CARL EDGEFIELD	*	**NO. 2017-CA-1050**
VERSUS	*	
		COURT OF APPEAL
AUDUBON NATURE INSTITUTE, INC., AUDUBON COMMISSION AND SCOTTSDALE INSURANCE COMPANY	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-13408, DIVISION "C"
Honorable Sidney H. Cates, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Terri F. Love, Judge Joy Cossich Lobrano, Judge Sandra Cabrina Jenkins)

LOBRANO, J., DISSENTS AND ASSIGNS REASONS

Darryl J. Carimi
CARIMI LAW FIRM
1 Hummingbird Road
Covington, LA 70433

COUNSEL FOR PLAINTIFF/APPELLANT, CARL EDGEFIELD

John W. Ellinghausen
Aaron M. Maples
KINNEY, ELLINGHAUSEN & DESHAZO
1250 Poydras Street, Suite 2450
New Orleans, LA 70113

COUNSEL FOR DEFENDANTS/APPELLEES, AUDUBON COMMISSION, AUDUBON NATURE INSTITUTE, INC., AND SCOTTSDALE INSURANCE COMPANY

APPEAL CONVERTED TO A WRIT; WRIT DENIED;
MOTION TO DISMISS DENIED

SEPTEMBER 12, 2018

This appeal arises from injuries plaintiff allegedly received as a result of a slip and fall while in the course and scope of his employment. Plaintiff was delivering seafood to defendants' restaurant when he slipped and fell on grease. Plaintiff contended that he sustained serious injuries. Defendants filed a motion for summary judgment contending that plaintiff failed to produce evidence that he would be able to meet his burden of proof at trial. The trial court agreed and granted the motion for summary judgment. Eight days later, plaintiff filed a motion for new trial and attached allegedly newly discovered evidence. The trial court summarily denied the motion for new trial.

Plaintiff appeals contending that the trial court erroneously summarily denied his motion for new trial. We convert plaintiff's appeal to an application for supervisory review, as the denial of a motion for new trial is an interlocutory judgment, and deny defendants' motion to dismiss. We find that the trial court did not abuse its discretion by summarily denying plaintiff's motion for new trial, as the evidence was not newly discovered. Therefore, plaintiff's appeal is converted to a writ, and the writ is denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

On December 15, 2004, Carl Edgefield, while working for New Orleans Gulf Seafood, was delivering seafood to the Audubon Golf Course Clubhouse Restaurant ("Clubhouse") when he allegedly slipped and fell on the entrance way to the kitchen at the Clubhouse. Mr. Edgefield contends that he fell and injured his back. Mr. Edgefield believed that he slipped on grease from a grease trap as he was walking up the steps to the kitchen. He further asserts that two Clubhouse employees helped him stand up. Mr. Edgefield did not know the employees names or if anyone saw him fall. However, the box of seafood he was delivering broke open. He claimed the same two employees helped him pick up the seafood. He then carried the box into the kitchen.

On December 22, 2005, Mr. Edgefield filed a Petition for Damages against Audubon Nature Institute, Inc., the Audubon Commission, and Scottsdale Insurance Company, as Audubon's insurer (collectively "Audubon"). Mr. Edgefield averred that his injuries were caused by Audubon's negligence.

After the passage of nearly twelve years, Audubon filed a Motion for Summary Judgment, contending that Mr. Edgefield could not satisfy his burden of proof at trial. The trial court granted the Motion for Summary Judgment on September 7, 2017, dismissing Mr. Edgefield's claims with prejudice. Eight days later, Mr. Edgefield filed a Motion for New Trial based on newly discovered evidence. The trial court summarily denied the motion on September 26, 2017. Mr. Edgefield then filed a Motion for Devolutive Appeal.

Mr. Edgefield asserts that the trial court erred by summarily denying his Motion for New Trial without considering the alleged newly discovered evidence.

JURISDICTION

A denial of a motion for new trial is a non-appealable and interlocutory judgment. *Wiles v. Wiles*, 15-1302, p. 2 (La. App. 4 Cir. 5/18/16), 193 So. 3d 397, 398. "The proper procedural device to seek review of an interlocutory judgment that is not immediately appealable is an application for supervisory writ." *Mandina, Inc. v. O'Brien*, 13-0085, p. 7 (La. App. 4 Cir. 7/31/13), 156 So. 3d 99, 103. However, "[i]n certain circumstances, this court has exercised its discretion to convert an appeal of an interlocutory judgment that is not immediately appealable into a supervisory writ application." *Id*., 13-0085, p. 7, 156 So. 3d at 104. This Court can convert an appeal to a supervisory writ when the motion for appeal was filed within the thirty-day time period for the filing of the application for supervisory review. The denial of Mr. Edgefield's Motion for New Trial occurred on September 26, 2017. Mr. Edgefield filed his Motion for Devolutive Appeal on October 26, 2017. As this was within the thirty-day window for filing an application for supervisory review, we exercise our discretion and convert the appeal to a supervisory writ.[1]

STANDARD OF REVIEW

"The applicable standard of review in ruling on a motion for new trial is whether the trial court abused its discretion." *Jouve v. State Farm Fire & Cas. Co.*, 10-1522, p. 15 (La. App. 4 Cir. 8/17/11), 74 So. 3d 220, 229. "The abuse of discretion standard applies regardless which ground—peremptory or discretionary—the new trial motion is based upon." *Autin v. Voronkova*, 15-0407, p. 4 (La. App. 4 Cir. 10/21/15), 177 So. 3d 1067, 1070.

[1] As we have converted the appeal to an application for supervisory review, Audubon's Motion to Dismiss is denied.

MOTION FOR NEW TRIAL

Mr. Edgefield contends that the trial court erred by ruling on his Motion for New Trial summarily and that the trial court did not consider his newly discovered evidence.

The Louisiana Code of Civil Procedure provides:

> A new trial shall be granted, upon contradictory motion of any party, in the following cases:
>
> * * *
>
> (2) When the party has discovered, since the trial, evidence important to the cause, which he could not, with due diligence, have obtained before or during the trial.

La. C.C.P. art. 1972. "A party seeking a new trial on the basis of newly discovered evidence must demonstrate that it has done all that is reasonable to lead to timely discovery of the evidence." *Jouve*, 10-1522, p. 15, 74 So. 3d at 229. "Newly discovered evidence justifies a new trial only if evidence: (1) is discovered after trial; (2) could not, with due diligence, have been discovered before or during the trial; and (3) is not merely cumulative, but instead would tend to change the result of the case." *Id*., 10-1522, pp. 15-16, 74 So. 3d at 229. "Where it is doubtful whether the newly discovered evidence could have been discovered with proper diligence, this doubt is resolved against granting a new trial." *Woessner v. Park One, Inc.*, 01-1647, p. 8 (La. App. 4 Cir. 3/27/02), 815 So. 2d 329, 334.

"[T]here is no absolute right to a contradictory hearing on a motion for new trial." *Waters v. Allstate Ins. Co.*, 98-0590 (La. App. 4 Cir. 3/31/99), 731 So. 2d 1001, 1004. "[A] jurisprudential exception has developed whereby a motion for new trial may be summarily denied in the absence of a clear showing in the motion of facts or law reasonably calculated to change the outcome or reasonably believed to have denied the applicant a fair trial." *Lopez v. Wal-Mart Stores, Inc.*, 94-2059,

p. 9 (La. App. 4 Cir. 8/13/97), 700 So. 2d 215, 220. *See also Williamson v. Haynes Best W. of Alexandria, Inc.*, 02-1076, p. 4 (La. App. 4 Cir. 1/21/04), 865 So. 2d 224, 227. "As a general rule, the trial court may summarily deny a motion for new trial if the motion simply reiterates issues thoroughly considered at trial." *Autin*, 15-0407, p. 5, 177 So. 3d at 1070.

On September 15, 2017, a mere eight days after the trial court's granting of Audubon's Motion for Summary Judgment, Mr. Edgefield filed a Motion for New Trial contending to have discovered new evidence, including: 1) architectural plans of Audubon Golf Course Clubhouse (Mr. Edgefield attempted to admit these into evidence the morning of the summary judgment hearing); 2) affidavit of Johnny Polk; 3) affidavit of Stephen Gogreve (a retired State Fire Marshall); 4) a new affidavit from Mr. Edgefield; and photographs of the grease traps.

It is undisputed that counsel for Mr. Edgefield attempted to enter the plans into the record at the hearing on the Motion for Summary Judgment. Counsel admitted that the plans were produced by Audubon years previously during discovery. Counsel asserted that he thought the plans were lost or with previous counsel, but "found them on the top of a shelf in my storage cabinet." The trial court denied the request to admit the plans. The plans are not newly discovered evidence.

Mr. Edgefield maintains that Mr. Polk, a former Audubon employee who allegedly helped Mr. Edgefield after his fall, was only discoverable on Facebook after the trial court's ruling on Audubon's Motion for Summary Judgment. We disagree. In 2007, Audubon furnished answers to interrogatories, which included Mr. Polk's name, address, and telephone number as a former member of the Audubon kitchen staff during the time of Mr. Edgefield's alleged fall. In her 2008

deposition, Lucinda Greenwood, the kitchen supervisor at the time of the alleged fall, stated that she believed Mr. Polk still resided in New Orleans. Mr. Edgefield included Mr. Polk in his "witness list" on September 1, 2010, and February 13, 2017. Audubon's Motion for Summary Judgment was not filed until April 19, 2017, ten years after learning that Mr. Polk was a former kitchen employee.

Motions for new trial have been denied because plaintiffs failed to acquire witness testimony within ample time and opportunity. *See Self v. Smith*, 629 So. 2d 446, 448 (La. App. 4th Cir. 1993). Nothing in the record demonstrates that Mr. Edgefield could not have located Mr. Polk within those ten years via Facebook or otherwise by exercising proper diligence prior to the hearing on the Motion for Summary Judgment.

Mr. Edgefield also attached the affidavit of Mr. Gogreve, a retired State Fire Marshall. Counsel for Mr. Edgefield could have retained an expert in support of Mr. Edgefield's claims anytime in the twelve years that the case was pending. As such, the record does not indicate that an expert could not be located prior to the summary judgment hearing without due diligence.

Lastly, Mr. Edgefield attached a new affidavit of his own and pictures of the grease traps. Both of these items could have been obtained with proper diligence in the twelve years prior to the granting of summary judgment.

Upon reviewing the allegedly newly discovered evidence Mr. Edgefield attached to his Motion for New Trial, we do not find that the evidence was newly discovered because the usage of due diligence could have produced same. Additionally, this Court held that any doubt as to the exercise of due diligence should be resolved against granting a new trial. *See Woessner*, 01-1647, p. 8, 815 So. 2d at 334. As such, we do not find that the trial court abused its discretion in

summarily denying Mr. Edgefield's Motion for New Trial, as these facts were easily discernable from the face of the record.

MERITS OF SUMMARY JUDGMENT

This Court has previously found that an appeal of a motion for new trial is also an appeal of the judgment on the merits "when . . . it is clear from the appellant's brief that the intent is to appeal the merits of the case." *Wiles*, 15-1302, p. 2, 193 So. 3d at 398. In *Wiles*, this Court found that it was "obvious" from the motion for appeal and brief that an appeal on the merits was intended. *Id*., 15-1302, p. 3, 193 So. 3d at 398.

In the present matter, Mr. Edgefield's Petition for Devolutive Appeal stated the following:

> 1. On September 26, 2017 the trial court refused to grant to plaintiff a timely application for a new trial.
> 2. Plaintiff hereby takes a devolutive appeal from the Judgment of the trial court rendered in this case.

The motion for appeal does not mention the trial court's September 7, 2017 judgment on the merits of the summary judgment. Further, Mr. Edgefield's appellant brief stated, regarding the trial court's denial of the Motion for New Trial, that "[t]his Final Judgment dismissed plaintiff's lawsuit and was therefore properly appealable to this Court of Appeal." Moreover, Mr. Edgefield's three assignments of error outlined in the appellant brief were as follows:

> 1. The Trial Court erred in failing to consider in the Motion for New Trial, the testimony of an eye witness who was not found until after the Motion for Summary Judgment was granted.
> 2. The Trial Court did not consider any of the new evidence presented and did not even allow the Motion for New Trial to take place, but dismissed the motion without a hearing.
> 3. The plaintiff's case was dismissed on a Motion for Summary Judgment, not after a trial on the merits. It

> was error to not even consider newly discovered evidence that was critical to the issue of fault and the cause of plaintiff's injury.

Thus, all three assignments of error, as dictated by Mr. Edgefield, concerned the judgment on the Motion for New Trial. The crux of the entire appellate argument was that the trial court should have considered the allegedly newly discovered evidence. The conclusion of the brief prayed for a new trial. Lastly, the only judgment attached to Mr. Edgefield's brief is that of the September 26, 2017 denial of the Motion for New Trial. As such, we do not find that it is "obvious" that Mr. Edgefield intended to appeal the trial court's judgment on the merits.[2]

DECREE

For the above-mentioned reasons, we convert Mr. Edgefield's devolutive appeal to an application for supervisory review and deny Audubon's Motion to Dismiss. We find that the trial court did not err by summarily denying Mr. Edgefield's Motion for New Trial, as none of the evidence was newly discovered. The writ is denied.

APPEAL CONVERTED TO A WRIT; WRIT DENIED; MOTION TO DISMISS DENIED

[2] This Court notes that Mr. Edgefield did not claim to be appealing the judgment on the merits of the summary judgment until Audubon filed a Motion to Dismiss the appeal.