

**THOMAS D. BAYER AND
LAURA D. KELLEY**

*

NO. 2017-CA-0948

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VERSUS

COURT OF APPEAL

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**STARR INTERNATIONAL
CORPORATION, CIMARRON,
LLC, ENTERGY NEW
ORLEANS, INC., ENTERGY
LOUISIANA, LLC AND
ENTERGY GULF STATES
LOUISIANA, INC.**

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FOURTH CIRCUIT

STATE OF LOUISIANA

CONSOLIDATED WITH:

CONSOLIDATED WITH:

**THOMAS D. BAYER AND
LAURA D. KELLEY**

NO. 2017-CA-0257

VERSUS

**STARR INTERNATIONAL
CORPORATION, ET AL.**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-03806, DIVISION "D"
Honorable Nakisha Ervin-Knott, JUDGE

Judge Joy Cossich Lobrano

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge
Tiffany G. Chase)

LOVE, J., CONCURS IN PART AND DISSENTS IN PART

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**AFFIRMED IN PART; REVERSED IN PART; REMANDED.
MAY 2, 2018**

The sole issue presented for appellate review concerns the recovery for emotional distress and mental anguish resulting from fire damage to property. After reviewing the record and applicable law, we affirm in part, reverse in part, and remand the remaining issue to the district court for further proceedings.

This litigation arises out of a fire that occurred at a house owned by plaintiff/appellant, Thomas D. Bayer, at 7418-7422 Maple Street in New Orleans, Louisiana.¹ On April 23, 2014, employees of Cimarron Underground, Inc. (“Cimarron”), were attempting to switch out a gas meter underneath the house when they accidentally started a fire. Neither Bayer nor Laura D. Kelley, also plaintiff/appellant, and a resident of the house, was present at the property at any time during the fire. Bayer was at Tulane University’s Riley Center while Kelley was at Tulane’s Elmwood campus.

By the time Bayer and Kelley returned to the house, the fire had been extinguished, however, Bayer testified “lots of smoke” was still present. Bayer stated that minor damage to the asbestos siding on the house was visible. He

¹ Bayer also had five tenants living on the property.

opened the front door to let himself and firefighters into the house. Inside he found small particles of ash, referred to by him as soot or ash. Kelley was also able to access the house after the incident. Kelley admitted in her deposition that she did not lose any items in the fire, and left the property before emergency personnel dispersed. Plaintiffs had complete access to the house after the fire and during renovations.

Plaintiffs filed suit against Cimarron, Starr Indemnity & Liability Company, Entergy New Orleans, Inc., Entergy Louisiana, L.L.C., and Entergy Gulf States Louisiana, Inc. in April 2015. On April 27, 2016, the defendants filed a motion for summary judgment seeking to dismiss the claims for emotional distress asserted by the plaintiffs.² The motion was heard on August 12, 2016 and the motion for summary judgment was granted by the district court on September 26, 2016.

Plaintiffs filed a motion for new trial on September 29, 2016, which was denied on December 6, 2016. Plaintiffs appealed the denial of their motion for new trial. On August 15, 2017, this court found that the prior judgement lacked the necessary decretal language and remanded the matter to the district court. The district court signed a new judgment on October 10, 2017, granting defendants' motion for summary judgment and denying plaintiffs' motion for new trial.

Plaintiffs have appealed this most recent judgment.

In its reasons for judgment, the district court found that:

² Plaintiffs' related claims for property damage, relocation, temporary housing and living expenses, and other incidental damages, were previously paid, and were not a part of the litigated claim. All Bayer's tenants were similarly reimbursed for all expenses incurred as a result of displacement, including the boarding of a tenant's dog.

Thomas Bayer did not witness the destruction of his home, did not take medication, or seem unusually upset. Thomas Bayer alleged high blood pressure, but such had already manifested itself prior to the incident. Thomas Bayer states he is going to take a medical examination to determine if his tinnitus is due to the incident. However, doctors in previous medical examination of Thomas Bayer did not provide that the tinnitus is a result of the incident.

Laura Kelley was not nearby or present at the incident and Thomas Bayer only has the usual worry and inconvenience of damage to his property.

The standard of review of the granting of a summary judgment is *de novo*.

This court discussed the standard of review for summary judgment in *Ducote v.*

Boleware, 15-0764, p. 6 (La.App. 4 Cir. 2/17/16), 216 So.3d 934, 939, *writ denied*,

16-0636 (La. 5/20/16), 191 So.3d 1071, as follows:

Appellate courts review the grant or denial of a motion for summary judgment *de novo*, using the same criteria applied by district courts to determine whether summary judgment is appropriate. This standard of review requires the appellate court to look at the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, to determine if they show that no genuine issue as to a material fact exists, and that the mover is entitled to judgment as a matter of law. A fact is material when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery; a fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, no need for trial on that issue exists and summary judgment is appropriate. To affirm a summary judgment, we must find reasonable minds would inevitably conclude that the mover is entitled to judgment

as a matter of the applicable law on the facts before the court.

Damages are generally awarded in property damages cases when the property is damaged by: (1) an intentional or illegal act; (2) an act for which the tortfeasor will be strictly or absolutely liable; (3) acts constituting nuisance; or (4) acts occurring when the owner is present or at the time, or shortly after, damage was negligently inflicted and suffers psychic trauma as a result. *See Williams v. City of Baton Rouge*, 98-1981, p. 15 (La. 4/13/99), 731 So.2d 240, 250 n. 5. *See also* Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law* § 7.02[6] (2d ed. 2004). “The jurisprudence...has limited such recovery by requiring that the emotional distress be severe and not merely the result of the usual worry or anxiety attendant to property damage.” *Smith v. University Animal Clinic, Inc.*, 09-745, pp. 1-2 (La.App. 3 Cir. 2/10/10), 30 So.3d 1154, 1156, *writ denied*, 10-0566 (La. 5/28/10), 36 So.3d 247 (*quoting Doerr v. Mobil Oil Corp.*, 04-1789, p. 9 (La.App. 4 Cir. 6/14/06), 935 So.2d 231, 237, *writ denied*, 06-1760 (La. 11/3/06), 940 So.2d 664).

“Every incident of property damage is necessarily accompanied by some degree of worry and consternation over such things as possible financial loss, settlement of insurance claims, and discomfort or inconvenience while awaiting and undergoing repair work.” *Trim v. South Eastern Exp., Inc.*, 562 So.2d 26, 28 (La.App. 5th Cir. 1990) (*quoting Thompson v. Simmons*, 499 So.2d 517, 520 (La.App. 2d Cir. 1986), *writ denied*, 501 So.2d 772 (La. 1987)). Owners of damaged property may not recover for such mental anguish unless they prove that

they suffered a psychic trauma in the nature of or similar to a physical injury as a direct result of the property damage. *Barrios v. Safeway Ins. Co.*, 11-1028, p. 6 (La.App. 4 Cir. 3/21/12), 97 So.3d 1019, 1022-23; *Elston v. Valley Elec. Membership Corp.*, 381 So.2d 554, 556 (La.App. 2d Cir. 1980).

We first address the claim for emotional distress asserted by Kelley. Here, we find that the district court correctly granted summary judgment. Kelley did not own the home in question or its furnishings. She did not identify any personal property she lost in the fire; in fact, she had no property damage whatsoever. She reported some stress and visited her chiropractor two times for treatment. However, the jurisprudence requires more to recover. We find that her claim was properly dismissed with prejudice by the district court.

We turn now to Bayer. He did own the house and all its furnishings including an extensive art collection. At the time of the fire, Bayer was exercising at the Riley Center. Kelley contacted the Center to inform him of the fire; Bayer testified that he heard: “Thomas Bayer, please go to your home...Please go to your home. Your house is on fire.” Bayer lived about one mile from the Riley Center; he testified that he ran home. He arrived at the scene shortly after the fire was extinguished, but still saw lots of smoke. He arrived just before the firefighters were to break in his front door to gain entry to the house.

He stated that he began to experience tinnitus about two months after the fire. Despite physical examinations and tests, no known underlying physiological

reason for the tinnitus could be found. No medication is available for the condition.

Bayer testified that the tinnitus has impacted his life.

We find that a genuine issue of material facts exists as to whether Bayer's tinnitus is related to the fire at his home and the resulting stress he experienced in its immediate aftermath. Consequently, the district court erred when it entered a summary judgment against him. Because we find that summary judgment was inappropriate, we preterm discussion of the district court's alleged error in denying the motion for new trial.

Based on the foregoing, we affirm the summary judgment entered against Laura D. Kelly, dismissing her claims with prejudice, reverse the summary judgment against Thomas D. Bayer, and remand the case to the district court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.