NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 1568

LINDA BERGERON, WIFE OF/AND
ROLAND BERGERON, III

VERSUS

STARWOOD HOTELS & RESORTS WORLDWIDE, INC., D/B/A
SHERATON BATON ROUGE CONVENTION CENTER HOTEL

Judgment Rendered: May 4, 2007

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 503,189

Honorable R. Michael Caldwell, Judge

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Sheraton Operating Corp., and Zurich
American Ins. Co.

* * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

Plaintiffs appeal a trial court judgment granting the defendants' motions for summary judgment and dismissing their claims with prejudice. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On January 11, 2002, plaintiffs, Linda Bergeron and Roland Bergeron, III, were guests at the Sheraton Baton Rouge Convention Center Hotel (the hotel). The Bergerons planned to attend a Mardi Gras ball at the Centroplex Convention Center (Centroplex) that evening. After the Bergerons asked about transportation, a receptionist at the hotel advised them that there was a shuttle available to take them to the Centroplex for the ball and directed them outside to board the shuttle. According to Mrs. Bergeron, there were several shuttles going in and out of the area around the Sheraton at that time. As Mrs. Bergeron attempted to board one of the shuttles, she slipped on an alleged defective condition on the shuttle and injured her leg.

The Bergerons subsequently filed suit against Starwood Hotels & Resorts Worldwide, Inc., d/b/a Sheraton Baton Rouge Convention Center Hotel, Sheraton Operating Corporation (collectively Starwood), Centroplex Centre Convention Hotel, L.L.C. (CCCH), and Zurich-American Insurance Company (Zurich), the insurer of both Starwood and CCCH. The defendants filed motions for summary judgment contending that they did not have custody or garde over the vehicle that Mrs. Bergeron was boarding at the time of her accident. Starwood further contended that plaintiffs could not prove that the defendants knew or should have known of the alleged defect in the vehicle. After a hearing, the trial court granted the motions for summary judgment and dismissed the plaintiffs' claims, with prejudice. The Bergerons have appealed.

DISCUSSION

Appellate courts review summary judgments *de novo* using the same criteria

that govern the trial court's determination of whether a summary judgment is appropriate. **Duplantis v. Dillard's Dept. Store**, 2002-0852, p. 5 (La. App. 1st Cir. 5/9/03), 849 So.2d 675, 679, writ denied, 2003-1620 (La. 10/10/03), 855 So.2d 350. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial, its burden on the motion does not require it to negate all essential elements of the adverse party's action, 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. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Kinchen v. Lewis**, 2002-2198, p. 4 (La. App. 1st Cir. 2/3/03), 844 So.2d 36, 39, writs denied, 2003-0648, 2003-0674 (La. 5/2/03), 842 So.2d 1106, 1108.

Louisiana Civil Code article 2317.1 provides for the liability of an owner or custodian of a thing for damage occasioned by its ruin, vice, or defect only when: (1) the owner or custodian knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect that caused the damage; (2) the damage could have been prevented by the exercise of reasonable care; and (3) the owner or custodian failed to exercise such reasonable care. As a preliminary matter, the plaintiffs bear the burden of proving at trial that the property that caused the damage was in the "custody" of the defendants. See **Tyler v. Our Lady of the**

Lake Hospital, Inc., 96-1750, p. 6 (La. App. 1st Cir. 6/20/97), 696 So.2d 681, 685.

Custody, distinct from ownership, refers to a person's supervision and control (garde) over a thing posing an unreasonable risk of harm. Garde is the obligation imposed by law on the proprietor of a thing, or on one who avails himself of it, to prevent it from causing damage to others. The fault of the person thus liable is based upon one's failure to prevent the thing from causing unreasonable injury to others. **Tyler**, 96-1750 at p. 6, 696 So.2d at 685.

In support of their motions for summary judgment, the defendants submitted the depositions of Mr. and Mrs. Bergeron, in which they testified concerning the vehicle on which Mrs. Bergeron had been injured. Mrs. Bergeron was unable to provide a very clear description of the vehicle; however, during his deposition, Mr. Bergeron was shown two photographs of different vehicles and was asked whether either of them was the vehicle in question. Mr. Bergeron testified that neither of the photographs, which were attached to his deposition as Exhibits #1 and #2, depicted the vehicle he and his wife had taken to the Centroplex.

In addition to these depositions, the defendants also attached the affidavit of Francis Grayson, Jr., to the motion for summary judgment. According to the affidavit, Mr. Grayson was the director of operations for Argosy Casino in January 2002. At that time, the hotel was owned by CCCH, a subsidiary of Argosy Gaming Company, Inc. (Argosy), and operated by Starwood. One of Mr. Grayson's duties was to coordinate the operations of the casino with those of the hotel, including the passenger vehicles used for patron and guest transportation. He stated that in January 2002, CCCH leased only one standard passenger van used by the hotel, and that a picture of this van had been shown to Mr. Bergeron during his deposition as Exhibit #1. Mr. Grayson further stated that at that time, no other passenger vans had been leased, owned, or operated by Argosy, Starwood, or CCCH.

This evidence demonstrated that there was an absence of factual support for an essential element of the plaintiffs' claim. Thus, the burden then shifted to the plaintiffs to produce factual support sufficient to establish that they would be able to satisfy their evidentiary proof at trial. However, the plaintiffs failed to offer any evidence to contradict this affidavit and demonstrate that the defendants had custody of the shuttle at issue. Instead, plaintiffs argue to this court that the defendants had custody or control over the shuttle simply because the receptionist at the hotel had directed them to a van outside. However, Mrs. Bergeron testified that there were several vans outside, as many people were going from the hotel to the Centroplex for the Mardi Gras ball. While there is no dispute that the defendants provided a shuttle, there is simply no evidence to connect the defendants with the particular shuttle used by the Bergerons that evening. In fact, the evidence specifically demonstrates that the defendants provided only one shuttle, and it was not the shuttle used by the plaintiffs. Accordingly, we find no error in the judgment of the trial court.

CONCLUSION

For the foregoing reasons, the judgment of the trial court, granting the defendants' motions for summary judgment, is affirmed. All costs of this appeal are assessed to plaintiffs, Linda Bergeron and Roland Bergeron, III.

AFFIRMED.