sup> Farmers applied for supervisory writs to this court concerning the denial of its motion for summary judgment; however, this court denied the writ application on February 4, 2010. Merwin v. Spears, 09-2365 (La. App. 1st Cir. 2/4/10)(unpublished).

pursuant to the homeowner's policy.<sup>5</sup>

Thereafter, Ms. Merwin filed a motion for summary judgment on the issue of whether Farmers had arbitrarily and capriciously denied coverage and had acted in bad faith. The Spears also filed a second motion for summary judgment, seeking to have Ms. Merwin's petition dismissed as to them. While the Spears' second motion was largely identical to the first motion, the second motion also relied on certain evidence obtained from the tests run by Farmers' expert witnesses, which was not available at the time the Spears filed the first motion.

The trial court granted Ms. Merwin's motion for summary judgment on the issue of Farmers' bad faith, but refused to certify it as a final judgment.<sup>6</sup> The trial court also granted the Spears' motion for summary judgment and dismissed Ms. Merwin's claim against them. It is from this judgment that Ms. Merwin has appealed.

#### **APPLICABLE LAW**

In determining whether summary judgment is appropriate, appellate courts conduct a *de novo* review of the evidence, employing the same criteria that govern the district court's determination of whether summary judgment is appropriate. Schwehm v. Jones, 03-0109 (La. App. 1st Cir. 2/23/04), 872 So.2d 1140, 1144. On a motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the moving party's burden on the motion is to 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, 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

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<sup>5</sup> Farmers tendered two checks to Ms. Merwin. One was in the amount of \$51,109.65, and the other was in the amount of \$4,000.

<sup>6</sup> On November 14, 2011, Farmers applied for supervisory writs to this court concerning the granting of Ms. Merwin's motion for summary judgment, finding that it had acted in bad faith. This court denied the writ, Merwin v. Spears, 11-2256 (La. App. 1st Cir. 3/28/11)(unpublished); however, the supreme court granted the writ, and in a per curiam, reversed the judgment of the trial court, finding genuine issues of material fact existed as to whether Farmers' initial decision to deny the claim had been reasonable, and remanded the matter for further proceedings. Merwin v. Spears, 12-0946 (La. 6/22/12), 90 So.3d 1041.

fact, and the moving party is entitled to judgment as a matter of law. See LSA-C.C.P. art. 966(C)(2).

A fact is material if it is essential to a cause of action under the applicable theory of recovery. Generally, material facts are those that potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of a legal dispute. Smith v. Our Lady of the Lake Hosp., Inc., 93-2512 (La. 7/5/94), 639 So.2d 730, 751. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Guardia v. Lakeview Regional Medical Center, 08-1369 (La. App. 1st Cir. 5/8/09), 13 So.3d 625, 628.

In a contract of sale, the seller warrants the buyer against redhibitory defects, or vices, in the thing sold. LSA-C.C. art. 2520. A defect is redhibitory when it renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a buyer the right to obtain rescission of the sale. Id. A defect is redhibitory also when, without rendering the thing totally useless, it diminishes its usefulness or its value so that it must be presumed that a buyer would still have bought it but for a lesser price. The existence of such a defect limits the right of a buyer to a reduction of the price. Id. A buyer may choose to seek only reduction of the price even when the redhibitory defect is such as to give him the right to obtain rescission of the sale. LSA-C.C. art. 2541. In an action for rescission because of a redhibitory defect, the court may limit the remedy of the buyer to a reduction of the price. Id.

## **DISCUSSION**

In their second motion for summary judgment, the Spears contend that the alleged redhibitory defect did not exist at the time of sale. In support of this argument, the Spears rely on Ms. Merwin's pleadings, as well as the affidavits and depositions of Ms. Merwin and Mr. Petrovic, which unequivocally demonstrate that neither of them observed any water release in the home, nor did they smell any musty and/or

mildew/mold odor in the home, from the date of the sale through the dates they left for their respective assignments aboard separate ships as merchant marines. The Spears also rely on these depositions to demonstrate that there was no evidence of any leak and no water damage during the time that Ms. Merwin and Mr. Petrovic lived in the house prior to the act of sale.

The Spears further rely on the report produced by Farmers' expert, Crawford Engineering. This report noted the existence of a cracked PVC joint behind the sheetrock of the wall in the master bathroom. According to the report, the crack was sizeable and allowed a substantial amount of water to flow freely within the wall cavity under minimal test pressure and flow. Because of the sizeable nature of the crack and the considerable amount of water capable of flowing through the crack, Crawford Engineering concluded that the leak was, more likely than not, sudden and accidental.

The Spears contend that these findings, as well as the affidavits and depositions of Ms. Merwin and Mr. Petrovic, demonstrate that the water leak was not a slow and gradual leak that existed prior to the sale. Instead, the Spears argue that, because the leak was very substantial, any resulting damage would have been noticeable in a very short period of time. As such, the leak could only have occurred subsequent to the date of sale.

Ms. Merwin acknowledges that she saw no evidence of any water leak or damage from the time she moved into the house in May 2007 through July 28, 2007, when she left for her assignment aboard ship as a merchant marine. However, the lack of any obvious damage to the home during that period is not at issue. Indeed, had Ms. Merwin been aware of the leak at the time of the sale, the Spears would owe no warranty for any damages resulting therefrom, because the leak would have been known to Ms. Merwin at the time of sale. See LSA-C.C. art. 2521. Instead, the issue is whether the defect that ultimately led to the leak existed at the time of the sale.

A review of the Crawford Engineering report indicates that the leak was the result of a crack in a PVC joint directly behind the master bathroom tub. Upon closer

inspection, Crawford Engineering determined that the PVC line servicing this joint had been pulled into place under tension before being secured with glue, instead of being secured with an additional Tee-joint.<sup>7</sup> Based on this information, Crawford Engineering concluded that the PVC joint damage, which resulted in the leak, occurred suddenly, due to stresses within the joint that were applied during initial installation.

According to the deposition of Douglas Spears, he and his wife had contracted for the building of the house and began living in it in 1965. The house originally had copper plumbing; however, at some point they had to replace the copper lines with PVC lines. Mr. Spears acknowledged that he did some minor plumbing work around the house, and, although he doubted that he had, he could not remember if he had installed these PVC lines himself. In any event, it is clear that the installation of the PVC lines, complete with the allegedly improper installation of the line servicing the PVC joint directly behind the master bathroom tub, which is the alleged defect in this matter, took place prior to the sale.

Based on a thorough *de novo* review of the record, it is clear that the Spears have failed to negate a crucial element in their defense against Ms. Merwin's claim that the home contained a redhibitory defect at the time of the sale. Because the Spears failed to point out to the court that there was an absence of factual support for one or more elements essential to Ms. Merwin's claim, the burden of proof never shifted to Ms. Merwin to offer any evidence in support of her claim. See LSA-C.C.P. art. 966(C)(2). Accordingly, the summary judgment granted in favor of the Spears is reversed.

#### **DECREE**

For the foregoing reasons, the summary judgment in favor of Douglas G. and Elizabeth Ann Benzer Spears is hereby reversed, and this matter is remanded to the trial court for further proceedings. All costs of this appeal are assessed to Douglas G. and Elizabeth Ann Benzer Spears.

#### **REVERSED AND REMANDED.**

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<sup>7</sup> According to Crawford Engineering's report, Tee-joints are used to change direction of water flow and to allow tension/compression-free connections.