CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO: 2017-4688 DIVISION J SECTION 15

LEE E. VARNADO

VERSUS

UNIVERSITY MEDICAL CENTER MANAGEMENT CORPORATION

FILED: _____ _____
DEPUTY CLERK

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

Plaintiff Lee E. Varnado submits this Memorandum in Opposition to Defendant's Motion for Summary Judgment. In their Motion, the Defendant, University Medical Center Management Corporation ("Defendant" or "UMC"), has attempted to reverse this Court's earlier ruling (which the 4th Circuit Court of Appeals declined to disturb on writ) which denied UMC's first Motion for Summary Judgment and held that Louisiana Civil Code article 2315 applies in this case. UMC has now filed a copycat Motion of the exact same Motion this Honorable Court has already denied—and this Court should summarily deny it again.

In their second bite at the apple, UMC has now referenced two unpublished appellate court opinions and a self-serving affidavit by their Facilities Manager which is directly contradicted by UMC's previous responses to discovery. UMC's argument, that this Court should apply a different legal standard than has already been established by this Court's previous interlocutory ruling on the first Summary Judgment, is not supported by the applicable legal precedent. Simply, the Defendant's Motion for Summary Judgment fails both legally and factually to meet the requirements for entry of summary judgment and should be denied, again.

I. RELEVANT FACTS

This matter involves a negligence claim for a slip and fall in a hospital parking lot. On

November 12, 2016, Plaintiff Lee E. Varnado suffered injuries to his lower back and right knee when he slipped and fell in a puddle of oil while walking into the University Medical Center Emergency Room to visit a friend who had been the victim of gun violence. As a result of his injuries, Mr. Varnado has experienced chronic pain and loss of movement, lost wages, and lost quality of life.

UMC is well on notice of these claims and has taken the Plaintiff's deposition. Mr. Varnado, 53 years old at the time of the incident, has brought an injury claim for all damages he sustained including his medical bills, pain, suffering, mental anguish, and lost wages. Mr. Varnado has brought this claim against the property owners, University Medical Center Management Corporation, which owns the Property at 2000 Canal Street, New Orleans, Louisiana 70112. Mr. Varnado has previously been employed as a laborer by Boh Bros. Construction Company and others, and as a butcher for the Piggly Wiggly grocery store. Mr. Varnado is currently unemployed.

II. STATEMENT OF GENUINELY DISPUTED FACTS

This matter is a relatively simple case of UMC failing to provide a safe environment for Mr. Varnado to visit his violence-affected friend at the city's charity hospital. Pursuant to *Louisiana Uniform District Court Rule 9.10,* Plaintiff submits the following list of genuinely disputed facts in support of his Opposition to Defendant's Motion for Summary Judgment.

- UMC asserts in its *Statement of Uncontested Facts* that "UMC's entire grounds were personally inspected Carey Becker on November 7, 2016," citing an affidavit of UMC Facilities Manager Cary Becker as proof.[1] However, in UMC's discovery responses to Plaintiff, UMC provided a maintenance log for November 7, 2016 which states that a Broderick Smith completed the inspection of UMC's grounds.[2] Whether or not Mr. Becker completed an inspection of the "grounds" and what he found during the alleged inspection is a genuinely contested fact in this case.

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[1] *See* Defendant's Statement of Uncontested Facts, no. 4.
[2] *See* Exhibit A – UMC Preventative Maintenance Log, November 7, 2016.

- UMC asserts in its *Statement of Uncontested Facts* that "UMC also has groundskeepers who inspect UMC property seven days a week for hazards," citing the deposition of UMC Facilities Manager Cary Becker as proof.[3] In discovery, Plaintiff has sought all records of UMC's alleged daily inspections and UMC has only provided weekly maintenance logs—no daily inspection logs.[4] Whether or not UMC conducts daily inspections of its grounds is a genuinely disputed fact in this case.
- Whether or not UMC had actual of constructive knowledge of the puddle of oil that Mr. Varnado slipped on is a contested fact for the jury to decide in this case.
- Whether or not the puddle of oil that Mr. Varnado slipped on constituted a "ruin, vice, or defect that created an unreasonable risk of harm" to Mr. Varnado is a contested fact for the trier of fact to decide in this case.

III. LAW & ARGUMENT

1. The Defendant's Motion for Summary Judgment

The basis for the Defendant's Motion for Summary Judgment is their contention that Mr. Varnado is unable to prove that: (1) UMC had actual or constructive knowledge of the defect; and (2) a ruin, vice, or defect existed that created an unreasonable risk of harm. Interestingly enough, UMC's first Motion for Summary Judgment argued the opposite - that the defect, a puddle of oil which Mr. Varnado slipped on as he walked towards the hospital emergency room entrance, was "readily observable and/or clearly visible to anyone walking in the area that day."[5] Nonetheless, these arguments can be separately disposed of upon a review of the facts and applicable law, because, at the very least, a material issue of fact clearly and obviously exists for the jury to decide with respect to both inquiries and as to the ultimate ruling on this matter.

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[3] *See* Defendant's Statement of Uncontested Facts, no. 6.
[4] *See* Exhibit B – Plaintiff's Request for Production No. 2 and documents produced by UMC in response.
[5] Defendant's Supplemental Memorandum in Support of [first] Motion for Summary Judgment (filed November 21, 2018) at p. 2.

2. Applicable Law: Standard on Motion for Summary Judgment

In ruling on a Motion for Summary Judgment, the Court's role is not to evaluate the credibility or weight of the evidence, or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact.[6] All doubts should be resolved in the non-moving party's favor.[7] The Court need not determine whether it is likely that the mover will prevail on the merits, but rather whether there is an issue of material fact.[8] Specifically relevant to this case is that the credibility of a witness is a question of fact to be decided by the trier of fact.[9] Despite UMC's unsupported allegations, there is a material issue of fact as to whether or not UMC had actual or constructive knowledge of the puddle of oil that caused Mr. Varnado's fall, and the burden of proof on that issue is on UMC, not Mr. Varnado.

3. Applicable Law: La. Civil Code Article 2315

UMC is mistaken in their assertion that Louisiana Civil Code Article 2317's strict liability standard is applicable in this case.[10] This Court has already ruled that Louisiana Civil Code Article 2315's negligence standard applies here, a ruling which the 4th Circuit Court of Appeals declined to disturb.[11] Under the negligence standard, the case law shows that a hospital owes a duty to its visitors to exercise reasonable care and to keep the premises in a safe condition commensurate with the particular circumstances involved; this duty owed is less than that owed by a merchant.[12] The court must consider the relationship between the risk of a fall and the reasonableness of the measures taken by the defendant to eliminate the risk.[13]

The Second Circuit's *Adams* case is more applicable here than any of the cases the Defendant cites. In *Adams,* the 2nd Circuit reversed the trial court because the trial court incorrectly

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[6] *Hines v. Garrett*, 876 So. 2d 764, 765 (La. 2004).
[7] *Id.*
[8] *Id.*
[9] *Canter v. Koehring Company*, 283 So.2d 716, 724 (La. 1973).
[10] *Pitre v. La. Tech University*, 673 So.2d 585, La. 1996; *Smith v. Northshore Regional Medical Center*, 170 So.3d 173 (La. App. 1 Cir. 2015); *Adams v. La. State Univ. Health Sciences Center*, 19 So.3d 512 (La. App. 2 Cir. 2009).
[11] *See* Judge Nicole Sheppard's Order Denying Summary Judgment (December 14, 2018); 4th Circuit Court of Appeal's *Writ Denied* (January 25, 2019).
[12] *Adams*, at 515.
[13] *Id.*

applied La. C.C. Art. 2317 in a slip-and-fall case at LSU Health Sciences Center Shreveport.[14] The *Adams* court stated that Louisiana Civil Code Article 2317 is not applicable in a a slip-and-fall case: "[t]he reasoning behind this rule is that the presence of a foreign substance, such as the cigarette butts in the present case, does not create a vice or a defect inherent in the thing itself."[15] The trial court was also mistaken in relying on LSUHSC's assertion that there was a lack of factual support for a finding that LSUHSC had actual or constructive notice of the condition that caused plaintiff's fall.[16] Thus, the granting of summary judgment was reversed and remanded for trial.[17]

In their Memorandum in Support, UMC relies on two unpublished opinions, *Gonzales v. Tenet Healthsystem Memorial Medical Center*[18] and *Yates v. Our Lady of the Angels Hospital*[19], to support their argument that the 2317 applies, instead of 2315. What UMC failed to mention was that both cases were unpublished opinions and both cases hinged on very different facts from the present case. In *Gonzales*, the 4th Circuit affirmed a trial court ruling applying 2317 to a slip-and-fall in a hospital parking garage only after noting a complete lack of evidence beyond the Plaintiff's testimony that he saw a water bucket near the place where he fell.[20] In the present case, Plaintiff has video evidence of the accident, which occurred in a hospital walkway, and there is also conflicting testimony and evidence regarding whether or not the area had been properly maintained by UMC's facilities manager.[21] There is also evidence of other similar accidents occurring in the same area and UMC failing to take any corrective action.[22]

In *Yates,* the Plaintiff slipped and fell in a hospital entryway during a heavy rainstorm where the Plaintiff had gotten soaking wet as she walked through the parking lot to the hospital.[23] The First Circuit Court of Appeals found this fact to be dispositive, and affirmed the trial court's

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[14] *Adams v. La. State Univ. Health Sciences Center*, 19 So.3d 512, 514-515 (La. App. 2 Cir. 2009)
[15] *Id.* at 515.
[16] *Id.*
[17] *Id.* at 517.
[18] 2006-1054 (La. App. 4 Cir. 12/20/06) (not reported in So. Rptr.)
[19] 2019-0661 (La. App. 1 Cir. 2/20/20) (not reported in So. Rptr.)
[20] *Gonzales*, at pp.4-5.
[21] *See* Statement of Genuinely Disputed Facts and footnotes, *supra*.
[22] *See* Exhibit C - UMC Accident Reports; Exhibit D - Deposition of Cary Becker at pp. 19-20.
[23] *Yates*, at p. 2.

ruling that the plaintiff in that case could not meet her burden of proving actual or constructive knowledge.[24] Contrary to the Defendant's arguments, the *Yates* case actually supports Plaintiff's position, and this Court's earlier ruling, that art. 2315 applies when a foreign substance, like oil, has created the defective condition on a premises, as opposed to rainwater which was a natural occurrence to be expected under the circumstances.[25]

> Unlike the present case, the cases cited by plaintiff [in support of her position that the hospital had the burden of exculpating itself from a presumption of negligence] involve accidents that occurred **inside buildings and/or that involve the plaintiff allegedly slipping on foreign substances**.[26]

In the present case, all parties admit that the accident occurred on a clear, sunny day with no rain, in a parking lot.[27] The dangerous condition was a puddle of oil on the hospital walkway. As this Court has already ruled, this fact is critical in determining who holds the burden of proving actual or constructive knowledge. In this case, it is the Defendant who must show it, and there is a genuine issue of fact as to whether or not UMC can meet that burden.

4. <u>Applicable Law: Actual or Constructive Knowledge</u>

Under a negligence standard in a slip-and-fall case, the plaintiff must show that they slipped, fell, and were injured because of a foreign substance on the hospital's premises.[28] The Plaintiff has testified as to this.[29] The burden then shifts to the hospital to exculpate itself from the presumption of negligence.[30] Thus, it is UMC's burden at trial to show that they did not have actual or constructive knowledge of the dangerous condition that existed, not Mr. Varnado's. Additionally, summary judgment is seldom appropriate for determinations based on subjective facts, such as motive, intent, good faith, knowledge and malice.[31]

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *See* UMC's Statement of Uncontested Facts.
[28] *Smith v. Northshore Regional Medical Center*, *Inc.*, 170 So.3d 173, 176 (La. App. 1 Cir. 2015).
[29] *See* Exhibit E – Lee Varnado Deposition at pp. 13-15.
[30] *Smith*, at p. 176.
[31] *Smith v. Our Lady of the Lake Hosp., Inc.,* 639 So. 2d 730, 751 (La. 1994).

5. <u>A Material Issue of Fact Exists as to Whether or Not UMC had Actual or Constructive Knowledge of the Defect</u>

UMC asserts that no material issue of fact exists as to whether UMC had actual or constructive notice of the defect. However, in their own pleadings, UMC conversely asserts: "[T]he puddle was readily observable and/or clearly visible by anyone walking in the area that day."[32] This alone is a judicial admission as to actual or constructive knowledge. The puddle cannot both be invisible and "readily observable and/or clearly visible" at the same time. In addition, the Defendant asserts that it performed daily inspections—which cannot be proven. On that daily inspection, was the puddle not "readily observable"?

The puddle of oil was located in a parking area near the Emergency Room entrance, an area that reasonably would be traversed by multiple hospital employees, hospital patients, and their guests multiple times an hour. Also, the nature of UMC's operation, which invites the sick, infirm and their families to its premises, would necessarily require UMC to be aware of the conditions of its entrances, parking lots, and adjacent walkways, to ensure their safety at all times.

Thus, on the basis of the facts discovered so far (and discovery is far from over, in fact UMC has not responded to outstanding discovery requests for which the deadline is the same date as this filing)[33], it would be more than reasonable for the factfinder (the jury) to conclude that UMC had actual or constructive knowledge of the dangerous condition. Given this, an obvious and real issue of material fact exists as to UMC's knowledge, especially given the conflicting evidence provided as to when and who completed maintenance inspections on the area prior to the accident, and the fact that discovery remains incomplete. Whether or not UMC completed daily or weekly inspections of the area and whether those inspections were sufficient to fulfill UMC's duty to keep their property safe, which is required under the general negligence statute, is also an issue that only the trier of fact can decide.

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[32] *See* Defendant's Supplemental Memorandum in Support of Motion for Summary Judgment (filed November 21, 2018) at p. 2.
[33] *See* Exhibit F – Plaintiff's Fifth Set of Interrogatories and Requests for Production of Documents (February 25, 2021)

6. Applicable Law: Vice or Defect that Created an Unreasonable Risk of Harm

Defendant argues that art. 2317 applies, which requires Plaintiff to prove that a vice or defect that created an unreasonable risk of harm existed on UMC property.[34] Defendant goes on to state that "there is no evidence that the condition of the ground in the parking lot created an unreasonable risk of harm" and that the Plaintiff's testimony did not contain enough details to prove this element of his claim. As explained above, Plaintiff's burden is to prove negligence under 2315. Under a negligence standard in a slip-and-fall case, the plaintiff must show that they slipped, fell, and were injured because of a foreign substance on the hospital's premises.[35] Nonetheless, in the present case there is relevant evidence beyond Plaintiff's testimony regarding the existence of a dangerous condition. This evidence includes a video of the accident,[36] accident reports of similar accidents occurring in the same area,[37] deposition testimony that UMC took no action to correct or prevent future accidents,[38] and conflicting evidence regarding how and when the premises are inspected for safety. A genuine issue of material fact clearly exists.

7. Applicable Law: Open and Obvious

UMC asserts that the puddle of oil where Mr. Varnado slipped was open and obvious to all.[39] This Court has already considered and rejected this argument when it was made in UMC's first Motion for Summary Judgement. Mr. Varnado testified that he did not see the puddle, and no other evidence has been submitted by UMC to support their contradictory assertion.[40] That UMC thinks it can simply waive its hand and say the puddle of oil was open and apparent but that it had no knowledge of it also shows a significant issue of fact remains.

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[34] *See Id*. at pp. 12-13.
[35] *Smith v. Northshore Regional Medical Center*, *Inc.*, 170 So.3d 173, 176 (La. App. 1 Cir. 2015).
[36] *See* Exhibit G - November 12, 2016 surveillance video of accident.
[37] *See* Exhibit C – UMC accident reports.
[38] *See* Exhibit D – Deposition of Cary Becker at pp. 18-19.
[39] *See* UMC's Memorandum in Support at p. 17.
[40] *See* Exhibit E – Mr. Varnado's Deposition Transcript at p. 13.

IV. Conclusion

A genuine issue of material fact exists as to whether the defendants knew or should have known about the dangerous condition that existed when Mr. Varnado slipped and fell on a puddle of oil on UMC property. The burden is on UMC to prove they did not have actual or constructive knowledge of the dangerous condition that caused Mr. Varnado's injuries. The owners cannot avoid liability for the damages caused to Mr. Varnado by defects that they knew or should have known. Accordingly, the Defendant's Motion for Summary Judgment should be DENIED.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing pleading has been served on all parties or their counsel of record by mailing same, properly addressed and postage prepaid, by electronic means, by facsimile and/or by hand delivery on January 9, 2023.

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STERNBERG, NACCARI & WHITE, LLC