

The Supreme Court of the State of Louisiana

OTIS JONES

No. 2022-CC-01035

VS.

WHIPS ELECTRIC, LLC, AFRICK
CONSTRUCTION, LLC, PARADISE POOLS
AND SPAS, INC., AND GREGORY BROWNE

IN RE: Gregory Browne - Applicant Defendant; AIG Property Casualty Company -
Applicant Defendant; Applying For Supervisory Writ, Parish of Orleans Civil,
Orleans Civil District Court Number(s) 2019-04000, Court of Appeal, Fourth
Circuit, Number(s) 2021-C-0238;

November 22, 2022

Writ application granted. See per curiam.

JLW
SJC
JTG
WJC
JBM

Hughes, J., would grant and docket.
Griffin, J., recused.

Supreme Court of Louisiana
November 22, 2022



Chief Deputy Clerk of Court
For the Court

11/22/2022

SUPREME COURT OF LOUISIANA

No. 2022-CC-01035

OTIS JONES

VS.

**WHIPS ELECTRIC, LLC, AFRICK CONSTRUCTION, LLC, PARADISE
POOLS AND SPAS, INC., AND GREGORY BROWNE**

On Supervisory Writ to the Orleans Civil District Court, Parish of Orleans

PER CURIAM*

In this case, we are called upon to determine whether a homeowner is entitled to summary judgment on the ground the homeowner had no knowledge of an allegedly dangerous condition that caused injury to an employee of a subcontractor working on the home. For the reasons that follow, we conclude summary judgment is appropriate.

UNDERLYING FACTS AND PROCEDURAL HISTORY

On May 1, 2017, Gregory Browne and his wife, Harriet Riley, while residing in Texas, purchased a home in New Orleans. After having the home inspected, Mr. Browne hired Paradise Pools and Spas, Inc. (“Paradise”) to install a pool, and Africk Construction, LLC (“Africk”) to perform a substantial remodeling project, which began in December 2017. Africk contracted with several subcontractors, including Whips Electric, LLC (“Whips”), which performed electrical work on the project, and Billy Keys Construction (“Keys”), which was responsible for pouring and finishing a concrete driveway.

On May 10, 2018, Otis Jones, an employee of Keys, was performing concrete finishing work on the driveway. As he did so, his arm touched a live electrical wire

* Griffin, J. recused.

which was protruding from a junction box located on a pillar next to the driveway. Mr. Jones sustained injuries as a result of the electrical shock. Mr. Browne and his wife were not living in the home at the time of the incident and did not move in until June 1, 2018.

Subsequently, Mr. Jones filed suit against Whips, Africk, and Paradise Pools. He later amended his suit to name Mr. Browne and AIG Property Casualty Insurance Co. in its capacity as the homeowner's insurer (collectively referred to hereinafter as the "homeowner defendants").

The homeowner defendants moved for summary judgment.¹ The homeowner defendants relied on Mr. Brownes' deposition, in which he testified he did not live in the house prior to the incident and had no knowledge of any exposed wires on the property. They further cited testimony from employees of Paradise and Whips, none of whom recalled seeing any exposed wires.

Plaintiff opposed the motion for summary judgment, arguing Mr. Browne testified to visiting the house during the construction more than five times in 2018. Furthermore, plaintiff relied on the deposition of Justin Whipple of Whips, who testified that either Mr. Browne and/or his wife were there every day during the twenty-two days he worked on the project.

After a hearing, the district court denied the homeowner defendants' motion for summary judgment. In oral reasons for judgment, the district court explained, "I don't think that we can determine this at this point without a trial."

The homeowner defendants sought review of the trial court's judgment. A five-judge panel of the court of appeal denied the writ, with two judges dissenting.

¹ Several months earlier, Africk and Whips filed motions for summary judgment, arguing plaintiff could not prove that either defendant knew or should have known about the exposed wire. The district court granted summary judgment in favor of these defendants and dismissed plaintiff's claims against them.

The homeowner defendants then applied to this court. In the exercise of our supervisory jurisdiction, we granted the writs and remanded the case to the court of appeal for briefing, argument and opinion. *Jones v. Whips, Electric, LLC*, 21-1429 (11/23/21), 328 So.3d 85.

On remand, a five-judge panel of the court of appeal again denied the writ in a plurality decision, with one judge concurring and two judges dissenting. *Jones v. Whips, Electric, LLC*, 21-0238 (La. App. 4th Cir. 5/9/22) (unpublished).

Upon the homeowner defendants' application to this court, we ordered written briefing pursuant to the provisions of La. Code Civ. P. art. 966(H).² Having received briefs from both parties, we now review the district court's ruling on the motion for summary judgment on the merits.

DISCUSSION

A ruling on a motion for summary judgment is reviewed under a de novo standard, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. *Guidry v. Brookshire Grocery Co.*, 19-1999 (La. 2/26/20), 289 So.3d 1026, 1027; *Murphy v. Savannah*, 18-0991 (La. 5/8/19), 282 So.3d 1034, 1038; *Wright v. Louisiana Power & Light*, 06-1181 (La. 3/9/07), 951 So.2d 1058, 1070.

Pursuant to La. Code Civ. P. art. 966(D)(1), the burden on the party moving for summary judgment "does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the

² As required by the article, we permitted the parties an opportunity to request oral argument and entertained plaintiff's request for argument. After careful consideration, we found oral argument was unnecessary under the facts of this case and therefore elected to exercise our discretion to consider the matter on written briefs only.

absence of factual support for one or more elements essential to the adverse party's claim, action, or defense.” *Reynolds v. Bordelon*, 14-2371 (La. 6/30/15), 172 So.3d 607, 610–11. When a motion for summary judgment is made and supported, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise, must set forth specific facts showing that there is a genuine issue for trial. La. Code Civ. P. art. 967(B); *Bufkin v. Felipe’s Louisiana, LLC*, 14-0288 (La. 10/15/14), 171 So.3d 851, 858. Once a motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. *Dauzat v. Curnest Guillot Logging Inc.*, 08-0528 (La. 12/2/08), 995 So.2d 1184, 1187 (citing *Babin v. Winn–Dixie Louisiana, Inc.*, 00-0078 (La. 6/30/00), 764 So.2d 37, 40).

We find the homeowner defendants satisfied their initial burden on summary judgment through the deposition of Mr. Browne, who testified he lived in Houston during the renovation work, did not perform any electrical work on the property and was not informed of any problems with the wire or junction box by anyone working on the project.

The homeowner defendants also relied on the deposition of Earl Hardouin, the president of Paradise Pools, who testified that he never saw the junction box and exposed wire and, consequently, never mentioned it to Mr. Browne or his wife. He further testified he never saw the Brownes doing any electrical work on the property.

Justin Whipple, the electrical contractor, testified he did not know the box existed and did not know what the wire in question was powering. Prior to being called to the property to take care of the live wire after the accident, he claimed he never worked on the junction box and never spoke to anyone about it.

Nonetheless, in concluding summary judgment was inappropriate, the court of appeal found the testimony of Mr. Whipple raised a genuine issue of material fact.

Specifically, the court explained Mr. Whipple’s deposition contradicted all other witnesses when he testified that Mr. Browne and his wife were at the home “every day” supervising his work. The court acknowledged Mr. Whipple did not clarify whether he was referring to the period of time leading up to the accident or his work for the couple after they moved into the home on June 1, 2018, but found Mr. Whipple’s testimony raised credibility concerns which could not be resolved on summary judgment. As a result, the court concluded summary judgment was inappropriate as “material questions of fact remain as to Browne’s personal involvement in the renovation project, as well as his constructive knowledge of the defect at issue.”

As the court of appeal conceded, Mr. Whipple’s testimony is equivocal as to whether he was referring to the presence of Mr. Brown and his wife at the home before or after the incident at issue. However, even assuming Mr. Whipple was referring to the time prior to the incident, we find his testimony does not create a genuine issue of material fact.

A fact is “material” when its existence or nonexistence may be essential to plaintiff’s cause of action under the applicable theory of recovery. *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512 (La. 7/5/94), 639 So.2d 730, 751; *Penalber v. Blount*, 550 So.2d 577, 583 (La. 1989).

The liability of the homeowner defendants is governed by La. Civ. Code art. 2317.1, which provides, in pertinent part, “[t]he 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.” An essential element to a claim under Article 2317.1 is proof that the owner or custodian had actual or constructive knowledge of the defect, meaning the party

either knew of the defect or, in the exercise of reasonable care, should have known of the defect. *Alvarado v. Lodge at the Bluffs, LLC*, 2016-0624 (La. App. 1 Cir. 3/29/17), 217 So.3d 429, 433, *writ denied*, 2017-0697 (La. 6/16/17), 219 So.3d 340.

Applying this law, it is clear that any factual dispute over whether Mr. Browne and his wife were at the home during the construction does not rise to the level of a material fact. Rather, in order for plaintiff to prevail, he must establish the homeowner defendants knew or should have known of the defect posed by the junction box and live electrical wire.

The undisputed testimony of Mr. Browne establishes he was not personally aware of the junction box and wire and was not informed of any electrical defects in the property. This testimony was corroborated by several contractors working on the property, who testified they were not aware of the existence of the live wire and therefore could not have informed Mr. Browne or his wife of its existence.

Considering that experienced contractors, including the electrical contractor, did not discover the live wire during the course of their work on the project, we do not find any factual support for the theory that Mr. Browne should have found it in the exercise of ordinary care. Plaintiff has not introduced any evidence showing that Mr. Browne had any particular expertise in electrical wiring, or that he conducted an extensive inspection of the home's electrical system.

At best, plaintiff speculates that Mr. Browne and his wife could have discovered the defect. However, mere speculation is not sufficient to satisfy plaintiff's burden of proof. *See Todd v. State Through Dept. of Soc. Services*, 96-3090 (La. 9/9/97), 699 So.2d 35, 43 (“[p]roof which establishes only possibility, speculation, or unsupported probability does not suffice to establish a claim.”).³

³ Plaintiff further contends that the homeowner defendants made a judicial admission that Mr. Browne should have known of the wire because they argued in their motion for summary judgment that the “exposed electrical wire is an open and obvious hazard.” We see no merit to this argument. Before a judicial admission or confession is binding in a civil matter, a party must rely on the

We conclude the motion for summary judgment has been properly supported by the homeowner defendants. Plaintiff failed to produce evidence of any genuine issue of material fact. Accordingly, summary judgment in favor of the homeowner defendants is mandated.

DECREE

For the reasons assigned, the writ is granted and made peremptory. The judgment of the district court is reversed, and summary judgment is rendered in favor of Gregory Browne and AIG Property Casualty Insurance Co., dismissing the suit of plaintiff, Otis Jones, against them with prejudice.

admission or confession to its detriment. *See Yount v. Lafayette Ins. Co.*, 08-0308 (La. App. 4th Cir. 1/28/09), 4 So. 3d 162, 173-174. Moreover, the jurisprudence has recognized that “a unilateral pleading or allegation in a petition is insufficient, absent a response to it, to constitute a binding judicial admission or confession as a matter of law.” *Wells Fargo Bank v. Washington*, 2019-0392 (La. App. 4th Cir. 10/23/19), 282 So. 3d 1176, 1180, *writ denied*, 2019-01868 (La. 1/22/20), 291 So. 3d 1039. In the instant case, plaintiff clearly did not rely on any purported admission that the defect was open and obvious and has instead consistently opposed this argument.