

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA  
COURT OF APPEAL  
FIRST CIRCUIT

2015 CA 1799

KEITH RUSSELL

VERSUS

TIMOTHY WALSH AND ANGELA WALSH/AND XYZ INSURANCE  
COMPANY

Judgment rendered: JUL 12 2016

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On Appeal from the  
Thirty-Second Judicial District Court  
In and for the Parish of Terrebonne  
State of Louisiana  
No. 172620

The Honorable Randall L. Bethancourt, Judge Presiding

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Perry W. Manning, Sr.  
Metairie, LA

Attorney for Plaintiff/Appellant  
Keith Russell

Doris T. Bobadilla  
Andrea L. Albert  
John C. Getty  
Mandeville, LA

Attorneys for Defendants/Appellees  
Timothy Walsh and Angela Walsh

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**BEFORE: GUIDRY, HOLDRIDGE, AND CHUTZ, JJ.**

## **HOLDRIDGE, J.**

Plaintiff-appellant, Keith Russell, seeks review of the trial court's granting of summary judgment in favor of defendants-appellees, Timothy Walsh and Angela Walsh. For the following reasons, we affirm.

### **FACTS AND PROCEDURAL HISTORY**

This personal injury action arose on August 5, 2013, when plaintiff was delivering patio material to defendants' home in Houma, Louisiana. Plaintiff exited the delivery truck, unloaded the patio material onto his shoulder, and proceeded to walk towards a fence on defendants' property. When plaintiff reached the fence, he realized that there was no entrance to the backyard. While walking towards the other side of the property to unload the material, plaintiff allegedly stepped into an uncovered water meter "hole" causing him to fall and injure his left knee. No one witnessed the fall.

Plaintiff did not speak with defendants after his fall. After completing the delivery, plaintiff notified his employer of the incident. Plaintiff received treatment for his left knee injury, and on July 28, 2014, he filed a petition for damages against defendants. Defendants answered plaintiff's petition and generally denied any liability. After conducting discovery, defendants filed a motion for summary judgment on June 19, 2015, seeking dismissal of all claims against them. Defendants asserted that no genuine issue of material fact existed and that plaintiff could not meet his burden to prove that defendants had actual or constructive notice of the alleged defect prior to the incident. In support of their motion, defendants offered plaintiff's deposition testimony, as well as defendants' affidavits, to show an absence of factual support to prove plaintiff's claim.

The following exchange occurred during plaintiff's deposition:

Q. As you sit here today, do you have any information whatsoever as to how long the water meter cover would have been off of that hole prior to your fall?

A. Couldn't tell you. Don't know.

Q. Am I correct that all you do know is that it was, the cover was off of it directly prior to your foot going in the hole, correct?

A. Yes.

Q. Am I correct that you can't testify that Mr. Walsh knew that the water meter was uncovered before your fall?

A. I couldn't testify to that, no.

Q. Am I also correct that you couldn't testify that Mrs. Walsh would have known that the water meter cover was uncovered prior to your fall?

A. No.

Q. Could you see the hole when you were sitting on the ground?

A. Yes.

Q. You could see there was a difference in what the hole, whether the coloring or the substance, than the grass, correct?

A. Yes.

Q. What if, for any reason, did you not see the hole prior to putting your foot in it?

A. Just was walking. Just fell in the hole.

Q. Can you testify that anything prevented you from seeing the hole that your foot went in to?

A. No. Just looking straight ahead, and missed it, I guess. Just was walking.

Plaintiff filed an opposition to the motion for summary judgment, asserting that a genuine issue of material fact existed concerning the manner in which the water meter cover was improperly placed. On September 11, 2015, the trial court signed a judgment granting the motion for summary judgment and dismissed plaintiff's claims, with prejudice. Thereafter, plaintiff devolutively appealed the

September 11, 2015 judgment. On appeal, plaintiff contends that the trial court erred in granting summary judgment because genuine issues of material fact remain in dispute.<sup>1</sup>

### STANDARD OF REVIEW

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. A summary judgment is appealed *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, *i.e.*, whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. *Samaha v. Rau*, 2007-1726 (La. 2/26/08), 977 So.2d 880, 882-83; *see Adams v. Arceneaux*, 2000-1440 (La. App. 1 Cir. 6/22/01), 809 So.2d 190, 193-94.

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, admitted for purposes of the summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).<sup>2</sup> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the

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<sup>1</sup> Plaintiff seems to suggest that the trial court improperly granted summary judgment prior to the completion of discovery; however, there is no evidence in the record to demonstrate that plaintiff filed a motion to continue the summary judgment hearing to request additional time to conduct discovery. The hearing on the motion for summary judgment was conducted thirteen months from the filing of plaintiff's petition, giving plaintiff ample time to file for discovery. *See Green v. State Farm Gen. Ins. Co.*, 35,775 (La. App. 2 Cir. 4/23/02), 835 So.2d 2, 6. We find plaintiff's argument without merit.

<sup>2</sup> Louisiana Code of Civil Procedure article 966 was recently amended by 2015 La. Acts 422, § 1; however, the new version of article 966 does not apply to this case as the amendment did not become effective until January 1, 2016. Accordingly, we apply the prior version of article 966 to the instant matter.

adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

## **DISCUSSION**

In the matter before us, the trial court found that plaintiff will bear the burden of proof at trial to produce evidence demonstrating that defendants had actual or constructive notice of the alleged defect, *i.e.*, the lack of a cover on the water meter "hole." Accordingly, the burden of proof shifted at the summary judgment hearing from defendants to plaintiff to provide factual support sufficient to satisfy his evidentiary burden. The trial court found, and we agree, that plaintiff failed to satisfy his evidentiary burden and there are no genuine issues of material fact.

Claims for damages premised on injuries caused by a thing are typically asserted pursuant to La. C.C. art. 2317 and 2317.1, which articles provide, respectively:

**Art. 2317. Acts of others and of things in custody**

We are responsible, not only for the damage occasioned by our own act, but for ... the things which we have in our custody. This, however, is to be understood with the following modifications.

**Art. 2317.1. Damage caused by ruin, vice, or defect in things**

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. Nothing in this Article shall preclude the court from the

application of the doctrine of *res ipsa loquitur* in an appropriate case.

A defect is defined as a condition that creates an unreasonable risk of harm. Thus, in order to establish a claim of custodial liability pursuant to La. C.C. arts. 2317 and 2317.1, a plaintiff has the burden of proving: (1) the property which caused the damage was in the “custody” of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. *Tomaso v. Home Depot, U.S.A., Inc.*, 2014-1467 (La. App. 1 Cir. 6/5/15), 174 So.3d 679, 682.

In moving for summary judgment, defendants pointed out through testamentary and documentary evidence that plaintiff had no factual support for an essential element of his claim, *i.e.*, that defendants had actual or constructive knowledge of the defective condition. In support of the motion, defendants offered plaintiff’s deposition testimony, in which he testified that he had no information on how long the water meter was allegedly uncovered, how the water meter allegedly became uncovered, and whether or not defendants knew about the water meter’s alleged condition. Plaintiff further testified that he did not know whether defendants or one of their agents actually removed the water meter cover and failed to place it back properly. Plaintiff also testified that he saw no sign of work being performed on or near the water meter on the date of his alleged injury. Moreover, defendants affirmed in their affidavits that they did not know that the water meter was uncovered or misplaced on the date of the alleged injury.

After a thorough *de novo* review of the record, we do not find factual support to show that plaintiff will be able to satisfy his evidentiary burden of proof at trial regarding the essential element of actual or constructive notice. Plaintiff

offered no evidence to show that he could meet his evidentiary burden of proof at trial. Additionally, plaintiff failed to offer evidence of the cause of the alleged defect, or establish any reasonable estimate of time that the alleged defect existed, and therefore he cannot prove whether defendants had any responsibility for the formation of the alleged defect. Considering the evidence before the court, summary judgment dismissing plaintiff's claim is appropriate. *See* La. C.C.P. art. 966(C)(2).

### **CONCLUSION**

For the foregoing reasons, we affirm the September 11, 2015 summary judgment dismissing all claims against defendants-appellees, Timothy Walsh and Angela Walsh, with prejudice. Costs of this appeal are assessed to plaintiff-appellant, Keith Russell.

**AFFIRMED.**