

EVELYN CROSBY,
WIDOW OF ERROL JEANSONNE

NO. 10-CA-1015

VERSUS

FIFTH CIRCUIT

WAL-MART STORES, INC., AND VAN
ORIENTAL FOOD, INC., TRAVELERS
LLOYDS INSURANCE COMPANY OF
CONNECTICUT, TRAVELERS INSURANCE
COMPANY AND METLIFE INSURANCE
COMPANY OF CONNECTICUT
SUCCESSOR OR ASSIGNEE OF
TRAVELERS INSURANCE COMPANY,
AND TRAVELERS LLOYDS INSURANCE
COMPANY OF CONNECTICUT

COURT OF APPEAL

STATE OF LOUISIANA

**COURT OF APPEAL
FIFTH CIRCUIT**

FILED JUN 14 2011

Patricia Vitazansky
CLERK

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 645-246, DIVISION "K"
HONORABLE ELLEN S. KOVACH, JUDGE PRESIDING

JUNE 14, 2011

**CLARENCE E. MCMANUS
JUDGE**

Panel composed of Judges Clarence E. McManus,
Walter J. Rothschild, and Fredericka Homberg Wicker

GEORGE B. RICHARD

Attorney at Law

Post Office Box 519

Marrero, Louisiana 70073

COUNSEL FOR PLAINTIFF/APPELLANT

MICHAEL F. GRENNAN

Attorney at Law

3838 North Causeway Boulevard

Suite 3160

Metairie, Louisiana 70002

COUNSEL FOR DEFENDANTS/APPELLEES

AFFIRMED

WAR
CEN
JHW

This is an appeal by plaintiff from the trial court's granting of summary judgment in favor of defendants, dismissing all claims. For the following reasons, we affirm the trial court's judgment.

STATEMENT OF THE CASE

On August 27, 2006, Evelyn Crosby, plaintiff, purchased two packages of egg rolls from the Wal-Mart store in Marrero, Louisiana. She cooked the egg rolls when she arrived home and ate them around 3 p.m. She began experiencing nausea, vomiting, diarrhea, and cramps around 11 p.m., after she went to bed. She experienced these symptoms all night. The next morning she awoke to severe and intensive pain. She called 911 and was taken by ambulance to West Jefferson Medical Center. Dr. Sandra Spedale treated Crosby in the emergency room for gastritis and dehydration. Crosby was hospitalized for three days.

On May 24, 2007, Crosby filed a petition for damages against Wal-Mart, Van Oriental Foods, the manufacturer of the egg rolls, and Travelers Insurance, as the insured for both Wal-Mart and Van Oriental. The plaintiff claimed she

suffered damages as a result of eating contaminated food and suffering food poisoning.

On May 11, 2010, defendants filed a motion for summary judgment, which was heard by the trial court on July 30, 2010. The trial court granted the motion in open court stating that the court sympathized with what the plaintiff suffered, but it's the plaintiff's burden to establish essential elements of the case and the plaintiff will not be able to that. Plaintiff now appeals this judgment arguing that she has proven a prima facie case and there are genuine issues of material fact, therefore, summary judgment was not appropriate. For the reasons which follow, we affirm the trial court's granting of summary judgment.

DISCUSSION

This is an appeal from the granting of a summary judgment in favor of defendants. It is well settled that appellate courts review summary judgments de novo using the same criteria applied by the trial courts to determine whether summary judgment is appropriate. *Landreneau v. Copeland's Cheesecake Bistro, L.L.C.*, 08-647 (La. App. 5 Cir. 1/13/09), 7 So.3d 703. Summary judgment procedure is designed to secure the just, speedy and inexpensive determination of every action, except those disallowed by law; the procedure is favored and must be construed to accomplish these ends. LSA-C.C.P. art. 966; *Id.* A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(C)(1); *Id.* The mover has the burden of establishing the absence of a genuine issue of material fact. However, when a motion for summary judgment has been filed and supported by evidence, the adverse party may no longer rely on the mere allegations or denials of his

pleadings, but his responses, through affidavits or otherwise, must set forth evidence demonstrating that there is a genuine issue for trial. LSA-C.C.P. art. 967; *Id.* Once the motion for summary judgment has been properly supported by the moving party, the failure of the adverse party to produce evidence of a material factual dispute mandates the granting of the motion. *Landreneau, supra.*

To meet his or her burden of proof in a food poisoning case, the plaintiff must prove that the deleterious condition existed in the product when it was purchased. *Landreneau, supra.* The plaintiff must further prove the existence of a causal relationship between the illness or injury and the consumption of the food. *Id.* In fulfilling this burden of proof, "it is not necessary for the consumer to negate every conceivable cause but he must show that it is more likely than not that the food's condition caused the injury of which he complains." *Id.*

According to her affidavit, Crosby claimed the only food she consumed on the day she became ill were the egg rolls she purchased from Wal-Mart. She stated in her affidavit that she consumed the egg rolls around 3 p.m. and became ill with nausea, vomiting, diarrhea, and cramps around 11 p.m. She reported to the emergency room of West Jefferson Medical Center the next day and was treated by Dr. Sandra Spedale.

Dr. Spedale's report, dated June 20, 2006, indicates that she diagnosed Crosby with acute gastritis with diarrhea, nausea, and vomiting. Dr. Spedale stated in her report that Crosby had possible food poisoning. A discharge summary was then completed by Dr. Spedale on June 23, 2006 which indicated that tests for shigella, salmonella, vibrio and e-coli were all negative.

Dr. Spedale testified by deposition and when asked if she could say to a reasonable medical certainty or more probably than not that the Crosby's illness was caused by food poisoning, Dr. Spedale answered "No, I don't think I can."

Dr. Spedale explained that Crosby was diagnosed with gastritis, which is basically a description of the symptoms she suffered, which could have been caused by exposure to a virus or from exposure to a toxin in food.

Based on Dr. Spedale's testimony, we find the trial court correctly found that Crosby could not meet her burden of proving her illness was caused by food poisoning from the consumption of the egg rolls purchased at Wal-Mart.

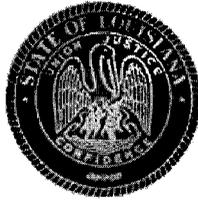
Accordingly, we find the trial court correctly granted summary judgment in favor of defendants and correctly dismissed all claims against defendants.

AFFIRMED

MARION F. EDWARDS
CHIEF JUDGE

SUSAN M. CHEHARDY
CLARENCE E. McMANUS
WALTER J. ROTHSCHILD
FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON

JUDGES



FIFTH CIRCUIT
101 DERBIGNY STREET (70053)
POST OFFICE BOX 489
GRETNA, LOUISIANA 70054
www.fifthcircuit.org

PETER J. FITZGERALD, JR.
CLERK OF COURT

GENEVIEVE L. VERRETTE
CHIEF DEPUTY CLERK

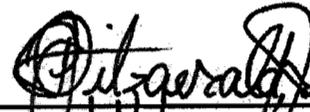
MARY E. LEGNON
FIRST DEPUTY CLERK

TROY A. BROUSSARD
DIRECTOR OF CENTRAL STAFF

(504) 376-1400
(504) 376-1498 FAX

**NOTICE OF JUDGMENT AND
CERTIFICATE OF MAILING**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED ON OR DELIVERED THIS DAY **JUNE 14, 2011** TO THE TRIAL JUDGE, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:



PETER J. FITZGERALD, JR.
CLERK OF COURT

10-CA-1015

MICHAEL F. GRENNAN
ATTORNEY AT LAW
3838 NORTH CAUSEWAY BOULEVARD
SUITE 3160
METAIRIE, LA 70002

GEORGE B. RICHARD
ATTORNEY AT LAW
P.O. BOX 519
MARRERO, LA 70073