

HELEN M. HARRISON

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NO. 2000-CA-2379

VERSUS

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COURT OF APPEAL

**ROY J. GONZALES,
CHRISTIAN M. COMARDO,
AND ABC INSURANCE
COMPANY**

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FOURTH CIRCUIT

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STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-11467, DIVISION "K-14"
HONORABLE RICHARD J. GANUCHEAU, JUDGE**

JUDGE MICHAEL E. KIRBY

(Court composed of Judge Steven R. Plotkin, Judge Patricia Rivet Murray,
Judge Michael E. Kirby)

**LEE M. PEACOCKE
SALLEY & ASSOCIATES
3445 NORTH CAUSEWAY BOULEVARD
SUITE 510
METAIRIE, LA 70002
COUNSEL FOR PLAINTIFF/APPELLANT**

**THOMAS G. BUCK
GEORGE C. AUCOIN, JR.
BLUE WILLIAMS L.L.P.
3421 NORTH CAUSEWAY BOULEVARD**

SUITE 901
METAIRIE, LA 700023760
COUNSEL FOR DEFENDANT/APPELLEE

The issue in this appeal is whether the trial court erred in granting summary judgment in favor of Christian Comarda, one of the defendants in a personal injury lawsuit brought by Helen Harrison.

For purposes of this appeal, the parties do not dispute that Ms. Harrison was injured on September 2, 1994 as she traversed the sidewalk in front of property located on Canal Street in New Orleans. The record shows that Mr. Comarda owned this property from August 31, 1993 until July 28, 1994, when he sold it to Mohammad Zeitoun in a credit sale approximately five weeks before Ms. Harrison's accident. The property was renovated by Fouad "Fred" Zeton, Zeitoun's son, and the sidewalk around the property was torn up at some point in connection with the renovations.

This is the second summary judgment proceeding in this case. On May 1, 1996, in Harrison v. Gonzales, 96-0104, this Court in an unpublished opinion reversed the trial court's grant of summary judgment, finding that although Mr. Comarda could not be held strictly liable because he did not own the property at the time of Ms. Harrison's injury, Ms. Harrison had sufficiently raised a factual question regarding whether Mr. Comarda had

created a hazardous condition and was therefore negligent.

In its May 1, 1996 decision, this Court stated the facts of this case as follows:

In her petition for damages, Ms. Harrison claims that on September 2, 1994, as she attempted to walk past the defendant's property, she noticed that the sidewalk in front of his building had been removed as part of renovation work. The pathway and area where the sidewalk otherwise would have been was obstructed by construction debris, chunks of concrete, boards, bricks, mud and pools of standing water. She attempted to pass the site by walking on a wooden plank which had been placed across the mud and water. As she did so, she lost her balance, stepped off the plank into the water and onto a nail protruding from the submerged board. Ms. Harrison claims Mr. Comarda "illegally" removed the sidewalk and negligently failed to erect a barricade or post any warning of the hazard.

After this court's decision, which specifically reserved Mr. Comarda's right to file another summary judgment motion, the parties undertook further discovery on the only issue remaining in the case relative to Mr. Comarda-- whether he was negligent in creating the hazardous condition that allegedly caused Ms. Harrison's injury. On February 10, 2000, Mr. Comarda filed a second summary judgment motion, asserting that the renovation and construction that allegedly created the hazard in the sidewalk were not commenced until after he sold the property in question and that he had no

role or part in the construction.

With this summary judgment motion, Mr. Comarda submitted his deposition and affidavit, affidavits from Catherine DeHaven and Judge Leon Cannizzaro, an amended affidavit from John Thomas, an amended set of answers to interrogatories from Mr. Zeitoun, and affidavits from both Mr. Zeitoun and his son. These items of evidence demonstrated that the sidewalk was not torn up until after Mr. Comarda sold the property and that Mr. Comarda had nothing to do with tearing up the sidewalk.

Emmar Mayberry, succession representative for Ms. Harrison's estate, appeals the March 20, 2000 judgment of the trial court granting Mr. Comarda's motion for summary judgment.

Appellate courts review summary judgments *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, 230. Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the any affidavits, show that there is no genuine issue of material fact, and that the movant is entitled to judgment as a matter of law. La. Code Civ. P. art. 966. Pursuant to the 1996 amendments to article 966, summary judgments are now favored, and the rules regarding summary

judgments are to be liberally applied. La. Code Civ. P. art. 966 (A) (2). The amendments leveled the playing field for the litigants, required equal scrutiny of documentation submitted by the parties, and removed the earlier overriding presumption in favor of trial on the merits. Marrogi v. Gerber, 2000-1091 (La.App. 4 Cir. 5/16/01), 787 So.2d 1098, writ denied, 2001-1768 (La. 9/28/01), ____ So.2d ____, 2001 WL 1159620.

Article 966 was also amended to alter the burden of proof in summary judgment proceedings. The initial burden of proof remains on the movant to show that no genuine issue of material fact exists. However, if the movant will not bear the burden of proof at trial, his burden on the motion requires him not to negate all essential elements of the plaintiff's claim, but rather to point out that there is an absence of factual support for one or more elements essential to the claim. La. Code Civ. P. art. 966 (C) (2); Fairbanks v. Tulane University, 98-1228 (La.App. 4 Cir. 3/31/99), 731 So.2d 983, 985.

After the movant has met his initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. La. Code Civ. P. art. 966 (C) (2). If the non-moving party fails to meet this burden, there is no genuine issue of material fact, and the movant is entitled to summary judgment. La. Code Civ. P. art. 966; Schwarz v. Administrators of Tulane

Educational Fund, 97-0222 (La.App. 4 Cir. 9/10/97), 699 So.2d 895, 897.

When a motion for summary judgment is properly supported, the non-moving party may not rest on the mere allegations of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. Code Civ. P. art. 967; Townley v. City of Iowa, 97-493 (La.App. 3 Cir. 10/29/97), 702 So.2d 323, 326.

In her first assignment of error, Ms. Mayberry argues that the trial court erred in granting the summary judgment motion when the motion was supported by contradictory affidavits from the same witness and by conflicting answers to interrogatories from the same party. Ms. Mayberry claims that the amendments created issues of credibility, which are not appropriate for summary judgment rulings. Also, Ms. Mayberry contends that some explanation is required regarding the changes.

Specifically, she complains about an affidavit by John Thomas, an attorney whose office is next to the property in question, which was submitted by Mr. Comarda to support his motion. This affidavit replaced an affidavit Mr. Thomas signed four years earlier on November 16, 1995. The first affidavit stated in part:

That at the time of Mrs. Harrison's accident the property next door was littered with boards and chunks of concrete. Construction work had been

started on the property several months earlier. The sidewalk was removed illegally without a permit then all work was stopped and the property sat idle during the summer months while rain water approximately a foot deep accumulated in the front yard. Someone had placed a plank across a portion of the yard where the sidewalk had once been.

Mr. Thomas's December 14, 1999 affidavit changed this paragraph to state:

That at the time of Mrs. Harrison's accident the property next door was littered with boards and chunks of concrete. Construction work had been started on the front of the property within the past thirty days. The sidewalk was removed within the past month and some rainwater had accumulated in the front yard and the area where the sidewalk had once been.

In his answers to interrogatories in October 1999, Mohammed Zeitoun responded that at the time of his acquisition of the property, the sidewalk was torn up and repairs needed to be done. In amended answers to interrogatories in January 2000, Mr. Zeitoun stated that the sidewalk was intact up until his acquisition of the property and that it was torn up immediately after the acquisition to level the sidewalk.

Perhaps if these amended documents were the only evidence offered to support Mr. Comarda's summary judgment motion, Ms. Mayberry's argument would be valid. As it is, Mr. Comarda's motion was supported by several affidavits, all stating that the sidewalk was intact on the date Mr.

Comarda sold the property to Mr. Zeitoun. The evidence presented to support the motion sufficiently pointed out the absence of factual support for at least one element of a negligence action. Mr. Comarda fulfilled his burden of proof on a summary judgment motion.

In her opposition to Mr. Comarda's motion, Ms. Mayberry failed to establish that she would be able to sustain a valid negligence claim against Mr. Comarda at trial. Instead of setting forth specific facts showing a genuine issue of material fact for trial, Ms. Mayberry merely asserted that the existence of the two pre-amendment documents created a material issue of fact. Her argument that the amended affidavit and answer to interrogatory create credibility questions is unfounded; there is no showing that either Mr. Thomas or Mr. Zeitoun had any motive for signing these documents other than to correct previous mistakes.

We are satisfied that the explanation for the amendments, which Ms. Mayberry demands, is simply that the two witnesses corrected earlier incorrect statements. We decline to hold that a corrected affidavit or a corrected answer to an interrogatory necessarily creates a material issue of fact, particularly when the correction, as in this case, merely puts the evidence in line with substantial other evidence supporting the motion for summary judgment. The jurisprudence offered by Ms. Mayberry to support

her argument is clearly distinguishable, and her assignment of error has no merit.

In her second assignment of error, Ms. Mayberry argues that the trial court erred by failing to recognize that a question of material fact existed as to whether a joint venture was created between Mr. Comarda and Fred Zeton concerning the development of the property in question. As such, Ms. Mayberry asserts, the negligence of Mr. Zeton could be imputed to Mr. Comarda.

Because Ms. Mayberry offered this joint venture argument to the trial court in opposition to the motion for summary judgment, although the theory was not offered in Ms. Harrison's petition, we will nonetheless evaluate the merits of her assignment of error.

At trial, Ms. Mayberry would have to prove the elements of a joint venture between Mr. Zeton and Mr. Comarda. Thus, in his motion for summary judgment, Mr. Comarda had to show the absence of factual support for an element of a joint venture claim. He accomplished this by submitting his deposition in support of his motion in which he described the history of the business dealings between himself and Mr. Zeton. Hence, through his motion, Mr. Comarda clearly established the absence of factual support for the element of mutual control in a joint venture.

Once again, Ms. Mayberry failed to meet her burden of proof in a summary judgment proceeding, that is, to produce factual support sufficient to satisfy her evidentiary burden at trial. Simply stated, Ms. Mayberry offered nothing to show the element of mutual control, which is inherent in a joint venture, particularly at the time Mr. Comarda sold the property to Mr. Zeton's father. The jurisprudence cited by Ms. Mayberry, which basically outlines the elements of a joint venture, does not diminish her burden in summary judgment proceeding. She did not set forth facts showing the existence of a genuine issue of material fact on the existence of a joint venture in this case.

Accordingly, for the reasons given, we find no error in the trial court's judgment granting summary judgment in favor of Mr. Comarda and dismissing Ms. Mayberry's claims against him.

AFFIRMED