STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 1110

SCOTT LOWE AND BETH LOWE

VERSUS

NOBLE, L.L.C., ET AL.

Judgment Rendered: OCT 17 2017

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Appealed from the
Twentieth Judicial District Court
In and for the Parish of West Feliciana
State of Louisiana
Suit Number 21767

Honorable Kathryn J. Jones, Presiding

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, C.J., GUIDRY, AND CHUTZ, JJ.

GUIDRY, J.

In this case arising out of a multi-vehicle accident, plaintiffs, Scott Lowe and Beth Lowe, appeal from a judgment of the trial court granting summary judgment in favor of defendants, Little Pine Island Corporation, Little Pine Island, LP, and John J. Cummings, III, dismissing plaintiffs' claims with prejudice. For the reasons that follow, we affirm in part, reverse in part and remand.

FACTS AND PROCEDURAL HISTORY

Oak Island, consisting of 1,482.60 acres of marshland south of Interstate 10 in New Orleans between the Bayou Sauvage National Wildlife Refuge and Interstate 510, is owned by Little Pine Island Partnership. The general partner of Little Pine Island Partnership is Little Pine Island Corporation, whose sole shareholder is John J. Cummings, III.

On August 24, 2011, Peter Babin IV, an employee of Cummings, observed smoke on Oak Island. Babin called Cummings to report smoke on the property and thereafter contacted the New Orleans Fire Department (NOFD). NOFD responded to the call and determined that there was a marsh fire on the south side of Interstate 10. NOFD investigated the fire but was unable to access it. At that time, NOFD reported that the cause of ignition was "undetermined."

NOFD returned to Oak Island on August 26, 2011, and determined that the area where the smoke was coming from was not accessible. Helicopter water drops over the affected area by the Louisiana Army National Guard began on August 30, 2011, and a command post was set up at Bayou Sauvage. Command post operations ceased between September 1, 2011, and September 4, 2011, due to Tropical Storm Lee affecting the area.

On September 5, 2011, NOFD entered the area affected by the marsh fire by boat and determined that accessibility was almost impossible, that it was almost impossible to get heavy equipment in the area due to the soft ground, and that the

area was very dangerous for NOFD personnel to work in. NOFD continued to monitor the area, and when flames were detected by air on September 10, 2011, more helicopter water drops were conducted. Over the next few months, NOFD continued to monitor the area daily for fire and smoke.

Thereafter, before daybreak on December 29, 2011, Scott Lowe was a guest passenger in a vehicle driven by David Porter, traveling westbound on Interstate 10 in New Orleans in the vicinity of Oak Island. Porter encountered a dense cloud of fog and/or smoke, resulting in zero visibility conditions. Although Porter began braking his vehicle, he nonetheless rear-ended the vehicle in front of him owned by Max Trans, LLC and operated by Tommy Lee Marshall, which was obstructing one or more lanes of travel. The Marshall truck apparently had also encountered the cloud of fog and/or smoke and had rear-ended another vehicle, which was also obstructing one or more lanes of travel on Interstate 10. Immediately after the collision between the Porter vehicle and the Marshall vehicle, the Porter vehicle was struck from the side and/or from behind by two additional vehicles.

On December 20, 2012, Lowe and his wife, Beth Lowe, filed a petition for damages, naming Little Pine Island Corporation, Little Pine Island LP, and John J. Cummings, III (collectively "Little Pine") as defendants,[1] asserting that the cloud of smoke, which either independently or in combination with fog caused the sudden and immediate reduction of visibility on Interstate 10, originated from the marsh fire on Oak Island, which was allowed by Little Pine to burn for many months prior to the accident. Accordingly, plaintiffs alleged that Little Pine was negligent in: allowing an unquenched marsh fire to continue to burn and obstruct visibility along a heavily traveled interstate highway; failing to bring the fire under control over many months; failing to exercise due care under the situation; acting

[1] Although plaintiffs' original petition named twenty-two defendants, we address only their claims against the Little Pine defendants herein.

in a careless manner without due regard for the safety of others, including motorists on Interstate 10 near the fire; and in failing to warn of an unreasonably dangerous condition, created in whole or in part by Little Pine. Particularly as to Cummings, the plaintiffs alleged that as the manager of Little Pine, he was negligent in failing to take action and/or direct employees to remedy the unreasonably dangerous condition posed by the marsh fire that was allowed to burn over many months when he had actual or constructive knowledge of said condition.

Little Pine answered the petition, raising multiple defenses. Particularly, Little Pine asserted that the reduced visibility caused by fog on the morning of the accident was an Act of God for which Little Pine could not be liable and that the cause of the fire on Oak Island was a lightning strike, which also was an Act of God for which Little Pine could not be liable.

Thereafter, Little Pine filed a motion for summary judgment on August 17, 2015,[2] asserting that there was no genuine issue of material fact as to whether Little Pine was liable for an unavoidable Act of God/force majeure, was liable as a landowner for damage caused by the marsh fire, or owed a duty to plaintiffs related to the extinguishment and/or control of the marsh fire. In connection with Little Pine's motion for summary judgment, Little Pine attached 24 exhibits.

Plaintiffs opposed Little Pine's motion for summary judgment, asserting that various exhibits offered by Little Pine in support of the motion were not competent summary judgment evidence under La. C.C.P. art. 967 and moved to strike Little Pine's Exhibit F, and Exhibits J-P. Additionally, plaintiffs asserted that Little Pine bore the burden on the motion for summary judgment to establish Act of God as an affirmative defense and that Little Pine did not provide evidence that the accident

[2] Little Pine had previously filed a motion for summary judgment on December 10, 2014, which the trial court denied as premature.

was directly and exclusively due to natural causes without human intervention and that no negligent behavior by Little Pine contributed to the accident. Particularly, plaintiffs asserted that Little Pine failed to provide evidence that the fire was caused by lightning and asserted that Little Pine contributed to the accident by failing to provide NOFD with access to Oak Island to extinguish the fire and failing to maintain the marshland by using controlled burns. In support thereof, plaintiffs submitted several exhibits, including an affidavit from Michael Henry, an expert in the field of wetlands management.

At the hearing on Little Pine's motion for summary judgment, the trial court heard arguments with regard to plaintiffs' motion to strike, wherein plaintiffs also alleged that Little Pine Exhibits G, H, I, Q, and S were not competent evidence on a motion for summary judgment. Following argument of counsel on the motion to strike, the trial court denied plaintiffs' motion. The trial court thereafter heard argument from counsel on the motion for summary judgment and took the matter under advisement. The trial court subsequently issued written reasons for judgment, finding no affirmative duty on Little Pine to conduct controlled burns; that Cummings was statutorily required to follow the instructions of NOFD, who noted repeatedly that the best course was to let the fire burn out; that the cause of the fire was irrelevant, because there was no evidence anyone with Little Pine started the fire, thus Little Pine's only duty was to call NOFD; and while some smoke may have been a factor, fog and/or smoke caused an unexpected zero visibility event rising to the level of being an Act of God. On December 30, 2015, the trial court signed a judgment granting summary judgment in favor of Little Pine and dismissing plaintiffs' claims against them with prejudice.

The plaintiffs now appeal from the trial court's judgment.

STANDARD OF REVIEW

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. Johnson v. Evan Hall Sugar Cooperative, Inc., 01-2956, p. 3 (La. App. 1st Cir. 12/30/02), 836 So. 2d 484, 486. A motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).[3] Only evidence admitted for purposes of the motion for summary judgment shall be considered by the court in its ruling on the motion. La. C.C.P. art. 966(F)(2). 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. Lieux v. Mitchell, 06-0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So. 2d 1199.

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,

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[3] Louisiana Code of Civil Procedure article 966 was amended and reenacted by La. Acts 2015, No. 422, § 1, with an effective date of January 1, 2016. The amended version of article 966 does not apply to any motion for summary judgment pending adjudication or appeal on the effective date of the Act; therefore, we refer to the former version of the article as applicable in this case. See Acts 2015, No. 422, §§ 2 and 3.

there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. C.C.P. art. 966(C)(2).

DISCUSSION

Motion to Strike

Evidence cited in and attached to a motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection raised in a memorandum or written motion to strike stating the specific grounds therefor. La. C.C. P. art. 966(F)(2) and (3).

In the instant case, plaintiffs objected to certain enumerated exhibits submitted by Little Pine in support of its motion for summary judgment.[4] Plaintiffs alleged that these exhibits were unsworn, unverified, and uncertified, and that Little Pine's attempt to rectify the competency of these exhibits with an affidavit was likewise insufficient, as the affidavit did not specifically reference the exhibits at issue, nor were any exhibits attached to the affidavit.

As noted previously, La. C.C.P. art. 966(B)(2) describes what a court may consider in its determination of a summary judgment motion, namely "pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any[.]" Further, La. C.C.P. art. 967(A) describes the type of documentation a party may submit in support of or in opposition to a motion for summary judgment. Boland v. West Feliciana Parish Police Jury, 03-1297, p. 5 (La. App. 1st Cir. 6/25/04), 878 So. 2d 808, 813, writ denied, 04-2286 (La.

[4] In the instant case, the record contains evidence that plaintiffs objected to Exhibit F and, in conjunction therewith, Exhibits J-P in their memorandum in opposition to Little Pine's motion for summary judgment. The plaintiffs further objected to Exhibits G, H, I, Q, and S at the hearing on their motion to strike and Little Pine's motion for summary judgment. While the objection to Exhibits G, H, I, Q, and S was not raised in a memorandum or by way of written motion to strike as contemplated by La. C.C.P. art. 966(F)(2) and (3), the parties do not dispute that the objection to the admissibility of these exhibits was brought before and addressed by the trial court. Therefore, we will consider plaintiffs' argument with regard to these exhibits on appeal.

11/24/04), 888 So. 2d 231. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth facts that would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. Boland, 03-1297 at p. 5, 878 So. 2d at 813.

Louisiana Code of Civil Procedure articles 966 and 967 do not permit a party to utilize unsworn and unverified documents as summary judgment evidence. Nettle v. Nettle, 15-1875, 15-1876, p. 4 (La. App. 1st Cir. 9/16/16), 212 So. 3d 1180, 1183, writ denied, 16-1846 (La. 12/16/16), 212 So. 3d 1170. A document that is not an affidavit or sworn to in any way, or is not certified or attached to an affidavit, is not of sufficient evidentiary quality to be considered on a motion for summary judgment. Unifund CCR Partners v. Perkins, 12-1851, p. 8 (La. App. 1st Cir. 9/25/13), 134 So. 3d 626, 632. Therefore, in meeting the burden of proof, unsworn or unverified documents, such as letters or reports, annexed to motions for summary judgment are not self-proving and will not be considered; attaching such documents to a motion for summary judgment does not transform such documents into competent summary judgment evidence. Bunge North America, Inc. v. Board of Commerce & Industry, 07-1746, p. 24 (La. App. 1st Cir. 5/2/08), 991 So. 2d 511, 527, writ denied, 08-1594 (La. 11/21/08), 996 So. 2d 1106.

In the instant case, plaintiffs objected to Little Pine's Exhibits F, G, H, I, J, L-P,[5] Q, and S.[6] Plaintiffs asserted that Exhibits G, H, I, J, and L-P are unsworn,

[5] We note that Little Pine withdrew Exhibit K, to which plaintiffs had objected, prior to the hearing on the motion to strike and the motion for summary judgment.

[6] Plaintiffs assert on appeal that they raised an objection as to certain exhibits attached to Exhibit E and raised an objection as to Exhibit V. However, there is no evidence in the record on appeal that an objection was made by plaintiffs as to these particular exhibits to Little Pine's motion for summary judgment, either in writing or at the hearing. Accordingly, because no objection was made on the record, these exhibits are deemed admitted for purposes of the motion for summary judgment. See La. C.C.P. art. 966(F)(2).

unverified, and uncertified and therefore, are inadmissible in support of Little Pine's motion for summary judgment. From our review of the record, we agree. These exhibits consist of a City of New Orleans Calendar of Events, excerpts from a NOFD presentation, NOFD situation reports, press releases, a summary of City of New Orleans conference calls, NOFD incident action plan excerpts, a NOFD timeline, NOFD email correspondence excerpts, and a New Orleans marsh fire meeting summary. None of these documents, however, are sworn to or verified. As such, they are not competent evidence on a motion for summary judgment. See Bunge, 07-1746 at p. 24, 991 So. 2d at 527.

Furthermore, while Little Pine asserts that these exhibits were produced by the City of New Orleans pursuant to a La. C.C.P. art. 1442 deposition, and therefore are authenticated and competent summary judgment evidence, Little Pine failed to submit a copy of said deposition, wherein these particular exhibits are identified and verified, in connection with its motion for summary judgment. See Boland, 03-1297 at p. 7, 878 So. 2d at 814.

Additionally, Exhibit F, which is an affidavit from Robert Eiserloh, Deputy Superintendent of Operations with NOFD, likewise does not certify these exhibits or otherwise render them competent summary judgment evidence. In his affidavit, Eiserloh states that as the Deputy Superintendent of Operations, he has "authority to certify the *subject records*." (Emphasis added.) Eiserloh further states that "[t]he records produced by NOFD pursuant to the Article 1442 Deposition of the City of New Orleans and the New Orleans Police Department and the Continued Article 1442 Deposition of the City of New Orleans and the New Orleans Police Department are true copies of original records maintained by NOFD that were requested ... in the above-captioned matter." Eiserloh finally states that the "*subject records* were kept in the course of the regularly conducted activity of NOFD and were prepared as a regular practice and custom." (Emphasis added.)

However, the affidavit does not name or otherwise identify the "subject records," nor does it specify that the "subject records" are attached to the affidavit. Because the vague wording of Eiserloh's affidavit does not identify or otherwise verify the exhibits at issue, nor indicate that the exhibits at issue are attached to the affidavit, we find that the affidavit does not satisfy the requirements of La. C.C.P. art. 967(A), and itself, is not competent summary judgment evidence. See Capital One Bank (USA), NA v. Sanches, 13-0003, pp. 9-10 (La. App. 4th Cir. 6/12/13), 119 So. 3d 870, 875; see also Unifund CCR Partners, 12-1851 at p. 7, 134 So. 3d at 631-632.

With regard to Exhibit S, which is a New Orleans Police Department (NOPD) crash report excerpt, we note that a police report, which is not authenticated or sworn to in any way, is not competent summary judgment evidence. See Lewis v. Jabbar, 08-1051, p. 6 (La. App. 1st Cir. 1/12/09), 5 So. 3d 250, 255 and Drury v. Allstate Insurance Company, 11-509, p. 8 (La. App. 5th Cir. 12/28/11), 86 So. 3d 634, 638. In this case, Little Pine failed to provide an affidavit or deposition testimony of the police officer who authored the report or other witnesses in support of its motion for summary judgment. See Drury, 11-509 at p. 8, 86 So. 3d at 638. As such, the crash report is not competent summary judgment evidence.

Finally, plaintiffs contend that an incident recall excerpt attached to Exhibit Q, which is the deposition of Edgar Edwards with NOPD, is unsworn, unverified, and uncertified and therefore is inadmissible in support of Little Pine's motion for summary judgment. However, the incident recall excerpt is identified by Edwards in his deposition as "normal New Orleans police report type findings," and it is attached to his deposition. Accordingly, because the incident recall excerpt is attached to Edwards' deposition, wherein it is identified and verified, it may

properly be considered on summary judgment. See Hughes v. Home Depot U.S.A., Inc., 15-0970, p. 5 (La. App. 1st Cir. 12/23/15) (unpublished opinion).

Because we find from our review of the record that Exhibits F, G, H, I, J, L-P, and S are not competent summary judgment evidence, the trial court abused its discretion in denying plaintiffs' motion to strike these exhibits. Accordingly, finding the trial court erred, we grant plaintiffs' motion to strike these exhibits, and they will not be considered in our *de novo* review of the record on appeal.

Liability of Little Pine

With regard to plaintiffs' allegations that Little Pine is liable for failing to extinguish and/or control the marsh fire and failing to warn motorists of its existence, Little Pine asserts that there is no genuine issue of material fact as to whether any duty, breach or substandard conduct by Little Pine exists as a proximate cause of the accident or plaintiffs' alleged damages. Little Pine also asserts that no genuine issue of material fact exists as to whether any conduct by Little Pine or condition of its property caused the fire or its continued burn. Furthermore, Little Pine asserts that the only possible causes of plaintiffs' damages were unexpected forces of nature beyond the control and duty of Little Pine as a landowner.

Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles of La. C. C. art. 2315. For liability to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) whether the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) whether the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) whether the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) whether the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of protection element); and (5) whether the plaintiff

was damaged (the damages element). Cusimano v. Wal-Mart Stores, Inc., 04-0248, pp. 3-4 (La. App. 1st Cir. 2/11/05), 906 So. 2d 484, 486-487. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. Cusimano, 04-0248 at p. 4, 906 So. 2d at 487.

With regard to plaintiffs' claims that Little Pine was negligent for allowing the marsh fire to continue to burn and obstruct visibility on I-10 and failing to bring the fire under control, Little Pine asserts that plaintiffs are unable to meet their burden of establishing that after Little Pine notified NOFD of the marsh fire, it owed any further duty to extinguish and/or control the fire.

Whether a legal duty exists, and the extent of that duty, depends on the facts and circumstances of the case, and the relationship of the parties. Bowman v. City of Baton Rouge/Parish of East Baton Rouge, 02-1376, p. 6 (La. App. 1st Cir. 5/9/03), 849 So. 2d 622, 627, writ denied, 03-1579 (La. 10/3/03), 855 So. 2d 315. Whether a duty is owed is a question of law. Rando v. Anco Insulations, Inc., 08-1163, 08-1169, p. 27 (La. 5/22/09), 16 So. 3d 1065, 1086. Simply put, the inquiry is whether the plaintiff has any law—statutory, jurisprudential, or arising from general principles of fault—to support his claim. Bowman, 02-1376 at p. 6, 849 So. 2d at 627.

Louisiana Revised Statute 33:1971, pertaining to fire ground authority, provides, in pertinent part:

> A. (1) When a situation develops which requires the services of and is responded to by the members of a fire department subject to this Subpart as provided in R.S. 33:1961, ... then the ranking fire protection or fire prevention officer from that jurisdiction dispatched to the scene shall have the sole authority, command, and control of all fire safety personnel and of all persons within the boundaries as described in Subsection B of this Section. ... This authority, command, and control shall be known as the fire ground authority.
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> * * *
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> B. The boundaries of such fire ground authority, command, and control shall extend to the perimeters of the zone of danger, which zone shall be determined by the ranking fire protection or fire

> prevention officer and the chief law enforcement officer at the scene from that jurisdiction.
>
> C. Defiance or violation of this authority, command, and control shall constitute fire fighting interference and shall be punishable in conformance with R.S. 14:206.

Accordingly, once a fire has been reported to the fire department and a fire protection or fire prevention officer responds to the scene, that officer has sole authority of all fire safety personnel and all persons within the zone of danger and the only further duty imposed upon a landowner is to not interfere with said authority.

In the instant case, Little Pine presented the deposition testimony of Chief Timothy A. McConnell, who was the assistant superintendent in charge of operations for the members of NOFD who responded to the marsh fire. Chief McConnell stated that once NOFD was notified about the fire, an incident report was generated and NOFD sent fire engines out to the address. Chief McConnell stated that once on site, NOFD established fire ground authority. As such, NOFD was in charge of extinguishment of the fire, in coordination with other agencies. According to Chief McConnell, NOFD did not initially have physical access to the location of the fire. However, this lack of access, according to Chief McConnell, was due to the fact that the fire was located on marsh land, which was made up of soft ground, and which posed a danger to NOFD personnel due to the presence of rattlesnakes, wild hogs, and alligators. As such, NOFD initially responded in late August by using "Bambi buckets," where water is dropped from the air. Then, in early September 2011, Tropical Storm Lee dropped over 10 inches of rain on the area. Thereafter, NOFD monitored the fire and its interface with urban areas and made the decision that the fire was fairly under control. Then as the seasons changed, the fire moved underground and NOFD took different action with the full co-operation of Little Pine. Chief McConnell specifically stated that Cummings

provided whatever assistance NOFD requested, including cutting roads and building bridges to provide NOFD access to the property, and that nothing Cummings did impeded NOFD.

Plaintiffs, however, have failed to present any evidence to establish that Little Pine owed a duty with respect to extinguishment of the fire beyond notifying NOFD of the fire and, once fire ground authority was established, not interfering with said authority. In opposing Little Pine's motion for summary judgment, plaintiffs assert that Little Pine interfered with NOFD fire ground authority by failing to provide access to the property until after the subject accident in December 2011. However, we find no evidence in the record to support this claim. Plaintiffs rely on excerpts of Chief McConnell's testimony to infer that the reason access was not obtained until after the December 2011 accident was due to the lack of cooperation from Little Pine. However, a reading of Chief McConnell's testimony, in its entirety as detailed above, clearly indicates that access was not requested by NOFD until after the December 2011 accident, and such decision was based on the strategy followed by NOFD in dealing with the fire. As this was the only evidence relied on by plaintiffs in support of their argument on this claim, plaintiffs failed to establish that Little Pine owed a duty to extinguish and control the fire beyond notifying NOFD of the fire and cooperating with NOFD in its extinguishment efforts, or that Little Pine breached any duty to cooperate with NOFD by refusing NOFD access to the property.

In seeking summary judgment, Little Pine also asserts that plaintiffs are unable to meet their burden of establishing that any conduct by Little Pine or condition of its property caused the fire or its continued burn. Specifically, Little Pine asserts that plaintiffs are unable to establish any defect on Little Pine's property, that Little Pine knew or should have known of a defect, or that any defect caused damages to plaintiffs.

The owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. He must discover any unreasonably dangerous condition on its premises and either correct the condition or warn potential victims of its existence. The basis for such delictual liability is established in La. C.C. arts. 2315, 2316, 2317 and 2317.1. Leonard v. Ryan's Family Steak Houses, Inc., 05-0775, p. 3 (La. App. 1st Cir. 6/21/06), 939 So. 2d 401, 404. In particular, La. C.C. art. 2317.1 provides, in pertinent part:

> 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, in order to establish liability 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. Leonard, 05-0775 at p. 3, 939 So. 2d at 404-405.

In the instant case, Little Pine asserts that based on the jurisprudence, the marsh fire itself was not a "quality" of the property to qualify under the legal definition of a defect. See Toussant v. Guice, 414 So. 2d 850, 852 (La. App. 4th Cir. 1982). Furthermore, Little Pine asserts that the undisputed testimony and evidence demonstrates that the only possible cause of the fire and its continued burn was lightning and the natural rural properties of the marshland.

In opposing Little Pine's motion, plaintiffs assert that the defect in the property is not the fire, but it is the accumulation of scrub shrub fuel. Whether the

property had a condition that created an unreasonable risk of harm is a mixed question of fact and law, which must be determined in light of the facts and circumstances of each particular case. See Broussard v. State ex rel. Office of State Buildings, 12-1238, p. 9 (La. 4/5/13), 113 So. 3d 175, 183; see also Waddell v. American Empire Surplus Lines Insurance Company, 13-1695, p. 3 (La. App. 1st Cir. 6/25/14) (unpublished opinion).

In connection with their opposition, plaintiffs submitted the affidavit and report of Michael Henry, a wetlands expert. Henry stated that he reviewed the evidence submitted in connection with Little Pine's motion for summary judgment, in addition to photographs provided by satellite studies and the deposition testimony of Babin and Cummings. Based on his review of the foregoing, Henry determined that Oak Island was primarily composed of "scrub shrub," which is a wetland dominated by shrubs, emergents, and other woody plants and small trees. According to Henry, in areas of scrub shrub wetlands where marsh fire and/or smoke could reasonably cause danger to homes and/or highways in close proximity thereto, a quantity of fuel generated by the life cycles of the scrub shrub plants can and should be controlled by burning to prevent excess accumulation. This practice is known as "periodic controlled burning."

According to Henry, it is obvious that no wetland management or controlled burning of the major portion of the 2,800 acre wetland was conducted for at least fifty years, if not substantially longer. Henry stated that if an unusual amount of organic peat and/or woody or vegetative material is allowed to accumulate on otherwise healthy marsh, a lightning strike or spontaneous combustion can cause a "hot fire," which can often go subterranean and which will not burn out on its own or with an accompanying rain storm. Henry stated that in such cases, as was the case here, the marsh fire can go on for months. Further, Henry stated that a marsh fire that ignites woody scrub shrub and accumulated woody byproduct tends to

burn much longer than a fire in a peat covered marsh, and the woody byproduct and scrub shrub will often continue to smolder, generating thicker smoke and possibly causing re-ignition of the fire. According to Henry, regular controlled burns every one to five years prevent the dangerous accumulation of fuel buildup by organic peat or woody byproduct accumulation. Henry further stated that periodic controlled burns are especially critical in areas where the uncontrolled burn could be hazardous to the public either by the uncontrolled spread of the fire or by the dense smoke generated by the resulting woody byproduct burn.

Accordingly, from our review of the record, we find that plaintiffs presented evidence sufficient to create a genuine issue of material fact regarding the existence of a defect in the property and whether Little Pine had constructive knowledge of such a defect. See Charan v. Bowman, 06-0882, p. 10 (La. App. 1st Cir. 8/1/07), 965 So. 2d 466, 473, writ denied, 07-1773 (La. 11/9/07), 967 So. 2d 505.

Additionally, with regard to whether the defect caused the damage, Henry testified that if an unusual amount of organic peat and/or woody material is allowed to accumulate on the property and a resulting fire occurs, these conditions can cause a "hot fire," which will not burn out on its own and can go on for months, which, according to Henry, is what occurred in the instant case, and that such a fire can generate thicker smoke. Ernest Wilkes, a driver who was involved in the accident at issue on Interstate 10 and whose deposition plaintiffs submitted in connection with their opposition, stated that he knew about the fire in the area and saw and smelled smoke at the accident scene both prior to and on the date of the accident. Wilkes further stated that the smoke, combined with fog present at the scene on the morning of the accident, created a "total whiteout," and he could not see anything. Accordingly, based on the foregoing, plaintiffs presented evidence creating a genuine issue of material fact as to whether the defective

condition of the property caused and/or contributed to the zero visibility conditions that led to the accident at issue.

Finally, plaintiffs assert that the four-month long fire could have been prevented if Little Pine had performed periodic controlled burns, which plaintiffs argue is an exercise in reasonable care.[7] As noted above, Henry stated that periodic controlled burns once every one to five years are regularly used by marsh land managers to control abnormal fuel buildup. See also La. R.S. 3:17 (providing that prescribed burning reduces naturally produced on-site vegetative fuels within wild land areas). Henry further opined that in areas of scrub shrub wetlands where a marsh fire and/or smoke could reasonably cause danger to homes and/or highways in close proximity thereto, a quantity of woody fuel generated by the life cycle of the scrub shrub plants can and should be controlled by periodic controlled burning to prevent excess accumulation. According to Henry, periodic controlled burns are especially critical in areas where an uncontrolled burn could be hazardous to the public either by the uncontrolled spread of the fire or by the dense smoke generated by the resulting woody product burn. Furthermore, Henry stated that the risk of "hot fire" would have been very substantially reduced, if not eliminated, by proper management of the marsh. Henry specifically noted that reasonable maintenance and management of the site would have allowed the 2011 fire to be less intense, easier to control, and easier to have been extinguished by accompanying rain showers, particularly the considerable amount of rain that fell on the site during Tropical Storm Lee.

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[7] This issue was simplistically framed in the trial court as whether Little Pine had a duty to perform periodic controlled burns. More particularly, the parties argued whether La. R.S. 3:17 created a duty to perform such burns. However, the issue, as noted above, is not simply whether Little Pine had a duty to perform periodic controlled burns, but whether, in determining landowner liability in accordance with La. C.C. art. 2317.1, such burns were an exercise in reasonable care that could have prevented the long-burning fire and said fire's contribution to the zero visibility conditions on the date of the accident.

Therefore, from our review of the record, plaintiffs presented evidence that under the facts and circumstances of this case, performing periodic controlled burns is an exercise in reasonable care and had Little Pine performed said burns, the marsh fire would have been less intense, easier to control, and would have been extinguished by accompanying rain showers and by the amount of rain falling on the area during Tropical Storm Lee in September 2011. As such, based on the foregoing, a genuine issue of material fact exists precluding summary judgment as to Little Pine's negligence under La. C.C. art. 2317.1.

Once a plaintiff has proven the elements necessary to recover for damage under La. C.C. art. 2317.1, the owner can avoid liability if it shows that the harm was caused by an Act of God. See Brown v. Williams, 36,863, p. 8 (La. App. 2nd Cir. 7/31/03), 850 So. 2d 1116, 1123, writ denied, 03-2445 (La. 11/21/03), 860 So. 2d 555. An Act of God, or force majeure, is an unusual, sudden and unexpected manifestation of the forces of nature, which man cannot resist. An injury caused by an Act of God is one which is due directly and exclusively to natural causes that could not have been prevented by the exercise of reasonable care. Rector v. Hartford Accident & Indemnity Company of Hartford, Connecticut, 120 So. 2d 511, 515 (La. App. 1st Cir. 1960). Accordingly, the Act of God defense is only available to a defendant who is free from negligence and who shows that the accident is the direct and exclusive result of natural causes that could not be prevented by the exercise of reasonable care. Wells v. Town of Delhi, 51,222, p. 8 (La. App. 2nd Cir. 4/5/17), 216 So. 3d 1095, 1101.

Little Pine asserts in its motion for summary judgment that the accident at issue was caused solely by unforeseeable and unprecedented weather conditions. However, because we find that that there exists disputed issues of material fact concerning whether Little Pine was negligent under La. C.C. art. 2317.1, and therefore, whether Little Pine's negligence contributed to the continued burn of the

marsh fire and the accident at issue, a genuine issue of material fact likewise exists as to whether the accident at issue was caused solely by unforeseeable and unprecedented weather conditions.

CONCLUSION

For the foregoing reasons, we grant plaintiffs' motion to strike as to Exhibits F, G, H, I, J, L-P, and S submitted in connection with Little Pine's motion for summary judgment. Furthermore, we affirm that portion of the trial court's December 30, 2015 judgment granting summary judgment as to plaintiffs' claims that Little Pine was negligent for allowing the marsh fire to continue to burn and obstruct visibility on Interstate 10 and failing to bring the fire under control. However, we reverse that portion of the trial court's December 30, 2015 judgment granting summary judgment as to plaintiffs' claim under La. C.C. art. 2317.1 and remand this matter to the trial court for further proceedings. All costs of this appeal are to be borne equally by the plaintiffs, Scott Lowe and Beth Lowe, and the defendants, Little Pine Island Corporation, Little Pine Island, LP, and John J. Cummings, III.

MOTION TO STRIKE GRANTED IN PART; DECEMBER 30, 2015 JUDGEMNT GRANTING MOTION FOR SUMMARY JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.