

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2018 CA 0415

MICHAEL MERCADER

VERSUS

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF PUBLIC
SAFETY AND CORRECTIONS; LOUISIANA STATE PENITENTIARY D/B/A
ANGOLA; BURL CAIN, IN HIS CAPACITY AS WARDEN

Judgment rendered: MAY 15 2019

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On Appeal from the
Twentieth Judicial District Court
In and for the Parish of West Feliciana
State of Louisiana
No. 20607

The Honorable Kathryn E. Jones, Judge Presiding

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Penitentiary d/b/a Angola; Burl Cain
in his capacity as Warden

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BEFORE: WHIPPLE, McDONALD, CRAIN, HOLDRIDGE, AND LANIER, JJ.

WJC CRAIN, J. Dissents and assigns reasons
By WJC

HOLDRIDGE, J.

The plaintiff, Michael Mercadel,¹ appeals a summary judgment dismissing his tort claim against the defendants, the State of Louisiana, the Louisiana State Penitentiary d/b/a Angola, and Burl Cain in his capacity as warden. For the following reasons, we reverse and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

On June 21, 2008, the plaintiff was visiting an inmate in the visiting center at the Louisiana State Penitentiary in Angola, Louisiana when the chair he was sitting in collapsed. As a result, the plaintiff allegedly sustained injuries. The chair was discarded shortly after the alleged accident because the defendants alleged that it posed a safety risk to their employees and inmates.

On June 9, 2009, the plaintiff filed a petition for damages against the defendants, arguing that his accident was caused by the negligence of the defendants and that they were liable for his injuries pursuant to La. R.S. 9:2800. The defendants answered, denying all allegations. On September 7, 2017, the defendants filed a motion for summary judgment, arguing that they were entitled to summary judgment because there was no genuine issue of material fact and that the plaintiff would not be able to carry his burden of proof at trial. Specifically, the defendants argued that the plaintiff could not show that the defendants had actual or constructive notice of the defective chair within a reasonable time to repair the defect as required by La. R.S. 9:2800. The defendants further argued that Warden Cain was immune from liability under La. R.S. 9:2798.1 because there was no evidence presented by the plaintiff that his conduct was malicious, intentional, willful, or reckless in the operation or maintenance of the chair.

¹ Michael Mercadel died on December 15, 2010. Therefore, his wife, Michele Mercadel, and her two minor children, Jahleil Mercadel and Jaheim Mercadel, were substituted as plaintiffs.

In support of their motion, the defendants submitted a memorandum that included a statement of facts, which provided: (1) after the plaintiff's accident, the chair was inspected and it was discovered that one of the rear legs of the chair was bent backwards; (2) the chairs in the visiting center were periodically cleaned, but not inspected; and (3) this was the first incident with this type of chair. The defendants cited Alvarado v. Lodge at the Bluffs, LLC, 2016-0624 (La. App. 1 Cir. 3/29/17), 217 So.3d 429, 431, writ denied, 2017-0697 (La. 6/16/17), 219 So.3d 340, wherein a plaintiff sued a resort and its insurer for the injuries she sustained from a collapsing stool. In that case, the court affirmed summary judgment finding that reasonable care does not require an innkeeper to conduct an intensive inspection or search for missing screws or other parts in chairs or stools after each rental or use, but only to make reasonable inspections to determine if any piece of furniture is in disrepair or defective. This court found that because there was a lack of evidence that the defect in the stool existed prior to the accident or that it would have been visible or discoverable upon mere inspection, the plaintiff could not meet her burden of proving that the defendants had actual or constructive notice of a defect in the stool. Id. at 434-335. In this case, the defendants argued that like the defendants in Alvarado, the employees of the Louisiana State Penitentiary were to report any defects that they reasonably discovered. The defendants further argued that they had no knowledge or notice of the defective chair prior to the plaintiff's accident. Therefore, the plaintiff could not bear his evidentiary burden of producing evidence that the defendants had constructive notice to provide for a genuine issue of material fact.

In opposition, the plaintiff argued that the defendants failed to submit any evidence to support their motion for summary judgment showing that no genuine issue of material fact exists. Specifically, the plaintiff argued that while the

defendants alleged that this was the first incident with this type of chair and that they periodically cleaned the chairs, the defendants failed to submit an affidavit, deposition, or any type of evidence that corroborated those allegations. The plaintiff further argued that the defendants' admission that it failed to inspect the chair was sufficient proof that the defendants did not do what was minimally required to maintain their property and reasonably discover any defects. The plaintiff argued that La. R.S. 9:2800 requires a public entity to reasonably inspect and maintain objects in their custody in accordance with La. C.C. art. 2317. Therefore, the plaintiff argued that because the defendants failed to take reasonable steps to maintain the chairs in the visiting center, Warden Cain did not have immunity from liability pursuant to La. R.S. 9:2798.1.

On September 7, 2017, the parties submitted the matter on briefs and pleadings. On December 13, 2017, the trial court signed a judgment, granting the defendants' motion for summary judgment and dismissing the plaintiff's claim with prejudice. The trial court provided reasons for judgment, stating in pertinent part that "the [defendants] did what was minimally required of them. The [defendants were] to report any defects that they reasonably discovered in order to remedy that defect. No such knowledge or notice [was] present and [the] plaintiff cannot meet the evidentiary burden of producing sufficient factual evidence to prove for a genuine issue of material fact." The plaintiff devolutively appealed.

STANDARD OF REVIEW

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents 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. 966A(3).² In determining whether summary judgment is appropriate, this court will review the evidence *de novo* using the same criteria governing the trial court's determination of whether summary judgment is appropriate. Thompson v. Center for Pediatric and Adolescent Medicine, L.L.C., 2017-1088 (La. App. 1 Cir. 3/15/18), 244 So.3d 441, 444, writ denied, 2018-0583 (La. 6/1/18), 243 So.3d 1062.

Louisiana Code of Civil Procedure article (D)(1)³ places the burden of proof on the party filing a motion for summary judgment. The mover can meet its burden by filing supporting documentary evidence consisting of pleadings, memoranda,⁴ affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions with its motion for summary judgment. La. C.C.P. art. 966(A)(4). The mover's supporting documents must prove the essential facts necessary to carry the mover's burden. This court has held that in deciding a summary judgment motion, it must first be determined whether the supporting documents presented by the mover are sufficient to resolve all material fact issues. Crockerham v. Louisiana Medical Mutual Insurance Company, 2017-1590 (La. App. 1 Cir. 6/21/18), 255 So.3d 604, 608 citing

² Louisiana Code of Civil Procedure article 966 was amended by Acts 2015, No. 422, effective January 1, 2016. Because the motion for summary judgment was filed on September 7, 2017, after the effective date of the amendments, the amendments to the summary judgment articles apply in this case.

³ Louisiana Code of Civil Procedure article 966(D)(1) states:

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue 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 the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.

⁴ However, a memorandum is not a pleading or evidence, but a document that can be used to advance the mover's argument in support or opposition to a motion for summary judgment. See La. C.C.P. art. 966, comments—2015, comment (c).

Dimattia v. Jackson Nat. Life Ins. Co., 2004-1936 (La. App. 1 Cir. 9/23/05), 923 So.2d 126, 129.

Once the mover properly establishes the material facts by its supporting documents, the mover does not have to negate all of the essential elements of the adverse party's claims, actions, or defenses. La. C.C.P. art. 966(D)(1); Babin v. Winn-Dixie Louisiana, Inc., 2000-0078 (La. 6/30/00), 764 So.2d 37, 38; Hardy v. Bowie, 98-2821 (La. 9/8/99), 744 So.2d 606, 609; Hayes v. Autin, 96-287 (La. App. 3 Cir. 12/26/96), 685 So.2d 691, 695, writ denied, 97-0281 (La. 3/14/97), 690 So.2d 41. The moving party must only point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(D)(1); Celotex Corp. v. Catrett, 477 U.S. 317, 332, 106 S.Ct. 2548, 2557, 91 L.Ed.2d 265 (1986); see also La. C.C.P. art. 966, comments—2015, comment (j). The burden then shifts to the non-moving party to produce factual support, through the use of proper documentary evidence attached to its opposition, which establishes the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. La. C.C.P. art. 966(D)(1). If the non-moving party fails to produce sufficient factual support in its opposition which proves the existence of a genuine issue of material fact, Article 966(D)(1) mandates the granting of the motion for summary judgment. Babin, 764 So.2d at 40; Celotex Corp., 477 U.S. 317, 326, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

DISCUSSION

The plaintiff asserted tort claims against the defendants based upon La. R.S. 9:2800. A public entity's liability for a defective thing within its custody or care is ordinarily analyzed under La. R.S. 9:2800. Broussard v. State ex rel. Office of

State Bldgs., 2012-1238 (La. 4/5/13), 113 So.3d 175, 181. Louisiana Revised Statutes 9:2800 provides, in pertinent part:

C. [N]o person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.

D. Constructive notice shall mean the existence of facts which infer actual knowledge.

In order for a plaintiff to recover against a public entity for damages due to a defective thing under La. R.S. 9:2800, he must prove: (1) the thing which caused the damage was in the custody of the public entity; (2) the thing was defective due to a condition creating an unreasonable risk of harm; (3) the entity had actual or constructive notice of the condition yet failed to take corrective action within a reasonable period of time; and (4) the defect was a cause of plaintiff's injury.

Barnett v. City of Baton Rouge, 2016-0222 (La. App. 1 Cir. 10/31/16), 206 So.3d 904, 908, writ denied, 2016-2142 (La. 1/13/17), 215 So.3d 256. To recover, the plaintiff bears the burden of proving all these inquiries in the affirmative and failure on any one is fatal to the case. Pitre v. Jefferson Parish Hospital Service District No. 2, 2016-361 (La. App. 5 Cir. 12/28/16), 210 So.3d 502, 506, writ denied, 2017-0150 (La. 3/13/17), 216 So.3d 802.

As the party filing the motion for summary judgment, the defendants had the burden of proof. To meet their burden, the defendants were required to establish the essential material facts necessary to meet their initial burden that there are no genuine issue of material fact. The relevant facts must be proven by the mover by submitting documentary evidence in accordance with La. C.C.P. art. 966(A)(4). While in their memorandum, the defendants made several factual allegations, they

failed to file any supporting documents whatsoever to establish any material facts.

In their memorandum, the defendants alleged:

The chair was inspected after the accident. One of the rear legs of the chair was bent backwards. Lt. Dupuis stated that this is the first incident with this type of chair. The chairs are periodically cleaned, but not inspected.

While these are all essential facts, there are no supporting documents attached to the defendant's motion to establish any of these facts. A memorandum is not evidence, but only a document which advances the argument of the moving party. See footnote

4. Furthermore, District Court Rule 9.10⁵ provides that a memorandum shall contain “[a] reference to the document proving each such fact, with the pertinent part containing proof of the fact designated.” In this case, the defendants failed to file any documentary evidence necessary for the mover to be entitled to summary judgment.

Unlike the lack of any documentary support offered by the mover in this case, in Alvarado, 217 So.3d at 429, the defendants offered affidavits and depositions which proved that the stool in question collapsed due to two missing screws. The unit in which the stool was located had been cleaned by employees before the plaintiff's visit and was cleaned before and after each rental guest. No screws were found by any members of the cleaning staff. If a member of the cleaning staff noticed any issues with a unit, they would report it to a supervisor for further attention. No report was made on the unit in question. Alvarado, 217 So.3d at 433-34.

⁵ District Court Rule 9.10(a) provides:

A memorandum in support of a motion for summary judgment shall contain:

- (1) A list of the essential legal elements necessary for the mover to be entitled to judgment;
- (2) A list of the material facts that the mover contends are not genuinely disputed; and
- (3) A reference to the document proving each such fact, with the pertinent part containing proof of the fact designated.

In this case, the chair in question had one leg which was bent backwards. There is no evidence submitted by the defendants to establish: (1) when, if ever, the chair was cleaned or inspected, (2) whether in the cleaning process the employees would or should have noticed the bent leg; and (3) what was the proper procedure for the employees to report a defect in the chairs in the visiting center at the Louisiana State Penitentiary. While the mover does not have to negate all of the elements of the plaintiff's claim, it does have to present supporting documentary evidence to establish the essential facts necessary to prove its entitlement to a grant of a motion for summary judgment.

Similarly, in Babin, supra, the defendant pointed out that the plaintiff was unable to produce factual support to satisfy the constructive notice requirement of the statute by showing the toothpick boxes were on the floor for some period of time before the plaintiff's alleged fall. However, unlike this case, in support of their motion, the defendant produced the affidavit of its employee who stated that she inspected the aisle ten minutes prior to plaintiff's fall and did not observe any toothpick boxes on the floor. Babin, 764 So.2d at 40. At that point, the burden shifted to the plaintiff to produce factual support sufficient to establish that he would be able to satisfy his evidentiary burden of proof at trial. In the instant matter, the burden did not shift to the plaintiff because the defendant offered no evidence that it had in place an inspection or cleaning process that would have allowed its employees to reasonably discover the defective chair leg.

The plaintiff further assigned as error that the trial court erred in holding that La. R.S. 9:2798.1 provided immunity to the defendants for their discretionary acts taken within the course and scope of their employment. The plaintiff argues that Warden Cain is not entitled to immunity regarding his duty under La. R.S. 9:2798.1. because he failed to maintain and inspect the chairs in the visiting center. Under La.

R.S. 9:2798.1(B), public entities and their officers or employees are immune from tort claims based on their policy-making decisions or discretionary acts within the course and scope of their employment. However, a governmental entity is not exempt from liability for “acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.” La. R.S. 9:2798.1(C)(2). Louisiana Revised Statutes 9:2798.1 does not protect against legal fault or negligent conduct at the operational level, but only confers immunity for policy decisions; i.e. decisions based on social, economic, or political concerns. Hebert v. Adcock, 2010-887 (La. App. 3 Cir. 2/2/11), 55 So.3d 1007, 1013, writ denied, 2011-0477 (La. 4/25/11), 62 So.3d 92, citing Chaney for Use and Benefit of Chaney v. National Railroad R.R. Passenger Corporation, 583 So.2d 926, 929 (La. App. 1 Cir. 1991).

The defendants raised its discretionary immunity claim in their motion for summary judgment. Therefore, the defendants had the burden of proof on this affirmative defense. Johnson v. Orleans Parish School Board, 2006-1223 (La. App. 4 Cir. 1/30/08), 975 So.2d 698, 710, writs denied, 2008-0607, 2008-0664, and 2008-0671 (La. 6/27/08), 983 So.2d 1291.

After a review of the record, we find that the trial court erred in finding that “Warden Cain [was] entitled to immunity regarding his exercise of his duty at [the] Louisiana State Penitentiary.” The failure to inspect or maintain the chairs is not a “policy decision” for which the Louisiana State Penitentiary or Warden Cain could claim immunity under La. R.S. 9:2798.1; rather, such failure to act is fault at the operational level, for which La. R.S. 9:2798.1 does not confer immunity. See Hebert, 55 So.3d at 113; accord Greene v. Succession of Alvarado, 2015-1960 (La. App. 1 Cir. 12/27/16), 210 So.3d 321, 331 (noting that the Department of Transportation and Development’s duty to maintain a bridge in a reasonably safe

condition is operational in nature, not policy-making or discretionary for which La. R.S. 9:2798.1 provides immunity). Thus, the defendants are not entitled to immunity under that statute.

Accordingly, after our *de novo* review of the record, we find that the defendants failed to carry their initial burden of establishing the essential facts which would allow summary judgment to be granted since they failed to produce any documentary evidence with their motion necessary to carry its summary judgment burden. Additionally, we find that the defendants failed to submit evidence warranting their immunity under La. R.S. 9:2798.1. Therefore, summary judgment should be denied.⁶

CONCLUSION

We reverse the December 13, 2017 judgment, which granted the motion for summary judgment in favor of the State of Louisiana, the Louisiana State Penitentiary d/b/a Angola, and Burl Cain in his capacity as warden, and dismissed Michael Mercadel's claim, and remand to the trial court for further proceedings. Costs of this appeal in the amount of \$1,452.32 are assessed to the State of Louisiana, the Louisiana State Penitentiary d/b/a Angola, and Burl Cain in his capacity as warden.

REVERSED AND REMANDED.

⁶ We pretermit discussion of the plaintiff's assignment of error concerning spoliation of evidence and pretermit consideration of any adverse presumption that may be applicable in this case based on the defendants' destruction of the chair in question. See Grantham v. Eldorado Resort Casino Shreveport, 49,474 (La. App. 2 Cir. 11/19/14), 152 So.3d 1028, 1032, writ denied, 2014-2654 (La. 3/6/15), 160 So.3d 1290.

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STATE OF LOUISIANA

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NO. 2018 CA 0415

WJC
(BY *WJS*)
CRAIN, J., dissents.

“When [a] statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Sebelius v. Cloer*, 569 U.S. 369, 381, 133 S.Ct. 1886, 1896, 185 L.Ed.2d 1003 (2013).

Louisiana Code of Civil Procedure article 966D now provides summary judgment shall be granted if the motion, *memorandum*, and supporting documents show there is no genuine issue of material fact and the mover is entitled to judgment as a matter of law. If the moving party will not bear the burden of proof at trial, Article 966D requires only that the mover *point out to the court* the absence of factual support for one or more elements essential to the adverse party’s claim, and specifically clarifies the mover *is not required to negate* the essential elements of the adverse party’s claim. Article 966D does not necessarily require the moving party who will not bear the burden of proof at trial to come forward with evidence in order to meet its burden on the motion for summary judgment. In contrast, when the burden on the motion for summary judgment shifts, the adverse party can only defeat the motion for summary judgment with evidence, as the non-moving party is required “to produce factual support sufficient *to establish* the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law.” La. Code Civ. Pro. art. 966D (emphasis added).

The distinction in the evidentiary burden imposed on the parties by Article 966 is not absurd such that it can be jurisprudentially altered. The legislature has

expressed its will that summary judgments are favored and the mover who will not bear the burden of proof at trial need only point out to the court the lack of support for an essential element of the adverse party's claim. The defendants met their burden of proof on the motion and the plaintiff thereafter failed to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the defendants are not entitled to judgment as a matter of law. The majority errs in requiring more of the defendants than the procedure set forth by the legislature and in reversing the trial court's judgment.