NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2154

LEAH RAINEY

VERSUS

ROLSTON B. STEELE, MD AND XYZ INSURANCE COMPANY

DATE OF JUDGMENT: AUG 17 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2008-15075, DIV. F, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE MARTIN E. COADY, JUDGE

* * * * * *

Timothy F. Upton
Covington, Louisiana

Counsel for Plaintiff-Appellant
Leah Rainey

Marianne S. Pensa
Metairie, Louisiana

Counsel for Defendant-Appellee
Rolston B. Steele

* * * * * *

BEFORE: KUHN, PETTIGREW, GAIDRY, MCDONALD, AND HIGGINBOTHAM, JJ.

Disposition: AFFIRMED.

Pettigrew, J. dissents and assigns reasons.

Higginbotham, J. dissents.

KUHN, J.

Plaintiff-appellant, Leah Rainey, appeals the trial court's dismissal of her claims for damages against defendant-appellee, Dr. Rolston Steele, for personal injuries she sustained when she fell off a ladder while painting the doctor's premises. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts, derived from the deposition testimony of Leah Rainey and Connie Wilder, Dr. Steele's office manager, are undisputed. Leah was assisting her mother-in-law, Cindy Rainey, on a painting project. Cindy had been verbally hired by Wilder to paint the interior of the office, specifically the reception area and the bathroom. Wilder advised Cindy that, in addition to having the walls repainted, Dr. Steele intended to replace the carpeting. The reception area had three interior windows, each framed by molding included in the painting project. According to Wilder, Cindy was given the four-day Thanksgiving holiday to complete the project to avoid disruption to the doctor's medical practice.

Leah had traveled by train from Michigan to St. Tammany Parish on Thanksgiving. Cindy had advised Leah she would help her daughter-in-law find a place to live; in exchange, Leah agreed to help Cindy with the painting project. Leah indicated that she was "very familiar with painting," having worked alongside her husband "a good six, seven years" in his vinyl siding business, explaining that he often painted the interior of buildings to which he was applying exterior siding.

According to Leah, she worked in the doctor's office in the nighttime hours of Saturday, November 24, 2007, for a couple hours without incident. During that time, she painted the framing of two of the elevated windows and a wall. Her job

included all the trim work around the windows. Pictures attached to Leah's deposition showed that the windows were elevated. The testimonial evidence established only that the windows were higher than nine feet, but less than twenty feet, from the floor. According to Leah, she started at the top of the window frame furthest to her left and, moving the ladder to the right, applied paint, to both the horizontal and the vertical trim that separated each window.

Leah described in detail how she used the ladder. The extension ladder, which had been supplied by Cindy, allowed Leah to work at the elevated height. She said the ladder worked "fine" and that she found nothing wrong with it. Leah stated that in light of her familiarity with painting, she knew that she had to check the floor before she put the ladder on it and did so. Because she was aware that the carpet was to be replaced after the painting project completed, in accordance with the industry custom, Leah stated that she did not lay any tarps on top of the carpet to protect it from paint. She said that for safety purposes, she put a hook on the ladder to hold the can of paint to avoid having to carry the paint and the brush at the same time as she ascended. Leah described that the extension ladder as having "hooks" or "teeth" at the bottom, explaining that these "teeth" would grab into the surface "so it will catch the ground. If it's outside, it's going to dig in to stop from falling or stop you. That's what it's meant for." Although Leah could see that the carpet was worn and old, she stated that did not feel uncomfortable putting the ladder on the carpet.

Leah returned the following night of November 25, 2007, the Sunday after Thanksgiving. Leah was accompanied by Cindy and her own minor daughter, who played with blocks while the ladies were painting. As Cindy was outside smoking a cigarette, Leah was applying a second, finishing coat of paint to the trim around the

elevated windows. According to Leah, "We had padding against the ladder so it would not mess up the paint." She explained that she had to move the ladder two or three times to apply the paint. Each time she moved the ladder, she checked to see that it was secured into the carpet. Having used the ladder at the same place the day before, she testified that the ladder never moved.

Leah described,

> I had went (sic) up the ladder. I was painting the tops up here (indicating on a photograph viewed during her deposition testimony). ...
>
> And I think I went down the ladder to get some more paint. More paint for the trim. And I secured everything. I was painting. I had three steps left to go all the way to the top of the ladder. And when I went to – I secured everything. I put my hook for my paint on, I had my paint brush. I was painting. I went to go step up one step higher to go up higher to paint. That's when the ladder fell.

Leah explained that she landed on her feet and then fell back, indicating that the ladder did not fall straight down, it "went like ... a swoop." Because she recalled that the carpet was pushed back with her when she landed, Leah concluded that the ladder had slipped due to loose carpet.

Finding herself in excruciating pain, Leah screamed to have her shoes removed. Cindy used a chair to move Leah and subsequently carried Leah on her back, down the steps of the doctor's office, and into a car. Cindy transported Leah to St. Tammany Parish Hospital where she was required to have surgery on her feet.

The following day when Wilder returned to work, she found white paint splattered on the wall and the carpet and noticed that the trim had not been completed. When Wilder called Cindy to complain, she first learned that Cindy had been assisted by Leah, who had fallen off a ladder and sustained injuries.

Leah subsequently filed this lawsuit seeking damages for her injuries from Dr. Steele. After filing an answer that generally denied liability, Dr. Steele moved for summary judgment. On August 2, 2010, the trial court signed a judgment granting summary judgment in favor of Dr. Steele and dismissing Leah's claims against him. This appeal by Leah followed.

DISCUSSION

On appeal, Leah contends the trial court erred in concluding that there were no outstanding material facts on the issue of whether Leah was injured as a result of an unreasonable risk of harm present in Dr. Steele's office for which he is liable. She asks that we reverse the trial court's judgment and allow her to proceed to trial.

A motion for summary judgment will be granted "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 mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B). The summary judgment procedure is favored and "is designed to secure the just, speedy, and inexpensive determination of every action...." La. C.C.P. art. 966(A)(2).

The burden of proof is on the moving party. La. C.C.P. art. 966(C)(2). However, if the moving party will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the moving party's burden on the motion is satisfied by pointing 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. ***Id.*** Thereafter, the adverse party must produce factual support sufficient to establish that she will be able to satisfy its evidentiary burden of proof at trial. Failure to do so shows that there is no genuine issue of material fact. ***Id.***

This court's review of a grant or denial of summary judgment is *de novo*. Thus, we ask the same questions as the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. ***Barrow v. Brownell***, 2005-1627, p. 5 (La. App. 1st Cir. 6/9/06), 938 So.2d 118, 121.

A "genuine issue" is a "triable issue." More precisely, an issue is genuine if reasonable persons could disagree. If, on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. Summary judgment is the means for disposing of such disputes. In determining whether an issue is "genuine," courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. Formal allegations without substance should be closely scrutinized to determine if they truly do reveal genuine issues of fact. ***Smith v. Our Lady of the Lake Hosp., Inc.***, 1993-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751.

A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. Simply put, a "material" fact is one that would matter on the trial on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. ***Id.***

In any tort case, the proper methodology for analysis begins with answering the following questions:

1. Was the conduct in question a cause-in-fact of the resulting harm?

2. What, if any, duties were owed by the respective parties?

3. Were the requisite duties breached?

4. Was the risk, and the harm caused, within the scope of protection afforded by the duty breached?

Vinccinelli v. Musso, 2001-0557, p. 3 (La. App. 1st Cir. 2/27/02), 818 So.2d 163, 165, ***writ denied***, 2002-0961 (La. 6/7/02), 818 So.2d 767.

At the onset of the summary judgment hearing, Dr. Steele stipulated that for purposes of summary judgment, on issues that the attorneys did not agree as to the facts, the facts were as Leah had alleged. Thus, we assume that the condition of the carpet, particularly its looseness, was the reason the ladder gave way and caused Leah to fall to the floor. And we focus our review on whether, under the particular facts and circumstances of this case, Dr. Steele owed a duty to Leah to protect against such an accident. The existence of a duty is a question of law. ***Hardy v. Bowie***, 1998-2821, p. 12 (La. 9/8/99), 744 So.2d 606, 614; ***Vinccinelli***, 2001-0557 at p. 3 n.5, 818 So.2d at 165 n.5.

The general rule is that the owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. He must discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence. ***Id.***, 2001-0557 at p. 4, 818 So.2d at 165. The duty is the same under the custodial liability of La. C.C. art. 2317.1 and 2322,[1] ***see Jackson v. Brumfield***, 2009-2142 (La. App. 1st Cir.

[1] La. C.C. art. 2317.1 states in relevant part,

> 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.

6/11/10), 40 So.3d 1242, and the negligence theory of La. C.C. art. 2315.[2] ***Vinccinelli***, 2001-0557 at p. 4, 818 So.2d at 165. Under either theory, plaintiff has the burden of proving that: (1) the property which caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) that defendant had actual or constructive knowledge of the risk. ***Id.***

The absence of an unreasonably dangerous condition implies the absence of a duty on the part of the defendant. ***Vinccinelli***, 2001-0557 at p. 4, 818 So.2d at 165 (citing ***Oster v. Dep't of Transp. and Dev.***, 582 So.2d 1285, 1288 (La. 1991)). A determination of whether there is an unreasonable risk of harm involves numerous considerations and cannot be applied mechanically. Claims and interests should be balanced, the risk and gravity of harm should be weighed, and individual and societal rights and obligations must be considered. ***Vinccinelli***, 2001-0557 at p. 4, 818 So.2d at 165-66 (relying on ***Entrevia v. Hood***, 427 So.2d 1146, 1149 (La. 1983)).

The determination of whether a particular risk of harm is reasonable is a

---

(Continued . . .)

La. C.C. art. 2322 states in pertinent part,

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the 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.

[2] La. C.C. art. 2315(A) states, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

matter wed to the facts of the case. In general, it is improper to characterize a risk as unreasonable without considering the surrounding circumstances. ***Celestine v. Union Oil Co. of California***, 1994-1868, pp. 8-9 (La. 4/10/95), 652 So.2d 1299, 1304. A court must determine whether the risk is unreasonable vis-à-vis the particular plaintiff involved. In doing so, it is appropriate to consider any contractual obligations owed by the plaintiff to the defendant with respect to the particular risk that resulted in harm. A court should also consider any specialized or superior knowledge the plaintiff may have. The status of the plaintiff is a factor to be considered in the fact-specific determination of whether a risk is unreasonable. ***Id.***, 1994-1868 at pp. 8-9, 652 So.2d at 1304-06.

The deposition testimony admitted at the summary judgment hearing establishes that through his office manager, Dr. Steele had contracted with Cindy to paint the reception area of his office. Cindy in turn employed Leah. Nothing in the record establishes that Dr. Steele was ever aware of Leah's presence until after the accident occurred. Nevertheless, for purposes of summary judgment and mindful of Dr. Steele's stipulation that on issues that the attorneys did not agree to the facts, the facts were as Leah had alleged, we presume Leah was an invited guest, who was on the premises for purposes of fulfilling the verbal contract between Dr. Steele and Cindy.

According to Leah's testimony, the ladder was provided by Cindy and was in working order. Leah was an experienced painter who took safety precautions in performing this job. She alone decided which equipment to use, selecting the extension ladder. She alone chose where to place the ladder. She alone determined that the teeth of the ladder were securely in place and that the carpet did not move.

She had worked in the same area the day before the accident without incident. Had the carpet moved, she testified that she would have found another way to finish the job.

As an experienced painter who had inspected the carpet before ascending up the ladder, Leah was in a better position to guard against the risk of loose carpet than Dr. Steele or Wilder, despite the office manager's admission that she knew the old, worn carpeting was loose in places, stating, "Particularly where, I do not know." Leah was clearly aware that Dr. Steele's office planned to replace the "old, worn carpet" after the painting project was concluded.

We note that the risk of harm that Leah was subjected to was unique to her status as a painter of the premises. Dr. Steele's ordinary visitors to his office would have utilized the carpet in a different manner from that of a painter. As such, any loose places in the carpet did not create an unreasonable risk of harm when the carpet was used for its intended purpose, i.e., to walk upon.

Given that there are no additional facts that will come forward at the trial of the matter; Leah alone determined where to place the ladder; no one in Dr. Steele's office supervised or directed her; and no one in the office knew exactly where the carpet was loose, the risk of harm from Dr. Steele's failure to warn of the presence of loose, old, worn carpet was not unreasonable vis-à-vis this particular plaintiff. Under the facts and circumstances established by the deposition testimony admitted into evidence at the summary judgment hearing, Dr. Steele's office did not owe a duty to an experienced painter like Leah to guard against this particular risk that gave rise to injury. ***See Celestine***, 1994-1868 at pp. 8-9, 652 So.2d at 1304-06. Accordingly, the trial court correctly granted summary judgment on this basis.

Moreover, we find the record devoid of evidence of an outstanding issue of fact on whether Dr. Steele had constructive notice of the risk of injury from loose carpeting so as to support the imposition of liability. Leah failed to offer evidence to support a finding that Dr. Steele knew or reasonably should have known that the carpet was loose in the place where the feet of the ladder were placed. While Wilder's deposition testimony established that the office manager knew that the carpet was loose in places, Wilder stated she did not know where in particular the carpet was loose. Thus, the only evidence Leah has offered to support the notice requirement establishes that Dr. Steele's office manager knew no more than that which Leah, an experienced painter, could have determined by her inspection of the carpet. In light of the fact that Leah carefully inspected the area before she placed the ladder, she was more familiar with the carpet than the record establishes the office manager was, anything the office manager could have told Leah about the any potential loose areas of the carpet was simply redundant of what the painter should have known based on her inspection. Accordingly, the lack of evidence that Dr. Steele knew or should have known that the carpet was loose in the precise place that Leah chose to position Cindy's ladder thereby obviated any finding that he or Wilder knew or should have known of the risk and warned Leah, and clearly supports the trial court's grant of summary judgment and dismissal of Leah's claims for damages.

DECREE

For these reasons, the trial court's judgment is affirmed. Appeal costs are assessed against plaintiff-appellant, Leah Rainey.

AFFIRMED.

LEAH RAINEY

VERSUS

ROLSTON B. STEELE, MD AND
XYZ INSURANCE COMPANY

NUMBER 2010 CA 2154

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: KUHN, PETTIGREW, GAIDRY, McDONALD, AND HIGGINBOTHAM, JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

I respectfully dissent from the majority's opinion.

The incident that forms the basis of this litigation is alleged to have resulted from old, loose carpeting on the floor of Dr. Steele's office, which slid away from the wall. As a result, the extension ladder, upon which Leah Rainey was painting, crashed to the ground causing her to fall. The general rule is that the owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. He must discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence. **Leonard v. Ryan's Family Steak Houses, Inc.**, 05-0775, p. 3 (La. App. 1 Cir. 6/21/06), 939 So.2d 401, 404.

Louisiana Civil Code articles 2315 and 2316 provide the basic codal foundation for delictual liability in our state. In addition to those articles, La. Civ. Code arts. 2317.1 and 2322 define the basis for delictual liability for defective things and buildings. Louisiana Civil Code article 2317.1 provides, in pertinent part, as follows:

> 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 addition, La. Civ. Code art. 2322 provides the same standard of proof for liability for a defective building and its components. La. Civ. Code art. 2322 provides, in pertinent part, as follows:

> The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the

> exercise of reasonable care, should have known of the 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.

Thus, to establish liability based upon ownership or custody of a thing, the plaintiff must show that (1) the defendant was the owner or custodian of a thing which caused the damage, (2) the thing had a ruin, vice, or defect that created an unreasonable risk of harm; (3) the ruin, vice, or defect of the thing caused the damage, (4) the defendant knew or, in the exercise of reasonable care, should have known of the ruin, vice or defect, (5) the damage could have been prevented by the exercise of reasonable care, and (6) the defendant failed to exercise such reasonable care. **Granada v. State Farm Mutual Insurance Company**, 04-1722, p. 5 (La. App. 1 Cir. 2/10/06), 935 So.2d 703, 707-08, writ denied, 06-0589 (La. 5/5/06), 927 So.2d 326.

The risk that occurs must be within the scope of the defendant's duty to exercise reasonable care. Thus, the court must decide if the risk which caused the damage is within the ambit of protection of the duty. In other words, under the facts and circumstances of this case, did Dr. Steele owe a duty to inform the painters hired to paint his office, i.e., Mrs. Rainey and her assistant, Leah Rainey, of the harm presented by the loose carpet?

Dr. Steele contended that the worn condition of the carpet in his office was obvious to all. Dr. Steele further relied on Leah Rainey's deposition testimony wherein she stated that she placed the extension ladder on the carpet moments before the accident, and the teeth at the bottom of the ladder were secured into the carpet, and the ladder did not move. Dr. Steele claimed that absent evidence that he had actual or constructive knowledge of the vice or defect that caused Leah Rainey's injury, the ruling of the trial court should be affirmed.

Leah Rainey agreed that although the age and worn condition of the carpet was visible and apparent to anyone that saw it, only Dr. Steele and/or his office manager, Ms. Wilder, had knowledge that the carpet was actually loose and pulling away from the

wall in certain areas.[1] Given Ms. Wilder's testimony in her deposition that the carpet was loose in certain areas, it appears Dr. Steele had actual or constructive knowledge of the defect that was a cause in fact of the injury. Additionally, it seems likely that Leah Rainey will be able to produce factual support sufficient to satisfy her evidentiary burden of proof at trial on an essential element of her case; namely, that the loose carpet in Dr. Steele's office was unreasonably dangerous. For this reason, summary judgment was not appropriate.

[1] In her deposition testimony, Ms. Wilder stated that although she did not inspect the carpet, "[t]here was loose carpet. It was old and frazzled in areas. Particularly where, I do not know."