NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0453

TIMOTHY D. WILDER AND KATHERINE WILDER

VERSUS

PILOT TRAVEL CENTERS, LLC/PILOT CORPORATION DBA PILOT TRUCK STOP

Judgment Rendered: November 9, 2011

Appealed from the
Twenty-first Judicial District Court
In and for the Parish of Livingston, Louisiana
Docket Number 113,383

Honorable Brenda Bedsole Ricks, Judge Presiding

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

WHIPPLE, J.

This is an appeal from a judgment of the Twenty-first Judicial District Court in Livingston Parish, granting the defendant's motion for summary judgment and dismissing the plaintiffs' suit with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Timothy and Katherine Wilder, filed suit against Pilot Travel Centers, LLC/Pilot Corporation, d/b/a Pilot Truck Stop ("Pilot"), for injuries allegedly sustained by Mr. Wilder on September 30, 2005, at the Pilot Travel Center in Denham Springs when he slipped as he was climbing into his truck and fell to the ground. On that date, a Pilot employee was cleaning the cement slab in Bay 18 with a pressure hose and a cleaning solution, and water mixed with the cleaning solution was flowing from Bay 18 in a northerly direction. Consequently, access to Bay 18 was blocked by a safety cone.

Mr. Wilder, a truck driver, proceeded into the next bay, Bay 19, to fuel his truck, which he was able to do without encountering any of the water and cleaning solution mixture. After fueling his truck, however, Mr. Wilder moved his truck forward and then walked through the water and cleaning solution mixture flowing from Bay 18 to enter the Pilot Travel Center store. After exiting the store, Mr. Wilder again walked through the water and cleaning solution mixture in returning to his truck. As he attempted to climb up into his truck, his right foot slipped on the rubber mat inside his tractor, and he slipped and fell to the ground.

In their petition, the Wilders averred that Mr. Wilder's injuries were caused by the negligence of Pilot in failing to maintain the Pilot premises in a proper condition, failing to maintain proper procedures for premises safety,

allowing water and degreasing agents to flow freely across the parking lot into an open public drain, allowing a dangerous condition to remain on the premises for an unreasonable amount of time, and creating an unreasonable risk of harm to its patrons. Thus, they sought damages for Mr. Wilder's personal injuries and for Mrs. Wilder's loss of consortium.

After filing an answer generally denying the allegations of the petition, Pilot filed a motion for summary judgment, averring that the Wilders would be unable to meet their burden of proof at trial to demonstrate the existence of an unreasonably dangerous condition on the Pilot premises and that Mr. Wilder was fully aware of the cleaning activities being conducted in the Pilot Travel Center parking lot before he voluntarily chose to walk through the water mixture. Thus, Pilot contended that it was entitled to judgment in its favor as a matter of law dismissing the Wilders' claims against it. Following a hearing on the motion, the trial court granted the motion and dismissed the Wilders' claims with prejudice. From this judgment, the Wilders appeal.

DISCUSSION

The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of an action. LSA-C.C.P. art. 966(A)(2). The mover bears the burden of proving that he is entitled to summary judgment. LSA-C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. LSA-C.C.P. art. 966(C)(2). If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving

party must produce factual support sufficient to satisfy his evidentiary burden at trial. LSA-C.C.P. art. 966(C)(2); East Tangipahoa Development Company, LLC v. Bedico Junction, LLC, 2008-1262 (La. App. 1st Cir. 12/23/08), 5 So. 3d 238, 243, writ denied, 2009-0166 (La. 3/27/09), 5 So. 3d 146.

The owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. Thus, in the instant case, in order to prevail at trial, the Wilders have the burden of proving that the gas station property was defective because it had a condition that created an unreasonable risk of harm to persons on the premises. See LSA-C.C. arts. 2317 & 2317.1; Smith v. The Runnels Schools, Inc., 2004-1329 (La. App. 1st Cir. 3/24/05), 907 So. 2d 109, 112. Whether a condition of a thing is unreasonably dangerous requires consideration of: (1) the utility of the thing; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the complained-of condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activity in terms of the activity's social utility or whether the activity is dangerous by nature. Smith, 907 So. 2d at 112. With regard to the second factor, if a dangerous condition is patently obvious and easily avoidable, it cannot be considered to present a condition creating an unreasonable risk of harm. Williams v. City of Baton Rouge, 2002-0682 (La. App. 1st Cir. 3/28/03), 844 So. 2d 360, 366; Alexander v. City of Baton Rouge, 98-1293 (La. App. 1st Cir. 6/25/99), 739 So. 2d 262, 268, writ denied, 99-2205 (La. 11/5/99), 750 So. 2d 188. Accordingly, a landowner generally has no duty to protect against an open and obvious hazard. Hutchinson v. Knights of Columbus, Council No. 5747, 2003-1533 (La. 2/20/04), 866 So. 2d 228, 234.

In support of its motion for summary judgment, Pilot submitted the affidavit of Tim Loucks, a Pilot employee, who explained that Pilot employees frequently inspect the bay areas and parking lot for debris and unusual substances and that they frequently pressure wash those areas to remove grease, oil, and other substances, in order to keep the bays and parking lot safe and to minimize the risk that someone will fall as a result of any build-up. Loucks also attested that there had been no other allegations of injury with respect to any alleged slipping or falling as a result of any pressure washing or degreasing activities at this Pilot location. Pilot also offered excerpts of Mr. Wilder's deposition, wherein he acknowledged that: he observed the cleaning activities taking place in Bay 18 when he drove into the Pilot facility on the day of the accident; he further observed a cone placed in front of Bay 18 to prevent traffic from entering the bay; he was able to fuel his truck in Bay 19 without encountering any of the water or cleaning solution from Bay 18; he was aware that the solution was traveling in a northerly direction from Bay 18; and after fueling his truck, he proceeded to move his truck forward in a northerly direction and then walk through the watery solution in the Bay 18 area to get to and from the Pilot store, despite his awareness of the obvious watery solution in the Bay 18 area.

Based on this evidence, we conclude that Pilot, as the mover on summary judgment, met its burden of showing that the wet condition of Bay 18 as it was being cleaned was an open and obvious condition and, thus, that it could not be considered to present a condition creating an unreasonable risk of harm. Accordingly, the burden shifted to the Wilders to come forward with evidence or factual support sufficient to satisfy their

evidentiary burden at trial. See Davis v. American Legion Hospital, 2006-608 (La. App. 3rd Cir. 11/2/06), 941 So. 2d 712, 715-716.

In support of their contention that summary judgment was inappropriate, the Wilders assert that genuine issues of material fact remain as to whether the wet condition of the Bay 18 area presented an unreasonable risk of harm. While acknowledging the obvious social utility of cleaning the bay areas, the Wilders contend that alternative cleaning procedures should have been used for the safety of Pilot patrons. In support of this assertion, they also offered excerpts of Mr. Wilder's deposition, wherein he testified that in his experience as a truck driver, he had never seen a gas station use a high-pressure hose to clean oil off the surface of the bay areas, but rather, had only seen a steam cleaner used. However, even if we were to ignore the open and obvious nature of the ongoing cleaning operations, we note that the Wilders offered no testimony, expert or otherwise, to support the assertion that use of a high-pressure hose and degreaser or cleaner in an area blocked off by a safety cone was in any way unsafe or created an unreasonable risk of harm.[1]

Considering the foregoing, we find that after the burden shifted to the Wilders, they failed to carry their burden to demonstrate that summary judgment was inappropriate by showing that the watery solution on and flowing from the area of Bay 18 from cleaning operations created an unreasonable risk of harm. Accordingly, on the record before us, we find that summary judgment was properly granted. See Smith, 907 So. 2d at 113,

[1]Moreover, while the Wilders assert that the question of whether Mr. Wilder could have avoided the watery solution is "hotly contested," Mr. Wilder acknowledged in his deposition that he chose not to traverse the area south of the safety cone, an area where there was no solution, in order to get to and from the Pilot store.

and Davis, 941 So. 2d at 716.

CONCLUSION

For the above and foregoing reasons, the July 26, 2010 judgment, granting Pilot's motion for summary judgment and dismissing with prejudice the Wilders' claims against it, is affirmed. Costs of this appeal are assessed against Timothy and Katherine Wilder.

AFFIRMED.