NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0893

RHP
JDH
by RHP

CHAD WEHRLIN AND MICHELLE WEHRLIN, INDIVIDUALLY AND ON BEHALF OF THEIR MINOR CHILDREN, BAILEY WEHRLIN AND KOREY MILLER

VERSUS

THE MANITOWOC COMPANY, INC., H&E EQUIPMENT SERVICES, INC., AND XYZ CORPORATION

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 590,976, Section 22
Honorable Timothy E. Kelley, Judge Presiding

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BEFORE: PARRO, HUGHES,[1] AND WELCH, JJ.

Judgment rendered MAY 07 2013

Welch, J. dissents and assigns reasons

[1] **Justice Jefferson D. Hughes III is serving as judge ad hoc by special appointment of the Louisiana Supreme Court.**

PARRO, J.

A heavy equipment operator was injured when disassembling part of a crane at the direction of his employer, the lessee of the crane. The operator, along with his family members, filed suit for damages against the manufacturer of the crane and against the owner/lessor of the crane. The trial court signed a judgment that granted summary judgment in favor of the owner/lessor of the crane and dismissed all of the plaintiffs' claims against the owner/lessor. The plaintiffs appeal from this adverse judgment. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, Grove U.S. L.L.C. (Grove) manufactured, sold, and delivered a Grove RT890E 90-ton rough terrain crane (Grove crane) to H&E Equipment Services, Inc. (H&E), one of its authorized distributors. H&E is located in Gonzales, Louisiana. In turn, in late October 2006, H&E leased the newly-purchased Grove crane to Dow Chemical Company (Dow) for use at Dow's facility in Taft, Louisiana. The Grove crane remained on lease to Dow at its Taft facility for approximately four years.

On April 11, 2008, Grove issued a notice, identified as "Product Improvement Program G08-103" (PIP), advising its distributors of an issue "regarding the weld quality on the boom swingaway extension" of several models of its cranes, including the Grove crane identified above. Specifically, Grove's PIP stated, in pertinent part, that it had been "determined that some of the welds on the lacings [of the boom swingaway extension] may not be to specifications or may be missing." The PIP required that the welds on the lacings be inspected and repaired as necessary, in accordance with attached instructions. As an authorized Grove distributor, H&E was authorized to perform the PIP repair to the Grove crane it leased to Dow. And, under the terms of its distributor agreement with Grove, H&E employed personnel who were qualified and factory trained in the assembly, disassembly, maintenance, and service of Grove cranes.

A "boom swingaway extension," as referenced in Grove's PIP, is also referred to in the industry as a "folding boom extension," a "bifold boom extension," or a "jib," and

is a structure that can be affixed to the end of a crane's main boom to provide additional reach. When in use, the folding boom extension is in an "erect" position; when not in use, the folding boom extension is "stowed" in a folded position on the side of the crane's main boom. On the Grove crane at issue in this appeal, the folding boom extension was comprised of two components: a base section constructed of metal lacing, sometimes singly referred to as the "jib"; and a "fly section" constructed of solid metal, sometimes referred to as the "stinger." In this opinion, we use the term "folding boom extension" to refer to the two-component structure (i.e., including the base/jib and the fly/stinger) attached to the Grove crane.[2]

In approximately September 2009, over a year after having received the PIP, H&E sent Brian Gremillion, one of its field technicians, to Dow to inspect the Grove crane to ascertain whether the PIP repair was required. Mr. Gremillion determined there was one missing weld on the Grove crane's folding boom extension, and he told Craig Hitt, a Dow work coordinator, not to use the folding boom extension. According to Mr. Gremillion, he did not remove and take the folding boom extension with him that day, because Dow was using the Grove crane.[3]

On December 22, 2009, Kelly Brown, an H&E service manager, called Mr. Hitt at Dow to inform him that he was sending two H&E field technicians to remove the "jib" from the Grove crane and to return it to H&E's facility so that the PIP repair could be performed. According to Mr. Brown, his use of the term "jib" meant the entire folding boom extension, including both the base/jib section and the fly/stinger section. In response, Mr. Hitt told Mr. Brown to simply send out an H&E truck, and he would have his Dow employees remove the "jib" and load it onto the truck for return to H&E's facility.[4] Mr. Hitt considered the "jib" removal a "routine task" for Dow employees and

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[2] When it is unclear whether the term "jib" is being used to refer to the entire folding boom extension or to the jib/base alone, we use the term "jib" in quotation marks.

[3] Kelly Brown, H&E's service manager, explained that, most of the time, H&E will not remove a "jib" until there is a means of transportation readily available to return it to H&E's facility.

[4] According to Mr. Brown, Mr. Hitt told him, "[D]on't worry about sending your guys; the crane is in use, and when they're finished with this crane, I'll have them bring it back to the yard and remove the jib."

had no concerns about their ability to safely perform the task. Mr. Brown readily agreed to the arrangement, based on his knowledge that Dow was a "safety conscious company" with "highly qualified" crane operators, and based on H&E's frequent interaction with Dow and its employees as it related to the operation of the Grove crane. Mr. Hitt and Mr. Brown did not discuss how the "jib" was going to be removed.

Mr. Hitt directed Chad Wehrlin, a heavy equipment operator, to remove the "jib" from the Grove crane, and Mr. Wehrlin proceeded to do so with the assistance of three other operators, Dwayne Folse, Max Rankin, and Donald Spahr.[5] Mr. Hitt understood that H&E was only going to pick up the base section of the folding boom extension, what he referenced as the "jib," so he told the operators to remove the "jib," but not the "stinger." Mr. Hitt did not discuss how to remove the jib/base with the operators, leaving the decision as to the method of removal to them.

With Mr. Wehrlin taking the lead, the operators assumed their respective roles in removing the jib/base from the Grove crane. Mr. Wehrlin was to rig the jib/base for lifting, and after the rigging was complete, he was to remove a pin from one end of the jib/base to detach it from the Grove crane's main boom. To accomplish his task, Mr. Wehrlin was standing on the deck of the crane, which was approximately six feet off of the ground. Mr. Rankin and Mr. Spahr were standing on the ground, and Mr. Wehrlin asked Mr. Spahr to release the pin on the other end of the jib/base, at the "nose" end of the Grove crane's folding boom extension. Mr. Folse operated a second crane, the assist crane, which was to lift the jib/base from the Grove crane's main boom, once it was detached, and set it on the ground.

In deciding how to rig and remove the jib/base from the Grove crane, Mr. Wehrlin relied on a label affixed to the jib/base titled "BOOM EXTENSION DATA" (boom data label) and also relied on the placement of four metal eyelets welded to the top of the jib/base during the manufacturing process. The boom data label showed both the

[5] Mr. Wehrlin, Max Rankin, and Dwayne Folse began the job, and Donald Spahr joined them shortly thereafter. Mr. Wehrlin was a direct employee of Union Carbide Corporation, and Mssrs. Rankin, Folse, and Spahr were direct employees of Jacobs Field Services, Inc. All four men reported to work at Dow's Taft facility and worked under Mr. Hitt's supervision.

jib/base and stinger/fly sections of the folding boom extension and provided data for determining the center of gravity for both sections of the folding boom extension. Further, according to a Grove corporate representative, the position of the metal eyelets welded to the top of the jib/base encompassed the center of gravity for both sections of the folding boom extension and allowed for the level lifting of both sections of the folding boom extension in a stable fashion. However, Mr. Wehrlin interpreted the boom data label as providing center of gravity data for the jib/base alone (and not for both sections) and determined his rigging method accordingly. And, as for the four metal eyelets, Mr. Wehrlin considered these to be "lifting lugs" and assumed they were positioned on the top of the jib/base so as to provide the correct center of gravity for stably lifting the jib/base alone. Based on his two incorrect assumptions regarding the boom data label and the metal eyelet placement on the jib/base, Mr. Wehrlin rigged the load for lifting with an incorrect center of gravity.

Mr. Wehrlin completed the rigging of the jib/base and remained standing on the Grove crane deck to help guide the jib/base out of its stowed position. After he released the pin on his end of the jib/base, Mr. Wehrlin's end "shot up in the air" approximately 15 feet while he was holding on to it.[6] Mr. Wehrlin let go of the jib/base, dropped back to the deck of the Grove crane, and then either fell or jumped from the deck to the ground to avoid being hit by the jib/base as it came down. As a result of the accident, Mr. Wehrlin sustained a severe left elbow dislocation, a fractured left wrist, and injuries to his left forearm. He underwent three surgeries and extensive physical therapy and did not work for several months. He returned to light duty as a heavy equipment operator at Dow in July 2010 and then to full duty in September 2010.

In May 2010, Mr. Wehrlin and his wife, Michelle Werhlin, filed suit, individually,

[6] It is unclear whether Mr. Wehrlin or Mr. Spahr released his pin first. Although Mr. Folse testified in his deposition that he saw Mr. Wehrlin remove his pin first, the other three operators were not sure in which order the pin release occurred.

and on behalf of their minor children, Bailey Wehrlin and Korey Miller,[7] against Grove and H&E.[8] In their petition, the plaintiffs alleged Grove was liable as the manufacturer of the Grove crane and asserted causes of action for defective design, defective construction, failure to warn, failure to conform to an express warranty, and any and all negligence and/or fault under the Louisiana Products Liability Law (LPLA), LSA-R.S. 9:2800.51 et seq. The plaintiffs also alleged that H&E was liable for failure to maintain the Grove crane in a safe condition; failure to warn of the Grove crane's dangerous condition of which H&E was aware; negligently offering the unreasonably dangerous Grove crane for lease; and any and all other negligence and/or fault allowed under Louisiana law. Both defendants answered the plaintiffs' petition and asserted affirmative defenses. The parties then spent over a year conducting discovery and addressing other pretrial matters. In March 2011, Dow and Union Carbide Corporation, Mr. Wehrlin's direct employer and a wholly owned subsidiary of Dow, intervened in the action to recover medical and indemnity benefits paid to Mr. Wehrlin after his accident.

In October 2011, H&E filed a motion for summary judgment seeking dismissal of all of the plaintiffs' claims against it. The plaintiffs responded by filing a motion for partial summary judgment regarding H&E's liability under LSA-C.C. art. 2317.1, as the owner of the allegedly defective Grove crane; and a separate motion for partial summary judgment regarding Grove's liability under the LPLA, as the manufacturer of the allegedly defective Grove crane. Grove filed its own motion for partial summary judgment, seeking dismissal of several of the plaintiffs' claims against it.

In January 2012, the trial court held a hearing on the cross motions for summary judgment.[9] At the hearing, the trial court concluded, in oral reasons, that H&E had not

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[7] Korey Miller is Mrs. Wehrlin's son from a previous marriage and Mr. Wehrlin's stepson.

[8] In their original petition, the plaintiffs named "The Manitowoc Company, Inc." as a defendant, identifying that entity as the manufacturer of the Grove crane. Grove answered the petition, stating that it had been "incorrectly named in the [p]etition ... as 'The Manitowoc Company, Inc.'" The plaintiffs subsequently amended their petition to name Grove as the manufacturer of the Grove crane. Plaintiffs also originally named "XYZ Corporation" as a defendant; the identity of this defendant is unknown.

[9] The trial court addressed several other matters at the January 2012 hearing; these matters are not at issue in this appeal.

breached any duty to Dow that resulted in Mr. Wehrlin's injuries. On February 24, 2012, the trial court signed a judgment granting H&E's motion for summary judgment and dismissing all of the plaintiffs' claims against H&E, with prejudice.[10] The plaintiffs filed a petition for appeal of the trial court's judgment, and the trial court signed an order granting a devolutive appeal to this court.[11]

On appeal, in three assignments of error, the plaintiffs contend the trial court manifestly erred in concluding that H&E breached no duty to Dow. First, they argue that the trial court erred in finding H&E had no "specialized" knowledge, regarding the use of the metal eyelets for lifting, beyond Dow's knowledge of such, when LSA-C.C. art. 2317.1 only requires actual or constructive knowledge of the defect. Second, they argue that the missing weld on the Grove crane's jib/base was another defect, and that the evidence established that H&E failed to exercise reasonable care by failing to perform the PIP repair at the time the weld defect was discovered, approximately three months prior to Mr. Wehrlin's accident. Third, they contend the trial court erred in granting summary judgment in favor of H&E, because there are genuine issues of material fact regarding H&E's alleged negligence in allowing Dow to remove the "jib" without first confirming that Dow could safely do so.

SUMMARY JUDGMENT AS TO THE PLAINTIFFS' CUSTODIAL LIABILITY CLAIM

A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B); Henry v. NOHSC Houma No. 1,

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[10] On February 27, 2012, the trial court signed a judgment denying the plaintiffs' motion for summary judgment as to H&E's liability. Further, on January 27, 2012, the trial court signed a judgment granting in part, and denying in part, Grove's motion for partial summary judgment as to certain of the plaintiffs' claims against Grove. The plaintiffs have not challenged the denial of their motion for partial summary judgment as to H&E's liability; further, the January 27, 2012 judgment is not before this court in this appeal.

[11] After the appeal was lodged, this court issued a rule to show cause order seeking clarification as to whether the February 24, 2012 judgment was actually the judgment from which the plaintiffs sought an appeal. Later, this court issued an order maintaining the appeal from the February 24, 2012 judgment. **Chad Wehrlin et al. v. The Manitowoc Company, Inc. et al.**, 12-0893 (La. App. 1st Cir. 8/24/12) (unpublished action).

L.L.C., 11-0738 (La. App. 1st Cir. 6/28/12), 97 So.3d 470, 473, writ denied, 12-1761 (La. 11/2/12), 99 So.3d 677. The burden of proof on summary judgment remains with the mover. However, if 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 him to negate all essential elements of the adverse party's claim, action, or defense, but rather 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 fact. LSA-C.C.P. art. 966(C)(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. Pugh v. St. Tammany Parish School Bd., 07-1856 (La. App. 1st Cir. 8/21/08), 994 So.2d 95, 97, writ denied, 08-2316 (La. 11/21/08), 996 So.2d 1113; see also LSA-C.C.P. art. 967(B).

Summary judgment is seldom appropriate for determinations based on subjective facts, such as motive, intent, good faith, knowledge, or malice. See Monterrey Center LLC v. Ed.ucation Partners, Inc., 08-0734 (La. App. 1st Cir. 12/23/08), 5 So.3d 225, 232. Nonetheless, Louisiana courts have recognized that, while "rare," summary judgment may be granted on subjective issues when no issue of material fact exists concerning that issue, or when the plaintiff fails to prove a factual dispute concerning the subjective issue. See Cote v. City of Shreveport, 46,571 (La. App. 2nd Cir. 9/21/11), 73 So.3d 435, 440 (summary judgment was proper when plaintiff failed to show employer had knowledge of employee's violent propensities), and Keppard v. AFC Enterprises, Inc., 00-2474 (La. App. 4th Cir. 11/2/8/01), 802 So.2d 959, 966 (summary judgment was appropriate when plaintiff presented nothing more than unsupported allegations regarding defendant's malice).

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. Greater Lafourche Port Com'n v. James Const. Group, L.L.C., 11-1548 (La. App. 1st Cir. 9/21/12), 104 So.3d 84, 88. 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. Henry, 97 So.3d at 473.

Louisiana Civil Code articles 2317 and 2317.1 define the basis for delictual liability for defective things, generally known as "custodial liability."[12] Granda v. State Farm Mut. Ins. Co., 04-1722 (La. App. 1st Cir. 2/10/06), 935 So.2d 703, 707-08, writ denied, 06-0589 (La. 5/5/06), 927 So.2d 326. To establish liability under these codal articles based on ownership or custody 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. Id. at 708.

H&E would not bear the burden of proof at trial; therefore, its burden on the motion for summary judgment did not require that it negate all essential elements of the plaintiffs' custodial liability claim. Rather, H&E's burden on the motion for summary judgment was to point out to the court that there was an absence of support for one or more elements essential to the plaintiffs' claim. La. C.C.P. art. 966(C)(2); see Babin v. Winn-Dixie Louisiana, Inc., 00-0078 (La. 6/30/00), 764 So.2d 37, 39-40. At that point, the burden would shift to the plaintiffs to present evidence that genuine issues of

[12] The legislation enacting LSA-C.C. art. 2317.1, effective April 16, 1996, abolished the concept of strict liability governed by prior interpretations of LSA-C.C. art. 2317. Since that date, a more appropriate term for liability under Articles 2317 and 2317.1 is seemingly "custodial liability," which now requires a finding of actual or constructive knowledge on behalf of the defendant. See Morgan v. City of Baton Rouge, 06-0158 (La. App. 1st Cir. 4/4/07), 960 So.2d 1013, 1016 n.1, writ denied, 07-1239 (La. 9/21/07), 964 So.2d 342.

material fact existed as to one or more elements essential to their custodial liability claim. Id.; also see Daniels v. USAgencies Cas. Ins. Co., 11-1357 (La. App. 1st Cir. 5/3/12), 92 So.3d 1049, 1054-55.

To establish H&E's custodial liability under LSA-C.C. art. 2317.1, plaintiffs would be required to prove, among other things, that H&E, as the owner of the Grove crane, knew, or reasonably should have known, that the Grove crane had a defect that created an unreasonable risk of harm. The plaintiffs identify one alleged defect in this case as the "improperly placed" metal eyelets welded to the top of the Grove crane's jib/base.[13] The plaintiffs also describe these metal eyelets as "lifting lugs." The plaintiffs argue, in their first assignment of error, that the trial court erred in finding H&E had no "specialized" knowledge that the metal eyelets could not be used to lift a folding boom extension or jib/base alone in a level manner. We agree that custodial liability under LSA-C.C. art. 2317.1 requires only actual or constructive knowledge of a thing's defect;[14] however, we find the plaintiffs have not presented sufficient evidence to create a genuine issue of material fact that H&E had such knowledge, i.e., that the metal eyelets could not be used to lift a folding boom extension or a jib/base alone in a level manner.

The concept of constructive knowledge under LSA-C.C. art. 2317.1 imposes a duty to exercise reasonable care to discover apparent defects in a thing in the defendant's garde or legal custody. See Broussard v. Voorhies, 06-2306 (La. App. 1st Cir. 9/19/07), 970 So.2d 1038, 1045, writ denied, 07-2052 (La. 12/14/07), 970 So.2d

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[13] In this appeal, the plaintiffs focus on H&E's "knowledge" of the alleged metal eyelet defect and do not argue that H&E is liable for damages due to Grove's allegedly misleading boom data label.

[14] Louisiana Civil Code article 2317.1 states:

> 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. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.

The use of the phrase "knew or, in the exercise of reasonable care, should have known" in LSA-C.C. art. 2317.1 is otherwise referred to as actual or constructive knowledge. See Myers v. Dronet, 01-5 (La. App. 3rd Cir. 6/22/01), 801 So.2d 1097, 1108.

535. Eric Fidler, Grove's corporate representative,[15] testified in his deposition that the four metal eyelets welded to the top of the Grove crane's jib/base were appropriately located so that the folding boom extension could be lifted "in a stable fashion." And, when deposed, experts from both Grove and H&E testified that, generally, rigging crews often use manufacturer-placed metal eyelets for lifting. However, neither the Grove crane's operator's manual, which was located in the Grove crane's cab on the day of the accident and which had a specific section with directions for removing the folding boom extension, nor any labeling on the folding boom extension itself, indicated that the metal eyelets on the Grove crane's jib/base were intended for this purpose. Further, although H&E personnel were factory trained in the assembly, disassembly, maintenance, and service of Grove cranes, there is no evidence that H&E had ever used the metal eyelets for lifting the Grove crane's folding boom extension or the jib/base alone. In fact, Mr. Brown, H&E service manager, and Mr. Raymond Hardison, H&E vice-president, both testified as H&E corporate representatives that they did not know the purpose of the metal eyelets and had never been told that they were for lifting. And, Mr. Gremillion, H&E field technician, testified that his personal opinion was that the metal eyelets were to "keep the [hoist] cable on top of the [folding boom extension] when rigging," but he had not been "taught" that by Grove.

In opposition to H&E's motion for summary judgment, the plaintiffs argue that the deposition testimony of Richard Simoneaux, H&E service manager in April 2008, shows that H&E knew not to use the metal eyelets for lifting. In his deposition, Mr. Simoneaux admitted that "movement" was a "known hazard" of "jib" removal. However, he explained that H&E's general practice was to use four slings spread out along a "jib" to remove it, and that this removal method minimized the risk that the "jib" would move when detached. He explained that he had never seen H&E personnel use the metal eyelets when removing the folding boom extension or the jib/base from a Grove crane or any other crane. When asked if this method was avoided because using

[15] Louisiana Code of Civil Procedure article 1442 sets forth the allowance and procedure for depositions of corporations, associations, or governmental agencies. See Yokum v. 615 Bourbon Street, L.L.C , 07-1785 (La. 2/26/08), 977 So.2d 859, 866 n.16.

metal eyelets would not allow a level lift, Mr. Simoneaux stated, "I really don't know. We just didn't do it that way."

We find that this case presents one of those "rare" instances where summary judgment was warranted on the subjective issue of knowledge. See Cote v. City of Shreveport, 73 So.3d at 440, and Keppard v. AFC Enterprises, Inc., 802 So.2d at 966. The fact that H&E did not or would not use the metal eyelets to remove "jibs" does not equate to actual or constructive knowledge that doing so created an unreasonable risk of harm. Rather, Mr. Simoneaux's testimony simply demonstrates that H&E used a different method to remove "jibs" than lifting with metal eyelets. And, contrary to the plaintiffs' argument, Mr. Simoneaux's admission that "movement" was a known hazard of "jib" removal is insufficient evidence to create a genuine issue of material fact as to whether H&E had knowledge that the metal eyelets could not be used to perform a level lift of a folding boom extension or a jib/base alone. See Strickland v. Tangi-Lanes Bowling, Inc., 08-1803 (La. App. 1st Cir. 8/6/09) (unpublished), 2009 WL 2413672. The plaintiffs have failed to produce factual support sufficient to establish that they can satisfy their evidentiary burden of proof at trial on this essential element of their custodial liability claim under LSA-C.C. art. 2317.1.[16] See LSA-C.C.P. art. 967(B). This assignment of error is without merit.

In their second assignment of error, the plaintiffs identify the missing weld on the Grove crane's jib/base as another defect that created an unreasonable risk of harm in this case. According to the plaintiffs, once H&E discovered the missing weld on the Grove crane's jib/base, H&E had a duty, as custodian of the Grove crane, to promptly repair the defect. They argue that H&E's failure to remove the folding boom extension from the Grove crane when discovered, and to then repair the missing weld, constituted a failure to exercise reasonable care that could have prevented Mr. Wehrlin's accident.

[16] In concluding that the plaintiffs failed to present sufficient evidence of the "knowledge" component of a custodial liability claim under LSA-C.C. art. 2317.1, we make no determinations regarding the remaining components (existence of a defect, prevention of the damage by the exercise of reasonable care, and failure to exercise reasonable care) of the plaintiffs' custodial liability claim.

To establish H&E's custodial liability based on the defective weld, the plaintiffs would be required to prove, among other things, that the defective weld created an unreasonable risk of harm and that this defect caused the plaintiffs' damages. See Granda, 935 So.2d at 708. Without addressing whether the defective weld presented an unreasonable risk of harm, we find no merit to plaintiffs' argument, because it is clear that the defective weld was not the defect that caused Mr. Wehrlin's accident or the plaintiffs' damages. When Mr. Gremillion ascertained that the Grove crane's folding boom extension was missing one weld, it is undisputed that he told Mr. Hitt not to use the folding boom extension. Further, it is also undisputed that Dow was not using the folding boom extension when Mr. Wehrlin's accident occurred; thus, there was no failure of the folding boom extension because of the missing weld. Simply put, although Mr. Wehrlin may have been removing the folding boom extension because of the defective weld, he was not injured because of the defective weld. This assignment of error is also without merit.

In summary, we find H&E has pointed out to the court that there is an absence of factual support for one or more elements essential to the plaintiffs' custodial liability claim under LSA-C.C. art. 2317.1. First, there is insufficient proof to create a genuine issue of material fact as to whether H&E had knowledge that the metal eyelets could not be used to levelly lift a folding boom extension or a jib/base alone. Second, there is no proof that the defective weld on the Grove crane's folding boom extension caused Mr. Wehrlin's accident. For these reasons, we conclude there are no genuine issues as to material fact on the plaintiffs' custodial liability claim, and the trial court properly granted summary judgment on that claim in favor of H&E.

SUMMARY JUDGMENT AS TO THE PLAINTIFFS' NEGLIGENCE CLAIM

In their third assignment of error, the plaintiffs contend the trial court erred in granting summary judgment in favor of H&E, because there are genuine issues of material fact regarding H&E's alleged negligence in allowing Dow to remove the "jib" without first confirming that Dow could safely do so. In opposition, H&E argues that it

was not negligent in allowing a "sophisticated and experienced owner and user of cranes like Dow" to remove the "jib."

We first note that, similar to the rarity of summary judgment on subjective issues such as knowledge, summary judgment is likewise not ordinarily appropriate for questions of negligence or for determinations regarding the reasonableness of a party's acts and conduct under all facts and circumstances of the case. See Biggs v. Cancienne, 12-0187, p. 3 (La. App. 1st Cir. 9/21/12), ___ So.3d ___, ___, and Greater Lafourche Port Com'n, 104 So.3d at 88. Louisiana Civil Code articles 2315 and 2316 provide the basic codal foundation for delictual liability for intentional torts and negligence in our state. See Granda, 935 So.2d at 707-08. Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles of these articles. For liability for damages to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard of care (the breach of duty element); (3) the defendant's substandard conduct was a cause in fact of the plaintiff's injuries (the cause in fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of protection element); and (5) actual damages (the damage element). Rideau v. State Farm Mut. Auto. Ins. Co., 06-0894 (La. App. 1st Cir. 8/29/07), 970 So.2d 564, 573, writ denied, 07-2228 (La. 1/11/08), 972 So.2d 1168. When no factual dispute exists and no credibility determinations are required, the legal question of the existence of a duty is appropriately addressed by summary judgment. Boland v. West Feliciana Parish Police Jury, 03-1297 (La. App. 1st Cir. 6/25/04), 878 So.2d 808, 816, writ denied, 04-2286 (La. 11/24/04), 888 So.2d 231. However, breach of duty, cause in fact, and actual damages are all factual issues. Manno v. Gutierrez, 05-0476 (La. App. 1st Cir. 3/29/06), 934 So.2d 112, 116-17. As with the plaintiffs' custodial liability claim discussed above, H&E would not bear the burden of proof at trial on the plaintiffs'

negligence claim; therefore, H&E's burden on the motion for summary judgment was to point out to the court that there was an absence of factual support for one or more elements essential to the plaintiffs' negligence claim. LSA-C.C.P. art. 966(C)(2). At that point, the burden would shift to the plaintiffs to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial. Id.

In support of its argument that it breached no duty, H&E points to the testimony of several witnesses as establishing that its decision to accept Dow's offer to remove the "jib" was reasonable. First, H&E points to the conversation that occurred between Mr. Brown and Mr. Hitt on the day the arrangement was made. On December 22, 2009, Mr. Brown called Mr. Hitt to inform him that two H&E field technicians were being sent to Dow to remove the "jib" from the Grove crane, so that it could be returned to H&E's facility for performance of the PIP repair. In response, Mr. Hitt told Mr. Brown to simply send out an H&E truck, and he would have his Dow employees remove the "jib" and load it onto the truck for return to H&E's facility. The deposition testimony of both Mr. Brown and Mr. Hitt clearly indicates that neither man questioned the competence of Dow's employees to perform the task. Mr. Brown testified that he readily agreed to the arrangement, based on his knowledge that Dow was a "safety conscious company" with "highly qualified" crane operators. In explaining why he accepted Mr. Hitt's offer, Mr. Brown stated, in his deposition:

> [W]hen I accepted that offer, I did it for a couple of reasons. Number one is because I had -- I know that [Dow] is not a fly-by-night company. I know that not only is it a safety conscious company, but the operators are highly qualified.
>
> I also know that my mechanics -- I don't visit the site. I'm in the shop, and I'm pulled at from every angle all day long. But my people visit the site. They know these guys, first name basis, one on one.
>
> Immediately after Craig [Mr. Hitt] made this offer --I had already told Brian [Gremillion] and Jared, saddle up, you're going to Dow to remove this. I told him, I said, Craig [Mr. Hitt] offered to have them take it off. At that time[,] even my people never hesitated to say great. They didn't say, oh, I don't know about that. Nobody had a question as to what was being done, how it was being done, or who was going to perform it or if it could be done safely.
>
> It was just a sewing machine. We talk to these people daily, and when I say daily, please don't hold me to that. Frequently.

Further, Mr. Hitt's deposition testimony also demonstrates that he had no reservations about having his Dow employees remove the "jib," because he considered the "jib" removal to be a "routine task" for them. The deposition testimony of Mssrs. Wehrlin, Folse, and Spahr, the three operators actually involved in the removal of the jib/base, also demonstrates that they considered "jib" removal to be a routine procedure and part of their regular job duties. Finally, H&E points to the testimony of the plaintiffs' expert, Patrick Fisher, as supporting the reasonableness of H&E's decision. When questioned by H&E's counsel, Mr. Fisher agreed that an experienced crane operator would be expected to be able to safely remove a "jib" from a crane. Based on his past dealings with Dow, he also agreed that Dow was a "very" safety-conscious company, and it was "reasonable" for H&E to assume that Dow personnel could safely remove a "jib."

Once H&E presented the above evidence, which indicates that its decision to allow Dow to remove the "jib" was reasonable, the burden shifted to the plaintiffs to produce factual support sufficient to establish that they would be able to prove H&E's decision was unreasonable, and hence, the breach of a duty. The plaintiffs argue that H&E breached its duty, because it knew the metal eyelets attached to the folding boom extension could not be used to lift a "jib" in a level manner, and H&E failed to inform Dow of this alleged defect. We have previously rejected the plaintiffs' argument that H&E had such knowledge. In disposing of the plaintiffs' custodial liability claim, we determined the plaintiffs had produced insufficient evidence that H&E had knowledge that the metal eyelets could not be used to lift a folding boom extension or a jib/base alone in a level manner. Thus, the plaintiffs cannot again rely on this alleged knowledge to establish H&E acted unreasonably in allowing Dow to remove the "jib," because they have presented insufficient evidence to show that H&E even had this knowledge of the alleged defect. If H&E had no knowledge that the metal eyelets could not be used to lift the "jib" in a level manner, it breached no duty by failing to inform

Dow not to use the metal eyelets. The plaintiffs' argument to the contrary is without merit.

Summary judgment on a negligence claim may be granted when a plaintiff fails to submit sufficient evidence to create a genuine issue of material fact that the defendant breached a duty. See Daniels v. USAgencies Casualty Insurance Company, 11-1357 (La. App. 1st Cir. 5/3/12), 92 So.3d 1049, 1058) (summary judgment appropriate where plaintiff failed to submit proof that motorist's conduct constituted a breach of any duty owed by a rescuer who was confronted with an emergency situation); Bergeron v. Argonaut Great Central Insurance Company, 10-0842 (La. App. 1st Cir. 3/21/11), 64 So.3d 255, 259 (summary judgment appropriate where restaurant failed to submit sufficient proof that state agency breached its duty to enforce sanitary code); Gunter v. Jefferson Davis Parish, 11-1018 (La. App. 3rd Cir. 2/1/12), 84 So.3d 705, 709-10 (summary judgment properly granted where wrongful death plaintiff failed to produce sufficient evidence to establish that police officers acted unreasonably in responding to alleged domestic dispute).

Based on our de novo review of the record, we find the plaintiffs have failed to produce sufficient proof to create a genuine issue of material fact that H&E breached the alleged duty in this case. H&E has pointed out to the court that there is insufficient proof to show that H&E was unreasonable in accepting Dow's offer to remove the "jib." We agree that the summary judgment evidence, consisting of testimony that H&E and Dow both considered "jib" removal to be a "routine task" that Dow employees were clearly qualified to perform, demonstrates that H&E's decision to accept Dow's offer to remove the "jib" was indeed reasonable. Because the plaintiffs have failed to produce sufficient evidence to show they will be able to carry their burden of proving a breach of this duty by H&E at trial, which is an essential element of their negligence claim, we conclude the trial court properly granted summary judgment in H&E's favor on their negligence claim.

CONCLUSION

For the foregoing reasons, we affirm the trial court's summary judgment in favor of H&E Equipment Services, Inc., which dismissed all claims asserted by Chad Wehrlin and Michelle Wehrlin, individually, and on behalf of their minor children, Bailey Wehrlin and Korey Miller, against H&E Equipment Services, Inc. Costs of this appeal are assessed to the plaintiffs.

AFFIRMED.

CHAD WEHRLIN, ET AL.

VERSUS

THE MANITOWOC COMPANY, INC., ET AL.

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2012 CA 0893

WELCH, J., dissenting.

A motion for summary judgment is rarely appropriate to dispose of a case requiring determination of subjective facts such as knowledge. Moreover, issues requiring the determination of reasonableness of acts and conduct of the parties under all of the facts and circumstances of the case cannot ordinarily be disposed of by summary judgment. **Greater Lafourche Port Commission v. James Construction Group, L.L.C.**, 2011-1548 (La. App. 1st Cir. 9/21/12), 104 So.3d 84, 88. I do not find this case to present one of those "rare" instances where summary judgment is warranted on the subjective issue of knowledge or on the issue of the reasonableness of a defendant's conduct. Instead, I find that there are genuine issues of material fact with respect to H&E's liability under both theories advanced by plaintiffs that preclude the granting of summary judgment in favor of H&E. Therefore, I respectfully dissent.

One theory of liability advanced by plaintiffs is that H&E breached its duty to exercise reasonable care by failing to timely implement the PIP repair. Plaintiffs contend that H&E's conduct in allowing the crane to remain in service after it discovered the missing weld violated OSHA regulations requiring that a defective crane be taken out of service for repair. They submit that had H&E timely performed the PIP repair when it discovered the missing weld in September 2009 by using its own "jib" removal procedures, Mr. Wehrlin's accident would not have occurred in December 2009. Plaintiffs further contend that H&E's breach of its duty to exercise reasonable care was not absolved by Dow's subsequent offer to

remove the jib and that the trial court erred in concluding that Dow's offer to remove the jib absolved H&E of liability for H&E's own negligence. In opposition, H&E contends that there is no evidence to support a factual finding that its delay in implementing the PIP repair was the cause of Mr. Wehrlin's accident.

The evidence on the motion for summary judgment reflects that Patrick Fisher, an expert civil engineer, who has experience in rigging, cranes, safety, and OSHA-related matters, initially stated in his deposition that given the same set of circumstances, Mr. Wehrlin's accident would still have occurred even if the "jib" had been removed in September 2009 when the defective weld was discovered. However, Mr. Fisher had previously prepared an "Industrial Accident Evaluation" in which he concluded that the failure by Grove and H&E to timely and properly implement the PIP contributed to the events of this incident. Mr. Fisher's report also found that the duty and obligation of H&E as an authorized distributor and owner of the Grove crane was to comply with the directive in a timely manner; however, the PIP was neglected for 17 months and neglected during annual mandatory OSHA inspections. His report further stated that OSHA regulations require that any conditions noted through inspections shall be corrected before operation of the crane is resumed. He concluded, "[t]he documentary evidence indicated that multiple inspections by H&E representatives of the [Grove crane] occurred and that the labels and weld defects in the bi-fold boom extension assembly ... should have caused the inspections to be unsatisfactory and caused the crane to be taken out of service until the deficiencies were corrected and re-inspected." Later, when questioned by plaintiffs' attorney, Mr. Fisher opined that had H&E acted earlier, employing the procedures H&E utilized itself (using two cranes and then taking off the jib), the accident would not have happened. Lastly, Mr. Fisher agreed with plaintiffs' attorney's position that a reasonably prudent

operator would have taken the crane out of service long before the date of Mr. Wehrlin's accident.

Additionally, H&E's service manager at the time of the accident, Mr. Brown, admitted in his deposition that the lapse of time between H&E's receipt of the PIP in April 2008 and its inspection of the crane in September 2009 was "excessive." He also admitted that the inspection should have been performed sooner than September 2009 to determine if the PIP repair was required.

I conclude that this evidence is sufficient to create a genuine issue of material fact as to whether H&E's delay in performing the PIP repair was unreasonable and whether that conduct was a substantial factor in causing the accident. The reasonableness of H&E's conduct regarding implementation of the PIP repair is a factual question that can only be answered after examining all of the facts and circumstances of the case. Thus, I find that the trial court erred in granting summary judgment in favor of H&E on plaintiffs' negligence claim.

Furthermore, I believe that there are genuine issues of material fact on the knowledge portion of plaintiffs' custodial liability claim that likewise preclude the granting of summary judgment on that theory of liability. To succeed at trial, plaintiffs must prove that H&E had constructive knowledge of the alleged defect—the improperly placed metal eyelets (lifting lugs) welded to the top of the crane's jib/base. I find that the testimony of Mr. Simoneaux, H&E's service manager, and evidence of the custom and practices in the industry create a genuine issue of fact as to whether H&E knew or should have known that it was improper to use the lifting lugs because the equipment would not lift level.

For the above reasons, I would reverse the summary judgment entered in favor of H&E and remand to the trial court for further proceedings.