

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1628

STEPHEN B. COGHLAN, SR.,  
INDIVIDUALLY AND AS ADMINISTRATOR  
OF THE ESTATE OF STEPHEN B. COGHLAN, JR.;  
AND BERNADETTE S. COGHLAN

VERSUS

JOSEPH ORTEGO, STATE FARM INSURANCE COMPANY,  
AND PROGRESSIVE INSURANCE COMPANY

Judgment Rendered: March 23, 2012.

\* \* \* \* \*

On Appeal from the  
19th Judicial District Court,  
In and for the Parish of East Baton Rouge,  
State of Louisiana  
Trial Court No. 582,739

The Honorable R. Michael Caldwell, Judge Presiding

\* \* \* \* \*

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\* \* \* \* \*

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

*Parro, J., dissents.*

**CARTER, C. J.**

Plaintiffs appeal a summary judgment dismissing their suit for wrongful death and survival damages. For the reasons that follow, we affirm.

**FACTS AND PROCEDURAL HISTORY**

This case arises from an accident that occurred on September 20, 2008, and caused the death of Stephen B. Coghlan, Jr. Stephen was operating a four-wheeler on Old Settlement Road in East Baton Rouge Parish. It is alleged that the four-wheeler Stephen was driving struck a pile of logs and tree debris in the roadway, causing Stephen to be ejected and killed.

Plaintiffs, Stephen B. Coghlan, Sr., and Bernadette S. Coghlan instituted suit against Joseph Ortego and his insurer, State Farm General Insurance Company (collectively, “defendants”), alleging that the debris that Stephen struck was in Mr. Ortego’s care, custody, and control, was placed in the roadway by him, and created the hazardous condition that caused Stephen’s death. Defendants answered the petition, admitting that Mr. Ortego piled debris resulting from Hurricane Gustav alongside the roadway, but denying any liability for Stephen’s death. Defendants averred that the accident was caused by Stephen and/or other parties over whom defendants had no authority or control.

The trial court granted a motion for summary judgment filed by defendants, finding that defendants had pointed out the absence of factual support for an essential element of plaintiffs’ claim, namely that Mr. Ortego had care, custody, or control of the debris pile at the time of the accident.

Accordingly, all claims against defendants were dismissed. Plaintiffs now appeal.

### DISCUSSION

Appellate courts review summary judgments *de novo*, using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Bozarth v. State LSU Medical Center/Chabert Medical Center*, 09-1393 (La. App. 1 Cir. 2/12/10), 35 So. 3d 316, 323. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, 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. Code Civ. Proc. Ann. art. 966B.

The burden of producing factual support on the motion for summary judgment is placed initially on the mover, who can ordinarily meet that burden by submitting depositions or affidavits or by pointing out the lack of factual support for an essential element in the adverse party's claim. *See* La. Code Civ. Proc. Ann. art. 966C(2); *Cheremie Services, Inc. v. Shell Deepwater Production, Inc.*, 09-1633 (La. 4/23/10), 35 So. 3d 1053, 1059. At that point, the party who bears the burden of persuasion at trial must produce factual support sufficient to establish that he will be able to meet his evidentiary burden at trial. *Cheremie*, 35 So. 3d at 1059; *see* La. Code Civ. Proc. Ann. art. 966C(2). Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a genuine issue of material fact mandates the granting of the motion. *Cheremie*, 35 So. 3d at 1059; *see* La. Code Civ. Proc. Ann. art. 966C(2). A fact is material when its existence or

nonexistence may be essential to a plaintiff's cause of action under the applicable theory of recovery. *Cheremie*, 35 So. 3d at 1059. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. *Id.*

Plaintiffs' claim against defendants is based on negligence. Louisiana Civil Code article 2317 provides that we are responsible for damages caused by the things in our custody. *See also* La. Civ. Code Ann. art. 2317.1. Therefore, proof that the thing that caused damages was in defendants' custody is an essential element of plaintiffs' case.

In support of their motion for summary judgment, defendants submitted the deposition testimony of Mr. Ortego and his wife. Mr. Ortego explained that he lives on a 5-acre tract of land and that half of the tract is wooded. His is the last property on his side of the street before the street dead-ends at a tract that was cleared for subdivision development, but was never developed. A gate blocked entry to the abandoned subdivision, but had fallen prior to the accident. Mr. Ortego described the abandoned subdivision as a popular place for a group of young people to ride four-wheelers and "party." The gate was replaced after the accident.

After Hurricane Gustav passed through the area, Mr. Ortego had a large amount of debris to be removed from his property. He piled the debris for pick-up, partially blocking the right lane of traffic between his driveway and the gate to the abandoned subdivision, but leaving enough room for the garbage trucks to turn around. Mr. Ortego attested that debris removal commenced and city/parish contractors came out at least once and removed debris from the pile, but did not retrieve all of it before the accident. He described the debris as being "scattered" by the contractors, but maintained

that he did not touch the debris pile after the contractors began clearing it. Mr. Ortego's wife, Carol, attested that she witnessed the contractors at the site removing debris on two occasions prior to the accident and that she did not move any of the debris from the pile. Considering this evidence, defendants contend that Mr. Ortego no longer had control over the debris pile at the time of the accident.

Plaintiffs offered no evidence to contradict the Ortegos' deposition testimony that contractors for the city/parish had commenced but had not completed removal of the debris pile prior to the accident. Instead, plaintiffs maintain that Mr. Ortego's original placement of the debris pile partially in the roadway created a hazardous condition that caused Stephen's death.

In the case of *De La Cruz v. Riley*, 04-0607 (La. App. 4 Cir. 2/2/05), 895 So. 2d 589, writ denied, 05-0513 (La. 4/22/05), 899 So. 2d 581, hurricane debris was piled off the asphalt roadway for removal. Similarly, sanitation crews commenced removal of the debris, but were unable to complete the job and left some debris on the asphalt of the road, which a driver tragically struck. The Fourth Circuit determined that:

The Parish's employees were the last to have control over the pile of debris at issue. We find, as the trial court did, that the Parish, therefore, had control as to the final location of the pile of debris and it was the Parish's responsibility, once the removal commenced, to complete the job.

*De La Cruz*, 895 So. 2d at 594.

Despite the factual difference between that case and this one in which Mr. Ortego admittedly piled some debris in the roadway, we agree with the Fourth Circuit's rationale, that once debris removal commenced, control over the debris shifted from the homeowner, who created the original pile, to

the entity conducting the debris removal. Here, the contractors were the last to have control over the pile of debris that Stephen struck.

We find that defendants met their burden of proof on the motion for summary judgment by establishing that Mr. Ortego did not have control over the pile of debris at the time of the accident, thus negating an essential element of plaintiffs' cause of action under Louisiana Civil Code article 2317. Plaintiffs did not then produce factual support sufficient to establish that they would be able to meet their evidentiary burden at trial. *See* La. Code Civ. Proc. Ann. art. 966C(2), *Cheremie*, 35 So. 3d at 1059. Plaintiffs' failure to produce evidence of a genuine issue of material fact mandated the granting of the motion for summary judgment. *See* La. Code Civ. Proc. Ann. art. 966C(2), *Cheremie*, 35 So. 3d at 1059.

#### **CONCLUSION**

The judgment of the trial court is affirmed. Costs of this appeal are assessed to Stephen B. Coghlan, Sr., and Bernadette Coghlan.

**AFFIRMED.**