

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1210

PAUL R. MICHELLI, INDIVIDUALLY AND ON BEHALF OF HIS MINOR
SON, ANTHONY VINCENT MICHELLI

VERSUS

LIBERTY INTERNATIONAL UNDERWRITERS AND FAMILY WORSHIP
CENTER CHURCH, INC. D/B/A JIMMY SWAGGART MINISTRIES

Judgment rendered

APR 25 2012



Appealed from the
19th Judicial District Court
in and for the of East Baton Rouge, Louisiana
Trial Court No. 582,763
Honorable Janice Clark, Judge


LEE HERRINGTON
BATON ROUGE, LA

ATTORNEYS FOR
PLAINTIFF-APPELLANT
PAUL R. MICHELLI,
INDIVIDUALLY AND ON BEHALF
OF HIS MINOR SON, ANTHONY
VINCENT MICHELLI

AMY E. NEWSOM
BATON ROUGE, LA

ATTORNEY FOR
DEFENDANTS-APPELLEES
LIBERTY INTERNATIONAL
UNDERWRITERS & FAMILY
WORSHIP CENTER CHURCH,
INC., D/B/A JIMMY SWAGGART
MINISTRIES

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.



McClelland, J. Concurs and Assigns Reasons.

PETTIGREW, J.

Paul R. Michelli, appearing herein both individually and as the duly authorized natural tutor of and on behalf of his minor son, Anthony Vincent Michelli ("Anthony"), appeals from a grant of summary judgment that dismissed his suit for personal injuries sustained by his minor son. For the reasons that follow, we hereby affirm.

The record before us reveals that on the evening of Saturday, April 25, 2009, Mr. Michelli drove his 14-year old son, Anthony, and a friend, Chris Summers, to an area of Baton Rouge known as Perkins Rowe where Mr. Michelli dropped the boys off in front of McDonalds. The boys intended to get something to eat, "hang out" with friends, and call Mr. Michelli later to pick them up. While at Perkins Rowe, the boys met up with another friend, Truitt Janney.

At approximately 9:00 p.m., Anthony made the decision to walk from Perkins Rowe to the J. W. Tucker Complex situated on the property of defendant, Family Worship Center Church, Inc. ("FWCC") d/b/a Jimmy Swaggart Ministries, located just off Bluebonnet Boulevard in Baton Rouge, Louisiana. The three boys allegedly planned to workout on exercise equipment designated for use by athletes at Family Christian Academy School ("FCA"),¹ where Anthony was a ninth-grade student and a member of the FCA varsity baseball team.

The boys entered the J. W. Tucker Complex through one of the front glass doors that had been propped open with a piece of wood. After turning on lights in the auditorium where the weight equipment was located, the boys noticed a vehicle that was not familiar to them pull up in the parking lot. As a result, the boys retreated to the back of the building through an open set of double doors, to the right, through another door and into a darkened storage closet. Looking through the doorway, the boys observed a man enter the Tucker Complex through the front glass doors, turn and enter office space that had been leased to Leeway Trucking Company, an independent trucking firm not affiliated with either FWCC or FCA. A few minutes later, Chris and Truitt left the storage

¹ FCA is operated by Jimmy Swaggart Ministries.

room without difficulty. Anthony was in the process of sending a text message on his cell phone as he left the dark storage room, and bumped into a section of iron guard rail that had been stored in the closet. As the guard rail began to fall, Anthony attempted to grab it. Due to the weight of the guard rail, Anthony was unable to prevent the railing from forcing his left hand down against the sharp edge of an underlying metal stand.² Upon returning to the lighted auditorium, Anthony examined his bloodied hand and "freaked out."

The boys hurriedly left the Tucker Complex, and Anthony realized he had dropped his cell phone. Because neither Chris nor Truitt had a cell phone, the boys borrowed the cell phone of a nearby truck driver in order to call Mr. Michelli. After receiving the call from Chris, Mr. Michelli called 9-1-1 and drove to the Tucker Complex.

Upon examination at Baton Rouge General Hospital, it was determined that Anthony's left index finger had been partially severed, his left middle finger had been crushed, and his left ring finger was lacerated. Due to the injuries he sustained, Anthony underwent extensive medical treatment and multiple surgeries in attempts to repair the injuries to his left hand. Medical expenses incurred on Anthony's behalf total \$58,623.70, with an additional \$27,500.00 for further surgery that has been recommended by his physician.

On September 21, 2009, Mr. Michelli filed suit on his son's behalf in the 19th Judicial District Court against FWCC and Liberty International Underwriters (collectively "defendants"). In connection with his Petition for Damages, Mr. Michelli alleged that it was fairly common practice for Anthony and other members of the FCA baseball team to workout in the J. W. Tucker Complex outside of regular school hours.³ Mr. Michelli also alleged that Anthony was present in the complex on the night of the accident with appropriate consent, and was a legally authorized user and "invitee" of the Complex.

² Mr. Michelli alleged that the stands in question have disappeared as a result of spoliation by defendants.

³ FCA alleged that students were permitted to use weights only when supervised by a coach, and that Anthony admitted in his deposition that prior to the accident, he had never been in the Tucker building without a teacher or faculty member from FCA.

Lastly, Mr. Michelli alleged that defendants were guilty of negligence and/or breach of a duty owed to invitees upon its property including his son, Anthony.⁴

Defendants later sought to dismiss the claims asserted by Mr. Michelli through the filing of a motion for summary judgment on July 9, 2010. It was the position of defendants that Anthony's injuries resulted from his decision to trespass on FWCC's property. Defendants asserted that in his deposition testimony, Anthony admitted that he had never been in the Tucker building without a coach or faculty member from FCA present. Defendants further asserted that "FWCC had no duty to anticipate and protect against the risk that three teenage trespassers would go into a storage room and then one teen would injure himself on stored items while texting in the pitch dark."

On September 1, 2010, Mr. Michelli filed a motion for partial summary judgment on the ground that the heavy iron guard railings on the FWCC premises created an unreasonable risk of harm. Mr. Michelli also sought sanctions against defendants for allegedly spoliating evidence by failing to preserve for inspection, examination, and use by Mr. Michelli the metal stands upon which the aforementioned railings fell.

Following a hearing on September 20, 2010, the trial court denied Mr. Michelli's motion for partial summary judgment, and granted defendants' motion for summary judgment resulting in the dismissal of Mr. Michelli's claims. A judgment to this effect was signed on September 28, 2010.⁵ Following the denial of his motion for new trial, Mr. Michelli has appealed from the dismissal of his claims on summary judgment.

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact. **Gonzales v. Kissner**, 2008-2154, p. 4 (La. App. 1 Cir. 9/11/09), 24 So.3d 214, 217. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together

⁴ Mr. Michelli later filed a Supplemental and Amending Petition on November 12, 2009, wherein he asserted a claim for substantial medical expenses he incurred on behalf of his son.

⁵ The trial court further denied Mr. Michelli's request for a stay, and gave him until October 20, 2010, to seek supervisory writs of review from this court. This court subsequently denied writs on January 7, 2011. See 2010-CW-1884 (La. App. 1 Cir. 01/07/2011).

with affidavits, if any, show that there is no genuine issue of material fact, and that mover is entitled to judgment as a matter of law. La. Code Civ. P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. P. art. 966(A)(2); **Aucoin v. Rochel**, 2008-1180, p. 5 (La. App. 1 Cir. 12/23/08), 5 So.3d 197, 200, writ denied, 2009-0122 (La. 3/27/09), 5 So.3d 143.

On a motion for summary judgment, the burden of proof is on the mover. If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the mover's burden on the motion does not require that all essential elements of the adverse party's claim, action, or defense be negated. Instead, the mover must 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, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment. La. Code Civ. P. art. 966(C)(2); **Robles v. ExxonMobile**, 2002-0854, p. 4 (La. App. 1 Cir. 3/28/03), 844 So.2d 339, 341.

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Boudreaux v. Vankerhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725,729-730. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether the mover is entitled to judgment as a matter of law. **Ernest v. Petroleum Service Corp.**, 2002-2482, p. 3 (La. App. 1 Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 2003-3439 (La. 2/20/04), 866 So.2d 830.

Louisiana Civil Code article 2317.1 provides, in pertinent part, as follows:

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.

In **Entrevia v. Hood**, 427 So.2d 1146 (La. 1983), the seminal case on premises liability with respect to trespassers, the court held that the injured person was required to prove the building or its appurtenances posed an unreasonable risk of harm. In determining whether a defect or unreasonable risk of harm is present, the jurisprudence notes that the defect must be of such a nature as to constitute a dangerous condition which would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances. **Durmon v. Billings**, 38,514, p. 7 (La. App. 2 Cir. 5/12/04), 873 So.2d 872, 876-877, writ denied, 2004-1805 (La. 10/29/04), 885 So.2d 588.

Under the unique facts of this case, we cannot say that the alleged defects in this case would reasonably be expected to cause injury to a prudent person using ordinary care under the circumstances. Based upon our review of the evidence before this court, we find no fact, the existence of which would preclude summary judgment. Anthony's injuries were created by his decision to trespass on FWCC's property. He would never have been hurt had he not illegally entered the building, hidden in a dark storage room, and bumped into guard rails stored in the dark room while sending a text message.

For the above and foregoing reasons, we affirm the trial court's grant of summary judgment, and assess all costs associated with this appeal against plaintiff-appellant, Paul R. Michelli. We issue this memorandum opinion in accordance with Uniform Rules—Courts of Appeal, Rule 2-16.1.B.

AFFIRMED.

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McCLENDON, J., concurs and assigns reasons.

I concur with the result reached by the majority. To hold an owner or custodian of a thing answerable for damage occasioned by its ruin, vice, or defect, requires a showing that that the owner or custodian, among other things, could have prevented the damage by the exercise of reasonable care and that he failed to exercise such reasonable care. LSA-C.C. art. 2317.1. In determining whether an owner or custodian exercised reasonable care requires a balancing of claims and interests and weighing of risk and harm. It involves the question of whether the owner or custodian failed to prevent the particular risk from resulting in harm to the particular plaintiff under the particular circumstances. See Justice Lemmon's concurring opinion in **Entrevia v. Hood**, 427 So.2d 1146, 1151 (La. 1983)(concurring opinion).