NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 0470

WILLIE BUTLER

VERSUS

WINNER'S CHOICE TRUCK STOP, INC. D/B/A FOREST GOLD TRUCK STOP AND SCOTTSDALE INSURANCE COMPANY

DATE OF JUDGMENT: OCT 29 2010

ON APPEAL FROM THE TWENTY-FIRST JUDICIAL DISTRICT COURT
NUMBER 19961, DIV. E, PARISH OF ST. HELENA
STATE OF LOUISIANA

HONORABLE BRENDA BEDSOLE RICKS, JUDGE

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Scottsdale Insurance Company

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BEFORE: KUHN, PETTIGREW, AND KLINE, JJ.[1]

Disposition: AFFIRMED.

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[1] The Honorable William F. Kline, Jr. is serving *pro tempore* by special appointment of the Louisiana Supreme Court.

KUHN, J.

Plaintiff-appellant, Willie Butler, appeals the trial court's judgment granting summary judgment in favor of defendants, Winner's Choice Truck Stop, Inc., d/b/a Forest Gold Truck Stop (Forest Gold) and its insurer, Scottsdale Insurance Company, and dismissing his claims for damages arising from injuries he sustained while pumping gasoline. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Butler filed this lawsuit averring that Forest Gold was liable to him as the custodian of a gasoline pump, which leaked gasoline while he was pumping it into his truck's tank, causing him to sustain personal injuries most notably to his eyes.[2] The defendants answered the lawsuit and subsequently moved for summary judgment, seeking dismissal from the lawsuit.

For purposes of summary judgment, the defendants conceded that the accident occurred as Butler described in his deposition testimony. According to Butler, on January 15, 2007, he held the nozzle and was leaning on his truck, facing the pump, using his right hand to pump the gasoline into his truck. The pump was not pre-set to automatically shut off so Butler was required to stop it when it reached the amount he wanted. All of a sudden, at a point at the top of the pump where a clamp is located, the hose popped loose and became unattached. Fuel came out and splashed Butler in his face. He reported to the cashier at the truck stop what had happened. The defendants also do not dispute, for summary

[2] Butler additionally sued Husky Corporation, the manufacturer of the gasoline pump, who remains in the lawsuit. The trial court correctly concluded that appellant was entitled to an immediate appeal of the appellees' dismissal from this litigation. ***See*** La. C.C.P. art. 1915A(1); ***see also Motorola, Inc. v. Associated Indem. Corp.***, 02-1351 (La. App. 1st Cir. 10/22/03), 867 So.2d 723, 732-33.

judgment purposes, that the hose was not attached to the pump at the breakaway valve shortly after Butler reported having sustained injuries. [3]

In asserting entitlement to summary judgment, the defendants contended that Butler could not establish that Forest Gold had the requisite knowledge necessary to support his claim. The trial court agreed and, in a judgment signed on September 14, 2009, granted summary judgment and dismissed Butler's claims against these defendants. A motion for rehearing/new trial was denied. This appeal followed.

DISCUSSION

Summary judgments are reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. ***Smith v. Our Lady of the Lake Hosp., Inc.***, 93-2512 (La. 7/5/94), 639 So.2d 730, 750. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, 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).

On issues for which the moving party will not bear the burden of proof at trial, the moving party's burden of proof 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. Thereafter, the nonmoving party must produce factual support sufficient to establish that it will be

[3] According to the undisputed evidence, the break-away technology allows the hose to separate from the pump. It is designed for instances when a customer forgets to remove the nozzle from the vehicle's tank and drives off. Product material for the breakaway valve indicates that when 200 pounds of pressure or more are exerted to the hose, the butterfly valves immediately close the gasoline line, allowing no more than a teaspoon of gasoline to be released.

able to satisfy its evidentiary burden of proof at trial; failure to do so shows that there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2); ***Clark v. Favalora***, 98-1802 (La. App. 1st Cir. 9/24/99), 745 So.2d 666, 673. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. ***Guardia v. Lakeview Regional Medical Ctr.***, 2008-1369 (La. App. 1st Cir. 5/8/09), 13 So.3d 625, 628.

The owner 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. La. C.C. art. 2317.1.

On appeal, the issue before us as posited by the parties is whether Forest Gold had notice of the alleged defect in the pump. Nothing in the record establishes that Forest Gold had actual knowledge that the pump and its breakaway valve were defective in the manner described by Butler.[4] Thus, the issue before us is whether Forest Gold should have known in the exercise of reasonable care that the pump would malfunction in the manner described by Butler.

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[4] We find no merit in Butler's contention that a previous instance of the hose becoming disconnected from the same type of pump at the breakaway valve was sufficient evidence to establish actual knowledge of a defect in the pump. According to the only evidence supporting such a finding, once with one of the old pumps (like that involved in Butler's incident) and once with one of the newer pumps that were subsequently installed at the truck stop, customers had driven away with the gasoline nozzle in their respective vehicles' tanks. Each time, the breakaway valve allowed the detachment of the hose as designed, and the customer came into the store to advise that the pump needed to be fixed. These inapposite facts do not impute knowledge of an accident like that Butler alleges to have sustained.

The record contains the affidavits and deposition testimony of two Forest Gold employees. Store manager, Frankie Williams, testified that at the time of the accident she was not working, having finished her shift earlier in the day. She said that upon her arrival around 7 a.m. on January 15, 2007, she had conducted a visual inspection of the premises, which included a walk through the pumps to verify they were working. She believed that had any hoses been disconnected from any of the pumps, she would have seen it during her inspection. Williams stated that on the day of Butler's incident, the truck stop did not keep inspection logs or other documentation showing that she had inspected the pumps.

According to Williams, when she arrived for work the day after the incident, the hose was attached. She explained the cashier on duty had left a handwritten note on Williams' desk. In the note, the cashier stated that on January 15, 2007, Butler had reported that gasoline had spewed in his face, he wanted someone at the location to know, he smelled like gasoline, and was wiping his eyes. The cashier also advised that she inspected the pump and that while there was no visible gas on the ground, the hose was disconnected. Williams stated that during the early morning hours, area maintenance employee, Michael Doucet, had come by the 24-hour facility and reinstalled the hose.

Doucet testified that on the date of the Butler incident, he repaired and serviced pumps for Forest Gold truck stops in Louisiana. He outlined how he was a one-man operation who tended to all problems that arose with the pumps, hoses, and other apparatuses related to the pumps in the several truck stop stores, including the one at which Butler was injured. The evidence established that Doucet had been servicing pumps with various employers for over seventeen

years. On the day of Butler's incident, Doucet had been working for Forest Gold for three years, essentially doing the same work he had done for previous employers. Doucet explained how the State annually calibrates all the fuel pumps, and if there are any problems, he makes the required adjustments to ensure compliance.

In addition to repairing fuel pumps, Doucet conducted monthly inspections. He described how, during his inspections, he ascertained whether there were any leaks or broken nozzles and conducted preventive maintenance. On January 15, 2007, Forest Gold did not keep a log of his monthly inspections. Doucet kept extra parts in his truck that he would charge to the store on an as-needed basis from the parts supplier.

Doucet attested that he inspected the pump at which Butler was injured before January 15, 2007, and that it had no problems. He noted that his monthly pump inspection always included a detailed assessment of all gasoline hoses, connection points, and connected apparatuses.

Doucet was highly skeptical that the incident could have occurred in the manner described by Butler, explaining that he had seen instances where the hose was disconnected and a customer had stuck it together but that an automatic shut-off mechanism prevented the pump from pumping any gasoline. He had never heard of a breakaway valve having become disconnected while someone was using the pump.

Butler urges that the evidence fails to establish that Forest Gold exercised the requisite reasonable care necessary to avoid liability under Article 2317.1. He suggests that the undocumented daily visual inspection that Williams testified she

undertook and the undocumented monthly detailed inspection that Doucet stated he conducted were insufficient to defeat summary judgment, urging that a trier of fact should determine whether the inspections were reasonable.[5]

The concept of constructive knowledge under Article 2317.1 imposes a reasonable duty to discover apparent defects in a thing in the defendants' *garde* or legal custody. ***Broussard v. Voorhies***, 06-2306 (La. App. 1st Cir. 9/19/07), 970 So.2d 1038, 1045, ***writ denied***, 07-2052 (La. 12/14/07), 970 So.2d 535.

In the context of summary judgment, Butler cannot merely point out to the court that the issue of whether a custodian has exercised reasonable care in maintaining a thing is factual one. The evidence established that Forest Gold had an inspection protocol in place. While Butler suggests that it was a deficient one, he has offered no evidence to support that suggestion. As movant, Forest Gold had to point out an absence of factual support for the element of constructive knowledge in the exercise of reasonable care in maintaining the gasoline pump. Williams and Doucet supplied that evidence by explaining Forest Gold's inspection protocols. The burden shifted to Butler to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. Butler did not. The record is devoid of any evidence establishing that a reasonable gasoline pump custodian would have acted any differently in its attempts to discover apparent defects in its gasoline pumps. In light of the evidence of the inspection protocols actually undertaken and mindful of the lack of evidence of a gasoline pump having previously malfunctioned in the manner

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[5] At oral argument, Butler urged that when Forest Gold acquired the pumps from the previous owner, it never inspected the pumps, but the record contains no evidence to support this assertion.

described by Butler, Forest Gold fulfilled its duty to discover apparent defects in the gasoline pumps. Accordingly, the trial court correctly granted summary judgment.

DECREE

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

AFFIRMED.