A. CHARLES FERGUSON AND ELIZABETH B. CARPENTER	*	**NO. 2019-CA-0061**
	*	
VERSUS		**COURT OF APPEAL**
	*	
AMERICAN EMPIRE SURPLUS LINES INSURANCE CO., TREYMARK PROPERTIES, LLC, AND MARK E. MORICE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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BROWN, J., CONCURS IN THE RESULT.

As pointed out by the majority, in *Jones v. Stewart*, 16-0329, p. 14 (La. App. 4 Cir. 10/5/16), 203 So.3d 384, 393 (citing *Bufkin v. Felipe's Louisiana, LLC*, 14-0288 (La. 10/15/14), 171 So.3d 851, *Rodriguez v. Dolgencorp, LLC*, 14-1725 (La. 11/14/14), 152 So.3d 871, and *Allen v. Lockwood*, 14-1724 (La. 2/13/15), 156 So.3d 650), this Court explained that "absent any material factual issue, the summary judgment procedure can be used to determine whether a defect is open and obvious and thus does not present an unreasonable risk of harm." In *Primeaux v. Best W. Plus Houma Inn*, 18-0841 (La. App. 1 Cir. 2/28/19)__ So.3d __ (2019 WL 989727 *9), the First Circuit held that "[t]o grant summary judgment in the [moving parties'] favor, this court must conclude . . . that no genuine issue of material fact exists that the complained of condition did not create an unreasonable risk of harm." I conclude that Defendants failed to establish a prime facie case that the roof which allegedly caused Mr. Ferguson to fall and sustain injuries was open, obvious, and not unreasonably dangerous. The only evidence submitted by Defendants in support of their motion for summary judgment was an affidavit by Mark Morice, the manager of Treymark Properties, LLC, in which Mr. Morice attested in pertinent part: (1) the roof was "very steep" and was made of tiles; (2) previously, no one had fallen off the roof of the property located at 3125-7 Jena; and (3) "Fergusons [sic] slip and fall off the roof could not have been anticipated

by Defendants nor prevented by Defendants."[1] In my opinion, Defendants failed to meet their burden of proof; thus, the burden never shifted to Plaintiffs pursuant to La. C.C.P. art. 966(D). Consequently, Defendants are not entitled to summary judgment in their favor as a matter of law.

[1] *See Allen*, 156 So.3d at 653 (wherein the Supreme Court found summary judgment proper when the defendants, the moving party, "produced evidence, through affidavits, depositions, and photographs, that the parking area had been used by congregants for decades without incident and the complained-of condition—the unpaved grassy parking area—was obvious and apparent to anyone who may potentially encounter it[,]" and "Plaintiff then failed to produce *any* evidence to rebut their evidence or demonstrate how the alleged defects caused the accident.").