LANDRY FONTANILLE, JR., AND JEANINE FONTANILLE	*	**NO. 2011-CA-0882**
	*	**COURT OF APPEAL**
VERSUS		
	*	**FOURTH CIRCUIT**
DARLEEN JACOBS LEVY AND ABC INSURANCE COMPANY	*	**STATE OF LOUISIANA**
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JONES, C.J., DISSENTS WITH REASONS

Louisiana Civil.Code. arts. 2315 and 2316 are the codal foundations for delictual liability for negligence in Louisiana. In addition to those articles, La. C.C. arts. 2317 and 2317.1 define the basis for delictual liability for defective things. La. C.C. art. 2322 defines the basis for delictual liability for buildings.

Prior to 1996, an owner's liability for a vice or defect on the premises was rooted in La. C.C. arts. 2317 and 2322. *Millien v. Jackson*, 2009-0056, p. 8 (La. App. 5 Cir. 12/29/09), 30 So.3d 167, 173. Both La. C.C. art. 2317 and art. 2322 formerly imposed strict liability based upon status as owner or custodian rather than on personal fault. *Id.* In 1996, the Louisiana legislature adopted La. C.C. art. 2317.1 and significantly amended La. C.C. art. 2322. La. C.C. art 2317.1 provides, in pertinent part:

> 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.

La. C.C. art. 2322 currently provides in pertinent part:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the 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.

Id. at 173-174. It is well-settled law that a landowner owes a duty to a plaintiff to discover any unreasonably dangerous conditions, and to either correct the condition or warn of its existence. *Dauzat v. Curnest Guillot Logging Inc.*, 2008-0528, pp. 4 (La. 12/2/08), 995 So.2d 1184, 1186. In determining whether a condition is unreasonably dangerous, courts have adopted a four-part test. This test requires consideration of: 1) the utility of the thing; 2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the complained-of condition; 3) the cost of preventing the harm; and 4) the nature of the plaintiff's activity in terms of the activity's social utility or whether the activity is dangerous by nature. *Hutchinson v. Knights of Columbus, Council No.* 5747, 2003-1533, pp. 9-10, (La. 2/20/04), 866 So.2d 228, 235.

In general, defendants may have no duty to protect against an open and obvious hazard. *Eisenhardt v. Snook,* 2008-1287, p. 5 (La. 3/17/09), 8 So.3d 541, 544. If the facts of a particular case show that the complained-of condition should be obvious to all, the condition may not be unreasonably dangerous, and the defendant may owe no duty to the plaintiff. *Id.* The degree to which a danger may be observed by a potential victim is one factor in the determination of whether the condition is unreasonably dangerous. *Id.*

The Louisiana Supreme Court has recognized that "there is no per se exception of repairmen from the ambit of an owner's strict liability. Such

exception only applies if a factual analysis results in a determination that the risk of injury or harm is unreasonable under the circumstances." *Celestine v. Union Oil Co. of California*, 98-1868, p. 6 (La. 4/10/95), 652 So.2d 1299, 1304-1305. See also *Meaux v. Wendy's Intern., Inc.*, 2010-0111, p. 19 (La. App. 5 Cir. 10/26/10), 5 So.3d 778, 790. In *Celestine*, the Supreme Court ultimately concluded: "We do not adopt a repairman exception to strict liability under La. C.C. arts. 2317 and 2322. However, we do conclude that plaintiff's status as a repairman is a significant factor in determination of whether a risk is unreasonable." *Id.* at p. 11, 652 So.2d at 1305.

Turning to the facts of the instant case, Mr. Fontanille was a repairman/carpenter hired to repair storm-damaged property. As a repairman, presumably he possessed certain knowledge and skill. Mr. Fontanille's affidavit reflects that he was aware the property was in a dilapidated condition. However, we note that Mr. Fontanille makes no specific reference to the condition of the door or casing around the door that caused his injuries. Furthermore, the record contains no evidence regarding the condition of the door and no evidence representing how or why the door fell. Also, as no discovery has been conducted, no experts have been retained, no depositions have been taken, and no statements have been taken from any witnesses at the scene of the accident. In fact, the record does not contain the name of the co-worker that was removing the door with Mr. Fontanille when it fell.

The only thing this record does contain, applicable to the motion for summary judgment, is opposing affidavits setting forth conflicting descriptions of the condition of the property and conflicting versions of how the accident happened. Mr. Fontanille claims that the door that injured him broke loose unexpectedly because of completely rotten wood surrounding the door frame and casing. Mr. Fontanille also states in his affidavit that he personally informed Ms.

Levy of the "dilapidated dangerous condition" of the property. Ms. Levy, on the other hand, denies that the property was in rotten condition and denies that Mr. Fontanille informed her that the property presented a great risk of harm. She further contends that Mr. Fontanille was injured when a co-worker inadvertently dropped a door, causing a glass pane to become dislodged and causing a laceration to Mr. Fontanille's arm. At the outset, we note that this statement is hearsay, as Ms. Levy admittedly has no first-hand knowledge of the incident. Moreover, there is no evidence in this record to corroborate Ms. Levy's assertion that the door was "dropped" on Mr. Fontanille by his co-worker.

In sum, our *de novo* review of the record demonstrates, particularly in light of the complete lack of discovery, that genuine issues of material facts exist with respect to whether or not a defect in the property presented an unreasonable risk of harm to Mr. Fontanille. Accordingly, Ms. Levy failed to carry her burden of proving that she is entitled to judgment as a matter of law.

Additionally, Ms. Levy submits that the exclusivity or immunity provision of the Louisiana Workers' Compensation Act bars Mr. Fontanille from suing her in her "dual capacity" as the owner of Homefinders and the owner of the property. However, our *de novo* review of the record reveals that no factual evidence was presented to the trial court on the issue of whether Ms. Levy is entitled to protection from tort liability pursuant to La. R.S. 23:1032.

La. R.S. 23:1032 provides, in pertinent part, as follows:

> A. (1)(a) Except for intentional acts provided for in Subsection B, the rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights, remedies, and claims for damages ....
>
> (b) This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director,

> stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine.

....

> C. The immunity from civil liability provided by this Section shall not extend to:
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> (1) Any officer, director, stockholder, partner, or employee of such employer or principal who is not engaged at the time of the injury in the normal course and scope of his employment....

Here, Ms. Levy submits that as the owner of Homefinders, and as the owner of the property where the accident occurred, her roles were inextricably intertwined and related to the employment relationship of Mr. Fontanille via her contractual relationship with Homefinders. However, as previously stated, the record is devoid of any factual evidence regarding Ms. Levy's role in the ownership and operation of Homefinders. Ms. Levy also maintains that Mr. Fontanille swears in his affidavit that Ms. Levy was in full control of Mr. Fontanille and the entire Homefinders' crew. However, Mr. Fontanille's affidavit makes no such assertion. In sum, on the evidence presented, Ms. Levy has not made a prima facie showing that she is entitled to the immunity afforded by La. R.S. 23:1032.

Therefore, I would reverse and remand; thus, I respectfully dissent.