**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2018 CA 1428

ODETTE NELSON

VERSUS

D'VILLE HOME GROUP, LLC; AND
LOUISIANA NURSING HOME TRUST

Judgment Rendered: JUN 13 2019

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On Appeal from the 23rd Judicial District Court
In and for the Parish of Ascension
State of Louisiana
No. 111,892

Honorable Alvin Turner, Jr., Judge Presiding

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**BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.**

**PENZATO, J.**

Plaintiff, Odette Nelson, appeals a summary judgment granted in favor of defendant, D'Ville Home Group, LLC ("D'Ville Home Group"), that dismissed her claims. For the following reasons, we affirm.

## FACTS AND PROCEDURAL HISTORY

On February 9, 2014, Ms. Nelson visited her nephew at Chateau D'Ville Rehabilitation and Retirement ("Chateau D'Ville") in Donaldsonville, Louisiana. As she was exiting through the front door, she fell. Ms. Nelson claims that her fall was caused by a rug[1] near the front entrance that was not lying flat, but was "buckled."

Ms. Nelson filed a petition for damages against D'Ville Home Group, as the owner and operator of Chateau D'Ville, in connection with the February 9, 2014 incident.[2] D'Ville Home Group filed a motion for summary judgment on March 26, 2018, asserting that Ms. Nelson had no evidence that the rug was defective or in a dangerous condition prior to her fall or that D'Ville Home Group had actual or constructive notice of any such defect or condition. Ms. Nelson opposed the motion, contending that the unreasonably dangerous condition of the rug had been reported to D'Ville Home Group prior to Ms. Nelson's fall. In support of her opposition to the motion for summary judgment, Ms. Nelson offered portions of her deposition wherein she testified that on the day she fell, "Charles Darcy [a patient at the nursing home] ... said that's that dag gone rug. We been telling them about it." Ms. Nelson also stated that another patient, Gary North said "they been having problems with that, that's what he said. A lot of people trips over that."

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[1] D'Ville Home Group refers to the rug at issue herein as a "mat." We refer to the object as a rug throughout this opinion.

[2] Louisiana Nursing Home Association Liability Trust ("Trust"), incorrectly named in the petition as the Louisiana Nursing Home Trust, was also named as a defendant. The Trust filed a motion for summary judgment asserting that it was not an insurer and therefore not subject to direct action for Ms. Nelson's injuries. The Trust's motion for summary judgment was granted, and the Trust was dismissed from the suit by judgment dated October 12, 2016.

D'Ville Home Group filed a reply memorandum arguing that the statements contained in Ms. Nelson's deposition of what was told to her about prior issues with the rug are inadmissible hearsay. D'Ville Home Group objected to those portions of Ms. Nelson's deposition submitted in support of her opposition and requested that they be stricken from the record.

Following a hearing on the motion for summary judgment, the trial court took the matter under advisement. On July 2, 2018, the trial court issued reasons for judgment, noting the only evidence that Ms. Nelson sought to admit in support of her contention D'Ville Home Group had notice was inadmissible hearsay to which no exception applies, and it could not consider Ms. Nelson's testimony as to statements made by a third-party declarant.[3] The trial court concluded that even if the rug did present an unreasonably dangerous condition, Ms. Nelson did not provide the trial court with any competent summary judgment evidence that D'Ville Home Group had notice of said condition. On August 6, 2018, the trial court signed a judgment in accordance with its reasons, granting D'Ville Home Group's motion for summary judgment and dismissing Ms. Nelson's claims. Ms. Nelson appealed the judgment, asserting as error the trial court's ruling that the statements made by Mr. Darcy were inadmissible hearsay.[4]

## LAW AND DISCUSSION

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). The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive

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[3] The trial court's reasons for judgment refer only to Mr. Darcy by name. However, the reasons for judgment refer to the statements attributed to him and the statements attributed to Mr. North.

[4] In her appellate brief, Ms. Nelson refers to Mr. Darcy as "Mr. Dorsey." We refer to him as Mr. Darcy in this opinion.

determination of every action. La. C.C.P. art. 966A(2).

The burden of proof is on the mover. La. C.C.P. art. 966D(1). Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion, the mover's burden does not require that all essential elements of the adverse party's claim, action, or defense be negated. Rather, 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 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. C.C.P. art. 966D(1).

The court may consider only those documents filed in support of or in opposition to the motion for summary judgment and shall consider any documents to which no objection is made. Any objection to a document shall be raised in a timely filed opposition or reply memorandum. The court shall consider all objections prior to rendering judgment and shall specifically state on the record or in writing which documents, if any, it held to be inadmissible or declined to consider. La. C.C.P. art. 966D(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. *Reynolds v. Bordelon*, 2014-2371 (La. 6/30/15), 172 So.3d 607, 610. 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. *Succession of Hickman v. State Through Bd. of Supervisors of Louisiana State Univ. Agricultural and Mechanical College*, 2016-1069 (La. App. 1 Cir. 4/12/17), 217 So. 3d 1240, 1244.

Louisiana Civil Code article 2317.1 provides as follows:

> 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.

For liability to attach under La. C.C. art. 2317.1, the plaintiff has the burden of proving that: (1) the property which caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. *Tomaso v. Home Depot, U.S.A., Inc.*, 2014-1467 (La. App. 1 Cir. 6/5/15), 174 So. 3d 679, 682.

In support of its motion for summary judgment, D'Ville Home Group submitted the affidavit of Bridget Matassa, Administrative Assistant for D'Ville Home Group. Ms. Matassa attested that she has been continuously employed by D'Ville Home Group since May 2005, and in connection with her position, she is familiar with the accident/claims history for every aspect of the nursing home property. She further attested that she is familiar with the allegations and investigation into the February 9, 2014 incident involving Ms. Nelson. According to Ms. Matassa, at the time of the incident, there was a rug near the front entrance of Chateau D'Ville where Ms. Nelson fell. Ms. Matassa attested that this area is used by countless people each day, and despite this high volume of people, no other falls occurred in this area and no one reported any problem with the sidewalk or rug prior to Ms. Nelson's fall on February 9, 2014. Ms. Matassa's affidavit was sufficient to shift the burden to Ms. Nelson to show that D'Ville Home Group had actual or constructive knowledge of an unreasonably dangerous condition caused

by the rug located near the front entrance of Chateau D'Ville. See La. C.C.P. art. 966D(1).

In opposition to the motion for summary judgment, Ms. Nelson relied upon her deposition testimony that she was told by Mr. Darcy that "[w]e been telling them about [the rug]." D'Ville Home Group objected to the statement as inadmissible hearsay in a reply memorandum as required by La. C.C.P. art. 966D(2). At the hearing on the motion for summary judgment, Ms. Nelson argued that the statement was a present sense impression and thus was admissible as an exception to the hearsay rule pursuant to La. C.E. art. 803(1).

The present sense impression exception of La. C.E. art. 803(1) allows the admissibility of a "statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." A present sense impression is confined to "describing or explaining" an event or condition perceived by the speaker. *Buckbee v. United Gas Pipe Line Co. Inc.*, 561 So. 2d 76, 84 (La. 1990). The critical factor is whether the statement was made while the individual was "perceiving" the event or "immediately thereafter." The statement may follow "immediately" after perceiving an event, allowing only for "the time needed for translating observation into speech." *Id.* (citing *McCormick on Evidence,* § 298). The party seeking to admit evidence under an exception to the hearsay rule has the burden to establish application of the exception. *State v. Johnson*, 2000-0680 (La. App. 1 Cir. 12/22/00), 775 So. 2d 670, 679, writ denied, 2002-1368 (La. 5/30/03), 845 So. 2d 1066.

Ms. Nelson's deposition testimony does not establish the amount of time that elapsed between her fall and Mr. Darcy's statement. More importantly, even if Mr. Darcy made the alleged statement contemporaneously to Ms. Nelson's fall, his alleged statement does not describe or explain an event he was perceiving (i.e., Ms. Nelson's fall or the condition of the rug), but rather described or explained an event

or condition that occurred prior to the fall (i.e., statements previously made to others about the rug).[5] See *Carbon v. Allstate Insurance Company*, 96-2109 (La. App. 1 Cir. 9/23/97), 701 So. 2d 462, 471-72, rev'd on other grounds, 97-3085 (La. 10/20/98), 719 So. 2d 437. Thus, we find that she failed to show that the hearsay exception is applicable in this case. Therefore, based on our review of the record, we find that D'Ville Home Group is entitled to summary judgment.

## CONCLUSION

For the above and foregoing reasons, the August 6, 2018 summary judgment in favor of D'Ville Home Group, LLC, is affirmed. Costs of this appeal are assessed to Odette Nelson.

**AFFIRMED.**

[5] While Ms. Nelson does not rely on or refer to Mr. North's alleged statements in her appellate brief, we note that his statements do not qualify as a present sense impression for the same reasons as Mr. Darcy's statements.