

**NOT DESIGNATED FOR PUBLICATION**

**KATHRYN R. BERGERON** \* **NO. 2007-CA-0724**  
**VERSUS** \* **COURT OF APPEAL**  
**SCHINDLER ELEVATOR** \* **FOURTH CIRCUIT**  
**CORPORATION &**  
**FREDERICK A. KEMPF AND** \* **STATE OF LOUISIANA**  
**RUTH JORDAN KEMPF D/B/A**  
**429 DECATUR LIMITED** \* \* \* \* \*  
**PARTNERSHIP**

**APPEAL FROM**  
**CIVIL DISTRICT COURT, ORLEANS PARISH**  
**NO. 2003-4173, DIVISION “F-10”**  
**Honorable Yada Magee, Judge**  
\* \* \* \* \*  
**Judge Patricia Rivet Murray**  
\* \* \* \* \*

(Court composed of Judge Patricia Rivet Murray, Judge James F. McKay, III,  
Judge Max N. Tobias, Jr.)

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(SCHINDLER ELEVATOR CORPORATION)

**REVERSED AND REMANDED**

This is a personal injury case arising out of an elevator accident. From the trial court's judgment granting the motion for summary judgment filed by the defendant, Schindler Elevator Corporation, and dismissing Schindler from the suit, the plaintiff, Kathryn Bergeron, appeals. For the reasons that follow, we reverse and remand.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

On March 16, 2002, Ms. Bergeron, an employee of the Bubba Gump Shrimp Company Restaurant, was injured on the job. The injury occurred when she was loading trays of silverware onto an elevator. The door to the elevator closed on her hand and would not reopen.

On March 14, 2002, two days before Ms. Bergeron's accident, Schindler, which had the maintenance contract on the elevator, had serviced the elevator. On that occasion, Bubba Gump had called Schindler to repair the elevator because the doors would not open when the elevator was called to a particular floor by pushing the elevator button. Bubba Gump had reported the same problem on February 25, 2002; April 27, 2002; and April 28, 2002. According to the work reports, Schindler's employees reset or rebooted the control system.

On March 19, 2003, Ms. Bergeron filed this suit against the owners of the premises and Schindler. As to Schindler, she alleged that it was negligent in failing to properly install the elevator; failing to provide proper maintenance and repairs to the elevator; failing to competently, adequately and sufficiently repair the elevator in question; failing to do what it should have done; and failing to see what it should have seen.

After answering the suit, Schindler filed a motion for summary judgment.<sup>1</sup> Schindler alleged that it did not violate any contractual, statutory, or other duty or obligation; and that it neither took any action nor failed to take any action that caused or contributed to Ms. Bergeron's alleged injuries. Schindler thus argued that summary judgment was appropriate as a matter of law.

Following a hearing, the trial court granted Schindler's motion and dismissed Ms. Bergeron's claim against Schindler. The trial court certified that judgment as final for purposes of appeal. This appeal by Ms. Bergeron followed.

## **DISCUSSION**

“Favored in Louisiana, the summary judgment procedure ‘is designed to secure the just, speedy, and inexpensive determination of every action’ and shall be construed to accomplish these ends.” *King v. Parish National Bank*, 04-0337, p. 7 (La. 10/19/04), 885 So.2d 540, 545 (quoting La. C.C.P. art. 966(A)(2)). Appellate courts review grants of summary judgment *de novo* using the same standard applied by the trial court in deciding the motion for summary judgment. *Schmidt v. Chevez*, 00-2456, p. 4 (La. App. 4 Cir.1/10/01), 778 So.2d 668, 670. According to this standard, a summary judgment shall be granted if the pleadings, depositions,

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<sup>1</sup> Schindler also filed a dilatory exception of vagueness and ambiguity. The record contains no evidence that a hearing was held on the exception or that a ruling has been issued by the trial court.

answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. 966(B); *Schmidt*, 00-2456 at p. 3, 778 So.2d at 670.

Affidavits supporting and opposing summary judgment “shall be made on personal knowledge, shall set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” La. C.C.P. art. 967. Personal knowledge encompasses only those facts which the affiant saw, heard, or perceived with his own senses. *Delcambre v. Price*, 99-0223, p.5 (La. App. 4 Cir. 3/24/99), 738 So.2d 593, 595.

The party seeking summary judgment has the burden of affirmatively showing the absence of a genuine issue of material fact. *Allen v. Integrated Health Services, Inc.*, 32,196, p. 3 (La. App. 2 Cir. 9/22/99), 743 So.2d 804, 806. A “material” fact is “one that would matter on the trial on the merits.” *Smith v. Our Lady of the Lake Hosp., Inc.*, 93-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. Stated otherwise, a fact is “material” if its existence or nonexistence may be essential to the plaintiff’s cause of action under the applicable theory of recovery. *Schmidt*, 00-2456 at p. 3, 778 So.2d at 670 (citing *Moyles v. Cruz*, 96-0307 (La. App. 4 Cir. 10/16/96), 682 So.2d 326).<sup>2</sup>

An elevator repairer is not held to a higher degree of care; rather, the repairer must only exercise reasonable care in the performance of services under its

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<sup>2</sup> Since the movant, Schindler, will not bear the burden of proof at trial, it is not necessary that it negate all elements of Ms. Bergeron’s claims. Rather, it needs only point out to the court the absence of factual support for one or more elements essential to Ms. Bergeron’s claims. Once the movant meets this initial burden, the burden shifts to Ms. Bergeron to present factual support sufficient to establish her ability to satisfy the evidentiary burden at trial. If Ms. Bergeron then fails to satisfy this burden, there is no genuine issue of material fact, and the movers are entitled to summary judgment. *King*, 04-0337 at p. 8, 885 So.2d at 545-46. The opponent to a properly supported motion for summary judgment may not rest on the mere allegations or denials of his or her pleadings, but must respond by

contract with the building owner. *Ledet v. Montgomery Elevator Co.*, 94-0411 (La. App. 4 Cir. 10/13/94), 644 So.2d 1075. Thus, this is a negligence case governed by La. C.C. art. 2315 and the duty-risk analysis.<sup>3</sup>

On appeal, Ms. Bergeron argues that the trial court erred in granting Schindler's motion for summary judgment because neither of the two affidavits Schindler submitted in support of its motion was based upon the personal knowledge of the affiant.

In support of its motion, Schindler introduced the affidavits of Patrick Sullivan, a Schindler employee, and Tommy Papale, Bubba Gump's manager. Mr. Sullivan attested that he inspected, serviced, and maintained the elevator at issue. He further attested that he repaired the elevator two days prior to Ms. Bergeron's accident, March 14, 2002. He still further attested that Bubba Gump did not advise him or anyone at Schindler of any malfunction or problem with the elevator.

However, Mr. Sullivan testified in his deposition, which Ms. Bergeron introduced in opposition to the summary judgment motion, that he did not remember if he repaired the elevator on March 14, 2002. During Mr. Sullivan's deposition, work reports initiated in connection with the service calls of February 25, 2002; March 14, 2002; and April 27, 2002 were reviewed.<sup>4</sup> These work reports establish that a Schindler employee other than Mr. Sullivan

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affidavits or as otherwise provided by law setting forth specific facts showing that there exists a genuine issue of material fact for trial. *Coates v. Anco Insulations, Inc.*, 00-1331, p. 5 (La. App. 4 Cir. 3/21/01), 786 So.2d 749, 753.

<sup>3</sup> Article 2315 provides that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. C.C. art. 2315. The duty-risk analysis is used to examine negligence claims. Under this analysis, the plaintiff must prove the following elements: (1) defendant's conduct was a cause-in-fact of the plaintiff's injuries; (2) the defendant had a duty to conform conduct to a specific standard; (3) the defendant breached that duty; (4) the defendant's conduct was the legal cause of plaintiff's injuries; and (5) plaintiff sustained actual damage. *Mosley v. Orleans Parish School Board*, 04-1273, pp. 3-4 (La. App. 4 Cir. 2/16/05), 898 So.2d 524, 527.

<sup>4</sup> Ms. Bergeron introduced copies of the Schindler work reports in opposition to the summary judgment motion.

performed the repairs. Given these circumstances, Mr. Sullivan's affidavit was not based on personal knowledge and thus failed to comply with the requirements of La. C.C.P. art. 967.

The other affidavit Schindler introduced was from Mr. Papale, Bubba Gump's manager. Mr. Papale attested that "immediately after the subject incident, restaurant personnel tested the elevator, and it worked normally." The reference in his affidavit to what restaurant personnel did establishes a lack of personal knowledge on Mr. Papale's part. His affidavit thus failed to comply with the requirements of La. C.C.P. art. 967.

Given the deficiencies in the proof Schindler offered in support of its motion for summary judgment, we find it failed to satisfy its burden of proof. Genuine issues of fact remain as to whether the elevator was properly serviced and properly functioning at the time of Ms Bergeron's accident.

### **DECREE**

For the foregoing reasons, the judgment of the trial court is reversed, and this matter is remanded to the trial court for further proceedings.

**REVERSED AND REMANDED**