NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0929

RODDY CHIASSON

VERSUS

J.E.L., LLC., ABC INSURANCE COMPANY, PAPA BEAR'S PIZZA, LLC. D/B/A MIKE'S DAIQUIRIS AND GRILL, DEF INSURANCE COMPANY, CIRCLE K STORES, INC., AND XYZ INSURANCE COMPANY

DATE OF JUDGMENT: MAR 2 1 2013

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 574,840, SEC. 27, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TODD HERNANDEZ, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.
Pettigrew J. Dissents

Disposition: AFFIRMED.

KUHN, J.

Plaintiff-appellant, Roddy Chiasson, appeals the trial court's judgment, granting summary judgment in favor of defendant-appellee, Circle K Stores, Inc. (Circle K), and dismissing his claims for damages after he sustained personal injuries in a bicycle accident. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 2009, Chiasson was riding his mountain bike, in an area known as Tigertown in Baton Rouge, generally traveling in an easterly direction to the Circle K convenience store located at 4405 Alvin Dark Avenue to pick up some bread and milk. He traversed a vacant lot adjacent to the Circle K premises on one side and a shopping center located on Bob Pettit Blvd on the other where two bars, JL's Place and Mike's Daiquiris, were housed. Chiasson drove over a speed bump allegedly situated primarily on the western side of the vacant lot and partially of the eastern side on the Circle K premises. Once his front tire crossed over the speed bump, he encountered a pothole, and Chiasson was thrown off his bike approximately 6-8 feet. He put his hand out to break the fall and landed on the ground. Chiasson sustained injuries to his left arm, neck, and back.

On January 29, 2009, Chiasson filed this lawsuit, naming Circle K and its insurer as defendants.[1] After answering the lawsuit, Circle K filed a motion for summary judgment, averring that it did not have custody, control, or garde of the leased premises, and, therefore, it was entitled to be dismissed from the lawsuit. The motion was continued to allow Chiasson more time to conduct discovery. On

[1] In his original and amending petition, Chiasson named various other defendants including the owners of the two bars and their respective insurers, the owners of the premises upon which the bars were located, the owners and the lessees of the vacant lot, and the owners of the Circle K premises.

October 17, 2011, the trial court heard the motion and granted summary judgment in favor of Circle K, dismissing Chiasson's claims with prejudice.[2] This appeal followed.

DISCUSSION

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B. The initial burden of producing evidence at the hearing on the motion for summary judgment is on the mover. ***Schultz v. Guoth***, 2010-0343 (La. 1/19/11), 57 So.3d 1002, 1006. If the mover will not bear the burden of proof at trial on the subject matter of the motion, they need only demonstrate the absence of factual support for one or more essential elements of their opponent's claim, action, or defense. If the moving parties point out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966C(2). A summary judgment is reviewed on appeal *de novo* with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, i.e.,

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[2] Motions for summary judgment filed by defendants Carolyn, Robert, and Todd Sobert, as lessees of the vacant lot and owners of the property upon which the bars were situtated; defendants Papa Bear's Pizza LLC d/b/a Mike's Daiquiris and Grill, Darin Adams, John Landry, and Gaffney Yonan LLC, as owners of Mike's Daiquiris; and defendants JEL, LLC, Darin Damas, and John Landry as owners of JL's Place were also granted by the trial court after the October 17, 2011 hearing. Chiasson has appealed the trial court's dismissal of these defendants in separate appeals. See ***Chiasson v. JEL, Inc.***, 2012-0930, 2012-0931, and 2012-0932 (La. App 1st Cir. --/--/--) (unpublished opinions). The trial court denied a similar motion for dismissal by summary judgment filed by the Circle K premises owners, Rose Vaughan, Robert Bennett, Glynn Hadskey, Margaret Sisson, and (now deceased) Norman Sisson. That action has not yet been the subject of judicial review. See La. C.C.P. arts. 968 and 2083.

determining 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, 882-83.

On appeal, Chiasson urges that outstanding issues of material fact preclude Circle K's dismissal from his lawsuit. Chiasson contends that the language of the lease between Circle K and the premises owners, Rose Vaughan, Robert Bennett, Glynn Hadskey, Margaret Sisson, and (now deceased) Norman Sisson, is ambiguous. And pointing to deposition testimony of Circle K employee, Nancy Lewis, Chiasson maintains that it was Circle K's duty to repair the pothole or that, at a minimum, an outstanding issue of material fact exists as to whose duty it was to repair the pothole.

Contracts have the effect of law for the parties. La. C.C. art. 1983. The courts are obligated to give legal effect to contracts according to the true intent of the parties. See La. C.C. art. 2045. The true intent of the parties to a contract is to be determined by the words of the contract when they are clear, explicit, and lead to no absurd consequences. See La. C.C. art. 2046. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent. ***Id.*** In such cases, the meaning and intent of the parties to the written contract must be sought within the four corners of the instrument and cannot be explained or contradicted by parol evidence. See La. C.C. art. 1848. Contracts, subject to interpretation from the instrument's four corners without the necessity of extrinsic evidence, are to be interpreted as a matter of law, and the use of extrinsic evidence is proper only where a contract is ambiguous after an examination of the four corners of the agreement. It is only

when a contract is ambiguous that we may look to parol evidence to determine the intent of the parties. See ***Guest House of Slidell v. Hills***, 2010-1949 (La. App. 1st Cir. 8/17/11), 76 So.3d 497, 500.

The lease agreement provides in pertinent part:

> 9. **MAINTENANCE**. LESSOR agrees to maintain in good repair the outside walls, roof and floor of the building and surface of the parking areas, sidewalks and driveways, as well as the structural soundness of the building, and all underground gas, water and sewer pipes except those parts of such pipes as are in or directly beneath the floor of the building. LESSEE agrees to keep the inside of the building in good repair, including the plumbing, electrical wiring, air conditioning and heating equipment, and those parts of underground gas, water and sewer pipes as are contained in or are directly beneath the floor of the building, and to paint the exterior walls and be responsible for all glass, casualty damage and reasonable wear and tear excepted. ...
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> 22. **COMMON AREAS**. LESSOR shall be responsible for cleaning and lighting the parking and other common areas of the shopping center ... but LESSEE shall bear a part of the cost of such cleaning and lighting in proportion to the number of square feet of floor space of the building leased by LESSEE as compared with the total number of square feet of floor space of all the buildings in the shopping center. That part of the common areas which primarily serves the customers of the building leased by LESSEE shall be lighted at night during LESSEE'S business hours. Upon the written request of LESSEE, LESSOR shall award a contract for cleaning the common areas to the lowest of three bidders, one of whom may be LESSEE. ...
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> 30. **COMPLETE AGREEMENT**. This lease contains a complete expression of the agreement between the parties and there are no promises, representations or inducements except such as are herein provided.

According to the unambiguous language of the lease agreement, Vaughan, Bennett, Hadskey, and the Sissons, as lessors, were required "to maintain in good repair the ... surface of the parking areas, sidewalks, and driveways." A photograph admitted into evidence by Chiasson shows that the pothole and that

portion of the speed bump that may be situated on the Circle K premises are located on the surface of the parking area. Although Chiasson attempts to distinguish the area because it is gravel and the remainder of the parking area appears to be concrete, we find this to be a distinction without relevance. The photograph clearly shows the area as susceptible of parking in contradistinction from "the inside of the building" and "those parts of underground gas, water and sewer pipes as are contained in or are directly beneath the floor of the building." Because that portion of the premises where the speed bump and pothole were located was the responsibility of the lessors, Circle K did not have custody, control or garde of the alleged unreasonable risk of harm so as to be liable to Chiasson for his injuries. See ***Giorgio v. Alliance Operating Corp.***, 2005-0002 (La. 1/19/06), 921 So.2d 58, 73. Accordingly, the trial court correctly granted summary judgment in favor of Circle K and dismissed it from the lawsuit.[3]

DECREE

For these reasons, the trial court's judgment, granting summary judgment and dismissing Circle K from this lawsuit is affirmed. Appeal costs are assessed against plaintiff-appellant, Roddy Chiasson.

AFFIRMED.

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[3] Chiasson asserted that Circle K undertook a duty to maintain the parking area where the pothole was located because its employees routinely cleaned the premises and offered assistance to him after the accident. But Chiasson offered no evidence that Circle K had actual knowledge of the existence of the pothole prior to the accident, which was located about 33 feet away from the building. Thus, these allegations are insufficient to impose a duty on Circle K to repair the pothole in that portion of the premises that the lessors had contractually agreed to maintain. See La. C.C. arts. 2315 and 2317.1. We also find no merit in Chiasson's suggestion that because an ice machine and pay phone were in the vicinity, Circle K derived benefit from and exercised direction and control over the area where the pothole was located. In addition to a lack of actual knowledge of the presence of the pothole prior to the accident, the record is devoid of any evidence showing that Circle K actually operated and derived a benefit from the ice machine or the phone. Thus, Chiasson's contention is without merit. See ***Giorgio***, 921 So.2d at 73.