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NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2020 CA 0601

GEANNA AND KENDALL LADNER

VERSUS

REM MANAGEMENT, LLC D/B/A MCDONALD'S, MASKER MANAGEMENT, LLC D/B/A MCDONALD'S BAYOU LIBERTY PROPERTY, LLC., AND XYZ INSURANCE COMPANY

Judgment Rendered: DEC 30 2020

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Appealed from the 22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit No. 2017-14424

The Honorable Vincent J. Lobello, Judge Presiding

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Stephanie M. Possa **Joseph C. Possa** **Lauren M. Ferand** **Cullen R. Clement** **Baton Rouge, Louisiana**	**Counsel for Plaintiffs/Appellants** **Geanna and Kendall Ladner**
Lyon H. Garrison **Robert T. Vorhoff** **Ebony S. Morris** **New Orleans, Louisiana**	**Counsel for Defendant/Appellee** **Ray Masker, Jr. erroneously named as REM Management, LLC d/b/a McDonald's and Masker Management, LLC d/b/a McDonald's and Bayou Liberty Property, LLC**

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BEFORE: GUIDRY, McCLENDON, AND LANIER, JJ.

McClendon, J., Concurs. by RB

Guidry, J., Concurs.

LANIER, J.

In this appeal, the plaintiffs/appellants, GeAnna Ladner and Kendall Ladner, challenge the summary judgment of the 22nd Judicial District Court in favor of the defendant/appellee, Ray Masker, Jr. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

The plaintiffs filed a petition for damages on September 25, 2017, in which they alleged that on September 23, 2016, Ms. Ladner entered a McDonald's restaurant located in St. Tammany Parish, where she slipped and fell due to an unknown substance on the floor.[1] They further alleged that no "wet floor" warning signs were placed around the unknown substance. Ms. Ladner claimed that she suffered bodily injury due to her fall, and Mr. Ladner, her spouse, claimed loss of consortium, services, and society due to Ms. Ladner's injuries.

The plaintiffs alleged their injuries were the result of negligence on the part of REM Management, d/b/a McDonald's (REM), Masker Management, LLC d/b/a McDonald's (Masker), and Bayou Liberty Property, LLC (Bayou), all of whom the plaintiffs claimed were responsible for the maintenance of the restaurant but failed to exercise reasonable care in cleaning the unknown substance from the floor.[2]

In a deposition on May 9, 2018, Ms. Ladner testified that she noticed a "spot of water on the [restaurant] floor," referring to the unknown substance, as she approached the counter and notified the cashier. She also stated that there were four or five other people waiting at the counter with her. Ms. Ladner estimated a wait of ten minutes from the time she ordered her food to the time she received it,

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[1] We recognize that on the face of the petition, the plaintiffs' claim was not filed within one year of the accident; however, since September 23, 2017 fell on a Saturday, the claim does not appear to have prescribed. Furthermore, the objection of prescription has not been pleaded and this court may not supply the objection of prescription. See La. C.C.P. art. 927(B).

[2] In the plaintiffs' petition for damages, Mr. Masker is listed as the agent for service of process for REM and Masker. In the defendants' answer to the petition, Mr. Masker stated that he was erroneously referred to as REM and Masker, and that he only answered the petition on behalf of himself. Bayou filed its own answer to the petition.

and she claimed that during that time she had forgotten about the spot of water she had observed earlier. When she turned away from the counter after retrieving her tray of food, she slipped in the spot of water but gripped a wall with her right arm before falling completely to the floor. Ms. Ladner estimated the spot of water was about the size of a plate, being circular in shape and approximately eight inches in diameter. Ms. Ladner claimed her sister, who had accompanied her to the restaurant, also saw the spot of water, and that they did not observe any "wet floor" signs in the restaurant.

On April 9, 2019, Victoria Lynn McNeil, a manager at the restaurant on the day the accident occurred, was deposed and testified that she was made aware of the accident by another employee shortly after it happened. Ms. McNeil spoke to Ms. Ladner, who was then sitting at a table. Ms. Ladner explained to Ms. McNeil that she had slipped on a "spot" on the floor. Ms. McNeil testified that employees are trained to clean up spills immediately after they are reported. Ms. McNeil inspected the floor in the area where Ms. Ladner had slipped but could not find any wet substances and did not clean the area. Ms. McNeil testified that there were already "wet floor" signs placed in the lobby, but that after Ms. Ladner slipped, she placed the signs closer to the area of the accident. Ms. McNeil documented the accident with a written report, which she said is the normal procedure for a slip-and-fall accident. Ms. McNeil identified Mr. Masker as the owner/operator of the restaurant.

Mr. Masker filed a motion for summary judgment on July 19, 2019, in which he claimed the plaintiffs could not meet their burden of proof required under La. R.S. 9:2800.6, *et seq*.[3] Attached as exhibits to the motion were the plaintiffs'

[3] Louisiana Revised Statutes 9:2800.6 states:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe

petition for damages, excerpts of Ms. Ladner's deposition, excerpts of Ms. McNeil's deposition, and the incident report. At the hearing on the motion for summary judgment on December 5, 2019, the trial court found that the unknown substance was an open and obvious hazard that Ms. Ladner was aware of prior to stepping in it. The trial court signed a judgment on January 6, 2020, which granted Mr. Masker's motion for summary judgment and dismissed all claims against him with prejudice. The plaintiffs have appealed this judgment.

ASSIGNMENTS OF ERROR

The plaintiffs cite three assignments of error. First, they assign as error the trial court's granting the summary judgment on the issue of comparative fault. Second, they assign error to the trial court's granting of the summary judgment on the issue of whether genuine issues of material fact exist. Finally, they assign error

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condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.

B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
(1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
(2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
(3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.

C. Definitions:
(1) "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition.
(2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.

D. Nothing herein shall affect any liability which a merchant may have under Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695.

to the trial court's not finding that Ms. Ladner had a diminished duty to keep a proper lookout for the hazard before the accident occurred.

STANDARD OF REVIEW

Summary judgment procedure is favored and "is designed to secure the just, speedy, and inexpensive determination of every action ... and shall be construed to accomplish these ends." *Jackson v. Wise*, 2017-1062 (La. App. 1 Cir. 4/13/18), 249 So.3d 845, 850, writ denied, 2018-0785 (La. 9/21/18), 252 So.3d 914, quoting La. C.C.P. art. 966(A)(2). After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show 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. 966 (A)(3); *Campbell v. Dolgencorp, LLC*, 2019-0036 (La. App. 1 Cir. 1/9/20), 294 So.3d 522, 526. A genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. *Jackson v. City of New Orleans*, 2012-2742, 2012-2743 (La. 1/28/14), 144 So.3d 876, 882, cert. denied, 574 U.S. 869, 135 S.Ct. 197, 190 L.Ed.2d 130 (2014). In reviewing the trial court's decision on a motion for summary judgment, this court applies a *de novo* standard of review using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. *Jackson v. Wise*, 249 So.3d at 850.

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. La.C.C.P. art. 966(D)(1); *Campbell*, 294 So.3d at 526. In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512 (La. 7/5/94), 639 So.2d 730, 751.

DISCUSSION

In determining whether a condition is unreasonably dangerous, courts have adopted a four-part risk-utility balancing test. This test requires consideration of: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. *Moore v. Murphy Oil USA, Inc.*, 2015-0096 (La. App. 1 Cir. 12/23/15), 186 So.3d 135, 147, writ denied, 2016-00444 (La. 5/20/16), 191 So.3d 1066.

The second prong of the risk-utility balancing test focuses on whether the defective condition is obvious and apparent, or as it has come to be commonly known, "open and obvious." Generally, a defendant does not have a duty to protect against an open and obvious hazard. *Moore*, 186 So.3d at 147; *Pitre v. Louisiana Tech Univ.*, 95-1466 (La. 5/10/96), 673 So.2d 585, 591. In order for a defect to be considered open and obvious, the danger created by that defect must be apparent to all corners, *i.e.*, everyone who may potentially encounter it. *Moore*, 186 So.3d at 147. Thus, in the instant case, the trial court had to decide if there was a genuine issue of material fact as to whether the complained-of condition, here the unknown substance on the restaurant's floor, created an unreasonable risk of harm. Summary judgment is proper when no legal duty is owed because the

condition encountered is obvious and apparent to all and not unreasonably dangerous. See *Moore*, 186 So.3d at 147-48.

From our review of the record, we agree with the trial court's determination that the hazard was open and obvious not only because Ms. Ladner stated that she herself had noticed the hazard upon entering the restaurant and approaching the counter, but that her sister had also noticed it. Ms. Ladner was able to describe the hazard in detail, comparing the hazard to the shape and size of a plate. However, the open and obvious inquiry focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge. *Broussard v. State ex rel. Office of State Bldgs.*, 2012-1238 (La. 4/5/13), 113 So.3d 175, 188.

More important than Ms. Ladner's testimony is the fact that Ms. Ladner's sister affirmatively saw the hazard and did not slip in it. There were also four or five other people waiting in the same area, making it reasonable for the trial court to conclude that the hazard was open and obvious to all who were present. If the complained-of condition should be obvious to all, then it may not be unreasonably dangerous. *Broussard*, 113 So.3d at 188. Accordingly, we conclude that the plaintiffs have not met their burden of proving that the unknown substance presented an unreasonable risk of harm as required by La. R.S. 9:2800.6(B), as there is no genuine issue of material fact that the substance was an open and obvious hazard.

Since the plaintiffs have not met their burden of proof, Mr. Masker is not liable for the plaintiff's injuries and comparative fault principles do not apply. See *Broussard*, 113 So.3d at 188-89 (where the defendant would otherwise be liable to the plaintiff, comparative fault principles apply). Likewise, the issue of whether Ms. Ladner had a diminished duty to use reasonable care is also inapplicable. Ms. Ladner's actions at the restaurant counter were not extraordinary. In other words,

she ordered food and waited for it to be given to her before turning from the counter and leaving with her tray. She did not testify to any distracting factors that would have diminished her ability to use reasonable care at the moment she slipped on the unknown substance. See *Hartford v. Wal-Mart Stores, Inc.*, 1999-0753 (La. App. 1 Cir. 5/16/00), 765 So.2d 1081, 1087, writ denied, 2000-1758 (La. 9/22/00), 768 So.2d 603 (customer's duty to use reasonable care and avoid obvious hazards was diminished since her attention was distracted by store employee as he greeted her and offered her a sales circular).

DECREE

The judgment of the 22nd Judicial District Court in favor of the defendant/appellee, Ray Masker, Jr., dismissing all claims against him with prejudice, is affirmed. All costs of this appeal are assessed to the plaintiffs/appellants, GeAnna Ladner and Kendall Ladner.

AFFIRMED.