

**NOT DESIGNATED FOR PUBLICATION**

**WYATT V. DEJOIE** \* **NO. 2002-CA-1308**  
**VERSUS** \* **COURT OF APPEAL**  
**SCIENTIFIC SERVICES AND** \* **FOURTH CIRCUIT**  
**PROTECTIVE PRODUCTS,** \* **STATE OF LOUISIANA**  
**INC., D/B/A RODENT GUARD -** \*  
**TERMITE AND PEST** \*  
**CONTROL** \*

\*  
\* \* \* \* \*

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2000-15538, DIVISION "F"  
Honorable Yada Magee, Judge  
\* \* \* \* \*  
**Judge Dennis R. Bagneris, Sr.**  
\* \* \* \* \*

(Court composed of Judge Steven R. Plotkin, Judge Dennis R. Bagneris, Sr.,  
and Judge David S. Gorbaty)

Robert M. Rosenberg  
POLACK ROSENBERG & ENDOM, LLP  
938 Lafayette Street  
Suite 100  
New Orleans, LA 70113  
**COUNSEL FOR PLAINTIFF/APPELLANT**

David M. Cambre  
LOZES & CAMBRE  
1010 Common Street

Suite 1700  
New Orleans, LA 70112

**COUNSEL FOR DEFENDANT/APPELLEE**

**REVERSED**

Plaintiff, Wyatt Dejoie, appeals the trial court's judgment granting defendant's motion for summary judgment and dismissing her claim with prejudice. The plaintiff instituted the present suit seeking damages for the defendant's alleged gross negligence in the treatment of Formosan termites in plaintiff's home.

On December 24, 1994, the plaintiff entered into a contract with defendant, Scientific Services and Protective Products, Inc. d/b/a Rodent Guard – Termite and Pest Control (Rodent Guard) in which the defendant agreed to treat plaintiff's home for active infestation and preventative measures. The contract was renewed annually through 1999. Over the next five years, plaintiff continually had a problem with termites, and, at one point, her house was tented. Eventually, plaintiff sued defendant alleging that it was grossly negligent in its performance of its duties under the contract. The defendant filed a motion for summary judgment alleging that it was entitled to summary judgment as a matter of law as plaintiff was unable to prove that defendant's actions were grossly negligent. The trial

court granted the motion for summary judgment and dismissed plaintiff's claims against defendant.

On appeal, the plaintiff contends that the trial court erred in granting defendant's summary judgment. She argues that the documentation produced in opposition to the motion for summary judgment reveals that the defendant was grossly negligent.

The contract provided in pertinent part:

1. PERFORMING THE WORK

The Company agrees to treat the building(s) in complete compliance with applicable rules and regulations of the Louisiana Structural Pest Control Commission and to inspect the property at least once prior to the expiration of this agreement. The Company will exercise care while performing any work hereunder to try to avoid damaging any part of the property, plants or animals. Under no circumstances or conditions shall the Company be responsible for damages caused by the Company at the time the work is performed except those damages resulting from gross negligence on the part of the Company.

\* \* \* \* \*

2. DAMAGE

The Customer understands that due to various conditions present in construction existing at the time this agreement is made, and the possibility of infestation and damage which are or are not visible to the Company, the Company cannot be liable for any damage to the structure(s) covered by this agreement, or its contents, caused by wood-destroying insects.

In support of its motion for summary judgment, the defendant

produced the deposition of Michael Prentice, an inspector with the Louisiana Department of Agriculture and Forestry. Prentice handles complaints about pest control companies and inspects job sites to determine if the pest control companies are acting in accordance with the state treatment code. Prentice testified that he inspected the plaintiff's home three times. He inspected the residence on September 11, 1997 and February 18, 1998, at the request of the defendant. Prentice inspected the house again on June 14, 1999, after the plaintiff sent the department a complaint letter. On each inspection, Prentice found active Formosan termite infestation. He also found no violations of the state treatment code by the defendant. On his last inspection, Prentice could not find the source of the termite infestation. He suggested to the plaintiff that she remove the baseboard of the infested wall to locate the source of the infestation.

Plaintiff relied upon the defendant's service reports in her opposition to the motion for summary judgment. The service reports reveal that the defendant treated plaintiff's house on numerous occasions between 1994 and 1999. However, the documentation also indicates that the defendant failed, for several months, to trench and treat the plaintiff's home after she reported seeing swarming termites. The service reports indicate that the plaintiff notified the defendant of swarming termites on June 10, 1995. The

defendant was supposed to trench and treat the house on December 13, 1995. However, a service report of July 1, 1996, revealed that the property was not trenched and treated on December 13, 1995, and was not trenched and treated until July 1, 1996. Further, a service report of September 30, 1997 conflicts with the testimony of Michael Prentice. Prentice identified the slab of the residence as being monolithic. Defendant states in the service report that Prentice was incorrect; that the slab was a floating slab. Prentice stated in his deposition that a floating slab had different treatment requirements from a monolithic slab. A floating slab would require the interior of the residence to be drilled. Prentice inspected the property and reviewed defendant's treatment under the requirements for a monolithic slab. Thus, plaintiff argues that Prentice did not check to see if the defendant drilled in the interior of the property. In fact, a review of the proposal submitted by the defendant for treatment of the property reveals that the interior of the residence was not included in the area to be drilled.

La. C.C. article 2004 states that "any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damages to the other party." The Louisiana Supreme Court in Ambrose v. New Orleans Police Dept. Ambulance Service, 93-3099, p. 5-6 (La.7/5/94); 639 So.2d 216, 219-220 defined gross negligence as follows:

Louisiana courts have frequently addressed the concept

of gross negligence. Gross negligence has been defined as the "want of even slight care and diligence" and the "want of that diligence which even careless men are accustomed to exercise." State v. Vinzant, 200 La. 301, 7 So.2d 917 (La.1942). Gross negligence has also been termed the "entire absence of care" and the "utter disregard of the dictates of prudence, amounting to complete neglect of the rights of others." Hendry Corp. v. Aircraft Rescue Vessels, 113 F.Supp. 198 (E.D.La.1953) (applying Louisiana law). Additionally, gross negligence has been described as an "extreme departure from ordinary care or the want of even scant care." W. Page Keeton, et. al., Prosser & Keeton on the Law of Torts, Sec. 34, at 211 (5th ed.1984); 65 C.J.S. Negligence, Sec. 8(4)(a), at 539-40 (1966 & Supp.1993). "There is often no clear distinction between such [willful, wanton, or reckless] conduct and 'gross' negligence, and the two have tended to merge and take on the same meaning." Falkowski v. Maurus, 637 So.2d 522 (La.App. 1st Cir.), writ denied, 629 So.2d 1176 (La.1993) (quoting Prosser & Keeton, supra, at 214). Gross negligence, therefore, has a well-defined legal meaning distinctly separate, and different, from ordinary negligence.

Summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. Article 966 was amended in 1996, but the burden of proof remains with the mover to show that no genuine issue of material fact exists. If, as here, the mover will not bear the burden of proof at trial, his burden on the motion does not require him 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. C.C. art. 966 C(2); Fairbanks v. Tulane University, 98-1228 (La.App. 4 Cir. 3/31/99), 731 So.2d 983. After the mover has met its 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. C.C.P. art. 966 C(2); Smith v. General Motors Corp., 31-258 (La.App. 2 Cir. 12/9/98), 722 So.2d 348. If the non-moving party fails to meet this burden, there is no genuine issue of material fact and the mover is entitled to summary judgment. La. C.C.P. art. 966; Schwarz v. Administrators of Tulane Educational Fund, 97-0222 (La.App. 4 Cir. 9/10/97), 699 So.2d 895. Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate.

In the case at bar, the defendant sought and obtained a summary judgment on the basis that the plaintiff could not prove that the defendant committed gross negligence. The defendant relied upon the deposition of Michael Prentice who stated that he found no violations of the state treatment code when he inspected the plaintiff's property. However, plaintiff opposed the motion for summary judgment arguing that Prentice did not have all the correct information when he inspected the property.

Prentice identified the slab as being monolithic. Defendant stated in its service report that the slab was not monolithic but floating. Prentice acknowledged in his deposition that there are different requirements for the two types of slabs. A floating slab would require drilling in the interior of the residence. The documentation presented by the plaintiff reveals that the defendant did not drill in the interior of the home. Prentice, believing the slab to be monolithic, either did not check for drilling within the interior of the residence or did not see any evidence of drilling within the interior of the home. If the defendant, knowing the slab to be floating, did not drill within the interior of the home, then it did violate the state treatment code and could be found grossly negligent. The plaintiff met her burden of proving that there are material issues of genuine fact. The trial court erred in granting the defendant's motion for summary judgment and dismissing plaintiff's claim with prejudice.

Accordingly, we reverse the judgment of the trial court.

**REVERSED**



