NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 1560

STEVEN AND MICHELE LAPORTE

VERSUS

TED AND LISA ROUSSEL, AND
WARREN VIRGETS D/B/A OSA INSPECTIONS

Judgment rendered: MAY - 2 2012

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On appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 584,762

Honorable Wilson E. Fields, Judge

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KUHN, J DISSENTS & ASSIGNS REASONS

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

GUIDRY, J.

The owners of a home, who purchased the property "as is where is," filed a petition seeking rescission of the sale and damages based on the discovery of several defects in the property. The owners now appeal the dismissal of their claims against the sellers pursuant to a summary judgment granted by the trial court.

FACTS AND PROCEDURAL HISTORY

On November 20, 2009, Steven and Michele Laporte filed a petition for damages against Ted and Lisa Roussel, from whom they purchased their home on June 26, 2009. According to the Laportes' petition, two days prior to the sale, they had the home inspected by Warren Virgets, doing business as OSA Inspections, and the inspection did not reveal any defects in the home. Shortly after moving into the home, however, the Laportes noticed that the in-ground pool was leaking water, that the house had a crack in the sheetrock of one of the bathrooms and cracks in the sheetrock of the walls of two bedrooms that were immediately adjacent to the bathroom. Another crack, extending from the top of the bathroom window down to and through the foundation of the home was also discovered on the exterior of the home. The Laportes also discovered that a tree on the property that extended over a neighboring property was rotten.

As a result of these defects, the Laportes filed the aforementioned petition for damages, alleging that the Roussels "were aware of all of the above listed defects, but knowingly and intentionally failed to disclose them." The Laportes also named Mr. Virgets as a defendant in the petition, alleging that he was liable, in solido, with the Roussels for "negligently [failing] to discover the defects which should have been readily apparent to an inspector."

Initially, the Roussels answered the Laportes' petition to simply deny liability and assert affirmative defenses. Later, however, the Roussels filed a motion for summary judgment asserting that they were not aware of any defects in the property, and thus, the waiver of warranties contained in the sales contract was enforceable and relieved them of any liability. The motion was opposed by the Laportes.

A hearing on the motion for summary judgment was held on February 28, 2011, following which the trial court rendered summary judgment in favor of the Roussels. It is from this judgment that the Laportes now appeal, contending that the trial court erred in failing to find that there are genuine issues of material fact, based on the evidence presented, which should have precluded the rendering of summary judgment in this matter.

STANDARD OF REVIEW

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. Johnson v. Evan Hall Sugar Cooperative, Inc., 01-2956, p. 3 (La. App. 1st Cir. 12/30/02), 836 So. 2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together 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. C.C.P. art. 966(B). Summary judgment is favored and is designed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2); Thomas v. Fina Oil and Chemical Company, 02-0338, pp. 4-5 (La. App. 1st Cir. 2/14/03), 845 So. 2d 498, 501-02.

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. C.C.P. art. 966(C)(2).

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. Lieux v. Mitchell, 06-0382, p. 9 (La. App. 1st Cir. 12/28/06), 951 So. 2d 307, 314, writ denied, 07-0905 (La. 6/15/07), 958 So. 2d 1199. 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 this case. Foreman v. Danos and Curole Marine Contractors, Inc., 97-2038, p. 7 (La. App. 1st Cir. 9/25/98), 722 So. 2d 1, 4, writ denied, 98-2703 (La. 12/18/98), 734 So. 2d 637.

DISCUSSION

Central to the resolution of this appeal is whether the Laportes produced factual evidence sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial. As the mover who will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the Roussels had to "point out" that there is an absence of factual support for one or more elements essential to the Laportes' claim.

According to La. C.C. art. 2545,[1] a seller is liable in redhibition to a buyer when the seller "knows that the thing he sells has a defect but omits to declare it, or ... declares that the thing has a quality that he knows it does not have...." And even when the parties agree to waive the warranty against redhibitory defects, which is what occurred in this case, such waiver is not binding in instances where the seller "has declared that the thing has a quality that he knew it did not have." See La. C.C. art. 2548.[2] The Roussels contend that the Laportes will be unable to prove that they had the requisite knowledge of the defects in the property to hold them liable under La. C.C. arts. 2545 and 2548.

In support of their motion for summary judgment, the Roussels submitted a copy of the act of sale by which they sold the property located at 18319 Creek Hollow Drive in Baton Rouge to the Laportes. Included in the act of sale is the following language:

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[1] Louisiana Civil Code article 2545 provides, in pertinent part:

> **Art. 2545. Liability of seller who knows of the defect; presumption of knowledge**
>
> A seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees. If the use made of the thing, or the fruits it might have yielded, were of some value to the buyer, such a seller may be allowed credit for such use or fruits.

[2] Louisiana Civil Code article 2548 provides:

> **Art. 2548. Exclusion or limitation of warranty; subrogation**
>
> The parties may agree to an exclusion or limitation of the warranty against redhibitory defects. The terms of the exclusion or limitation must be clear and unambiguous and must be brought to the attention of the buyer.
>
> A buyer is not bound by an otherwise effective exclusion or limitation of the warranty when the seller has declared that the thing has a quality that he knew it did not have.
>
> The buyer is subrogated to the rights in warranty of the seller against other persons, even when the warranty is excluded.

> PURCHASERS(S) agrees and stipulates that the property, including the improvements located thereon, is conveyed and sold "as-is, where-is" without any warranties whatsoever as to fitness or condition, whether expressed or implied, and Purchaser expressly waives the warranty of fitness and the guarantee against hidden or latent vices (defects in the property sold which render it useless or render its use so inconvenient or imperfect that Purchaser would not have purchased it had she known of the vice or defect) provided by law in Louisiana, more specifically, that warranty imposed by Louisiana Civil Code art. 2520, *et seq.* with respect to Seller's warranty against latent or hidden defects of the property sold, or any other applicable law, not even for a return of the purchase price. Purchaser forfeits the right to avoid the sale or reduce the purchase price on account of some hidden or latent vice or defect in the property sold. Seller expressly subrogates Purchaser to all rights, claims and causes of action Seller may have arising from or relating to any hidden or latent defects in the property. **This provision has been called to the attention of the PURCHASERS(S) and fully explained to the PURCHASER(S), and the PURCHASER(S) acknowledges that he/she has read and understands this waiver of all express or implied warranties and accepts the property without any express or implied warranties.** [Emphasis in original.]

The Roussels also submitted an affidavit wherein they stated they "have no knowledge, now or formerly, regarding the allegations of defects of the property as alleged in the Petition; that [they] never patched, textured or painted any cracks in walls or placed any caulk or mortar filling in the exterior walls[.]" Thus, the Roussels assert that the Laportes will not be able to establish that they are liable under La. C.C. arts. 2545 or 2548. Also, in the motion for summary judgment, the Roussels pointed out that the defects in the pool and a tree located on the property were visible and easily discoverable, and thus, in accordance with La. C.C. art. 2521,[3] there can be no claim in redhibition against them regarding those alleged defects.

In opposition to the motion for summary judgment, the Laportes offered a certified copy of the property disclosure document completed by the Roussels, in which none of the defects the Laportes later discovered are mentioned in the

[3] That article provides that "[t]he seller owes no warranty for defects in the thing that were known to the buyer at the time of the sale, or for defects that should have been discovered by a reasonably prudent buyer of such things."

document. The Laportes also offered the affidavit of their next door neighbor, Darrell Saltamachia, who had resided in the home next door to the property for 20 years. In his affidavit, Mr. Saltamachia stated that while the Roussels lived in the home next door, he observed that they "used their pool on an almost daily basis during the Spring, Summer and Fall;" that the Roussels "had to add water to their pool;" and "that within a few months prior to the sale to [the Laportes], [the Roussels] had interior construction work done to their home" as "he observed carpenters coming in and out" of the Roussels' home during that time.

Finally, in addition to their own affidavit attesting to the defects they had discovered in the home shortly after moving in, the Laportes also offered the affidavit of Spencer Maxcy, a licensed residential home inspector. In his affidavit, Mr. Maxcy stated that he performed an inspection of the Laporte's home in December 23, 2009, which revealed "signs of structural failure throughout the left side of the home." He further stated that all of the defects he observed appeared to be caulked, sealed, or painted and that the painting, sealing, and caulking "appeared to be relatively new, less than a few years old."

It is the Laportes' contention that the foregoing evidence creates a genuine issue of material fact that should have precluded summary judgment in this matter. We disagree. The circumstantial evidence offered by the Laportes may have been sufficient to create a genuine issue of material fact regarding the Roussels' knowledge of the defects discovered in the property if this was the only evidence presented. However, because the evidence offered is not sufficient to refute the affirmative showing made by the Roussels, there is no genuine issue of material fact demonstrated. See Shelton v. Standard/700 Associates, 01-0587, pp. 6-9. (La. 10/16/01), 798 So. 2d 60, 65-67; Thomas v. Comfort Center of Monroe, La, Inc.,

10-0494, pp. 12-13, 17 (La. App. 1st Cir. 10/29/10), 48 So. 3d 1228, 1236-37 and 1239.

Notably, we observe that the Roussels expressly state that they had no knowledge of the defects identified in the structure of the home, and as for the defects in the pool and tree, they declared that such were evident and easily discoverable. Whereas, Mr. Saltamachia's observation of carpenters working at the home prior to the sale only indicates some type of work was performed in the home, he did not identify exactly what kind of work was performed or where in the home the work was performed. So alone, Mr. Saltamachia's affidavit does not conflict with that of the Roussels. Likewise, Mr. Maxcy's statement that the painting, sealing, and caulking of the cracks identified in the home was "less than a few *years* old" clearly extends beyond the time period identified by Mr. Saltamachia as to when he observed carpenters working on the home.[4] Moreover, no evidence was offered by the Laportes to indicate that the problems identified with the pool and the rotten tree were not evident and easily discoverable. Thus, based on our *de novo* review, we find no genuine issue of material fact presented and therefore conclude that summary judgment was properly granted.

CONCLUSION

For the foregoing reasons, we find that summary judgment was properly rendered in favor of the Roussels and thus affirm. All costs of this appeal are cast to the plaintiffs, Steven and Michele Laporte.

AFFIRMED.

[4] In their memorandum in support of the motion for summary judgment, the Roussels stated that they only owned the home for three years prior to selling it to the Laportes.

STEVEN AND MICHELE LAPORTE

VERSUS

TED AND LISA ROUSSEL, ET AL.

FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

NO. 2011 CA 1560

KUHN, J., dissenting.

I respectfully disagree with the majority's conclusion that summary judgment was properly granted.

Although an exclusion or limitation of the warranty against redhibitory defects is usually effective, under La. C.C. art. 2548, an otherwise effective exclusion or limitation of the warranty is ineffective if the seller commits fraud upon the buyer. Thus, although the warranty against redhibitory defects may be excluded or limited, a seller cannot contract against his own fraud and relieve himself of liability to fraudulently induced buyers. ***Shelton v. Standard/700 Associates***, 01-0587 (La. 10/16/01), 798 So.2d 60, 64. A seller with knowledge of a redhibitory defect who, rather than informing the buyer of the defect, opts to obtain a waiver of the warranty implied by law, commits fraud, which vitiates the waiver of warranty. ***Boos v. Benson Jeep-Eagle Company, Inc.*** 98-1424 (La. App. 4th Cir. 6/24/98), 717 So.2d 661, 665, writ denied, 98-2008 (La. 10/30/98), 728 So.2d 387; ***Helwick v. Montgomery Ventures Ltd.***, 95-0765 (La. App. 4th Cir. 12/14/95), 665 So.2d 1303, 1306, writ denied, 96-0175 (La. 3/15/96).

Thus, whether or not the defendants had knowledge of the defects alleged by the plaintiffs is an issue of material fact in the instant case. In support of their motion for summary judgment, the defendants introduced an affidavit in which they denied having any knowledge of these defects. However, that assertion appears to be logically inconsistent with their claim that the leaking swimming pool and the rotten tree were evident and easily discoverable by the plaintiffs.

Moreover, in opposition to the defendants' motion, the plaintiffs introduced an affidavit from a former neighbor of the defendants who stated that: (1) the defendants used their swimming pool almost daily during the Spring, Summer and Fall and had to add water to the pool; and (2) shortly before moving, the defendants cut several low-lying branches off of the tree in their yard that overhung the neighbor's swimming pool. The plaintiffs also introduced their own affidavit, in which they stated that, after moving into the house, they discovered that the pool liner in their swimming pool was pulled away from the main drain and that the tree overhanging the neighbor's swimming pool was rotten.

In my view, the plaintiffs presented sufficient evidence to raise a genuine issue of material fact regarding the defendants' knowledge of the alleged defects in the swimming pool and the rotten tree. The majority opinion initially seems to acknowledge this fact when it states that "[t]he circumstantial evidence offered by the [plaintiffs] may have been sufficient to create a genuine issue of material fact regarding the [defendants'] knowledge of the defects discovered in the property if this was the only evidence presented." However, the majority opinion then continues on to state that plaintiffs' circumstantial evidence was insufficient to refute the affirmative showing made by the defendants. Thus, in reaching its decision, it appears the majority weighed the evidence presented by the defendants against the opposing evidence presented by the plaintiffs.

In determining whether a genuine issue of material fact exists, a court should not consider the merits, make credibility determinations, evaluate testimony or weigh evidence. ***Suire v. Lafayette City-Parish Consolidated Government***, 04-1459 (La. 4/12/05), 907 So.2d 37, 48. Hence, a summary judgment is rarely appropriate for a determination based upon subjective facts such as knowledge, because ascertaining subjective facts calls for credibility evaluations and the

weighing of testimony, and summary judgment is not warranted for such determinations. ***Helwick***, 665 So.2d at 1306. Moreover, any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of trial on the merits. ***Suire***, 907 So.2d at 48.

For these reasons, I disagree with the majority's conclusion that summary judgment in the defendants' favor was warranted. Based on the opposing evidence presented by the parties, I believe summary judgment was precluded by the existence of genuine issues of material fact regarding whether or not the defendants had knowledge of the defects in the swimming pool and the tree. Accordingly, I dissent.