

18-8674  
No. \_\_\_\_\_

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.  
FILED

FEB 27 2019

OFFICE OF THE CLERK

DEWAYNE MONTGOMERY – PETITIONER

vs.

GARRY LEWIS PROPERTIES – RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE STATE OF LOUISIANA, COURT OF APPEAL, FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(i)  
**QUESTION(S) PRESENTED**

- (i) Whether the court of appeal's decision below, which effectively shifted the burden of proof onto Petitioner, a non-moving party at the summary judgment stage, without adequate discovery, is contrary to established precedent.
- (ii) Whether the inequitable nature of the erroneous decision, as well as its adverse effect on tenants in the State of Louisiana and nationwide, who rely on protection from slum landlords, merits this Court's review.

(ii)

## **LIST OF PARTIES**

Petitioner submits that all parties appear in the caption of the case on the cover page, and are listed below for the Court's reference:

Petitioner: Dewayne Montgomery

Respondent: Garry Lewis Properties

**TABLE OF CONTENTS**

OPINIONS BELOW .....	1
JURISDICTION .....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	
INVOLVED .....	2
STATEMENT OF THE CASE .....	3
REASONS FOR GRANTING THE WRIT .....	7
CONCLUSION .....	13

**INDEX TO APPENDICES**

APPENDIX "A" ..... Judgment of the Louisiana Court of Appeal, First Circuit. Dated August 10, 2018.

APPENDIX "B" ..... Judgment of the 19<sup>th</sup> Judicial District Court. Dated September 21, 2017.

APPENDIX "C" ..... Order denying Writ of Certiorari, Supreme Court of the State of Louisiana. Dated December 17, 2018.

APPENDIX "D" ..... Order Denying Petition for Rehearing. Dated August 27, 2018.

## TABLE OF AUTHORITIES CITED

	<u>Page Number</u>
<u>CASES</u>	
<i>Duncan v. U.S.A.A. Ins. Co.</i> , 06-363 p. 3 (La. 11/29/06), 950 So.2d 544, 546 .....	7
<i>Hines v. Garrett</i> , 876 So.2d at 765-66 .....	8
<i>King v. Parish National Bank</i> , 04-0337, p. 7 (La. 10/19/04), 885 So.2d 540, 545 .....	8
<i>Jones v. Estate of Santiago</i> , 03-1424, p. 5 (La. 4/14/04), 870 So.2d 1002, 1006 .....	8
<i>Murphy v. L &amp; L Marine Transp., Inc.</i> , 97-33 (La.App. 5 Cir. 5/28/97), 695 So.2d 1045, 1047 .....	9
<i>Patrick v. Iberia Bank</i> , 05-783, pp. 3-4 (La.App. 5 Cir. 3/14/06), 926 So.2d 632, 634 .....	9
<i>Pillow v. Roymar Ltd. P'ship</i> , 15-730 (La. App. 5 Cir. 06/30/16), 197 So.3d 348, 354, writ denied, 16-1465 (La. 11/15/16), 209 So.3d 780 .....	11
<i>Shubert v. Tonti Dev. Corp.</i> , 09-348 (La. App. 5 Cir. 12/29/09), 30 So.3d 977, 985-986 .....	12
<i>Simon v. Hillensbeck</i> , 12-87 (La. App. 4 Cir. 09/19/12), 100 So.3d 946, 951 .....	11
<i>Wells v. Norris</i> , 46,458 (La. App. 2 Cir. 08/10/11), 71 So.3d 1165, writ denied, 2011-1949 (La. 11/18/11), 75 So.3d 465 .....	12

	<u>Page Number</u>
<i>Wright v. Louisiana Power &amp; Light</i> , 06-1181, p. 17 (La.3/9/07), 951 So.2d 1058, 1070 .....	8
 <b><u>STATUTES AND RULES</u></b>	
La.Code Civ. Pro. art. 966D(1) .....	2, 5
La. C.C. 2696 .....	2, 3, 11
La. C.C. art. 2697 .....	5, 11
La. C.C. art. 2699 .....	5, 11, 12

IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is found at *Montgomery v. GARRY LEWIS PROPERTIES*, La. Court of Appeals, 1st Circuit 2018, No. 2017 CA 1720.

JURISDICTION

The date on which the highest state court decided the merits of the case was August 10, 2018. A copy of that decision appears at Appendix A. A timely petition for rehearing was thereafter denied on August 27, 2018, and a copy of the order denying rehearing appears at Appendix D.

Additionally, the Louisiana Supreme Court denied certiorari on December 17, 2018 and appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### La. C.C. 2696

Art. 2696. Warranty against vices or defects.

The lessor warrants the lessee that the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose.

This warranty also extends to vices or defects that arise after the delivery of the thing and are not attributable to the fault of the lessee.

Acts 2004, No. 821, §1, eff. Jan. 1, 2005.

### La.Code Civ. Pro. art. 966D(1)

The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion 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 absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law

## STATEMENT OF THE CASE

Petitioner brought forth claims of negligence, breach of contract, breach of implied warranty of habitability and negligent infliction of emotional distress against Respondent, his lessor, on March 29, 2016. Petitioner's claims came forth as a result of various health problems he began experiencing following his rental of an apartment from Respondent. After misinterpreting the standard of review and essentially shifting the summary judgment burden of proof onto the non-moving party, the court of appeals upheld the dismissal of Petitioner's claims. The decision was legally erroneous as well as manifestly unjust, meriting a writ.

On March 1, 2016, Petitioner leased a condo apartment from Respondent (hereinafter referred to as "Leased Premises"). Upon taking possession of the Leased Premises, Petitioner almost immediately noticed an awkward smell coming from inside the Leased Premises. Upon further investigation of the awkward smell which permeated the Leased Premises, Petitioner noticed black mold & rat feces inside the Leased Premises' Air Conditioning Unit and ventilation system. On or about March 5, 2016, Petitioner began to experience breathing problems and other health ailments.

Although not required for the court of appeals to consider under a theory of strict liability pursuant to La. C.C. 2696, Petitioner immediately notified Respondent of the mold infestation, rat feces, and inoperable electrical outlets. This put Respondent on due notice of the uninhabitable nature of the Leased Premises. In spite of said notice, Respondent knowingly failed to respond and/or remediate these issues.

On or about March 6, 2016, Petitioner began to suffer from congestion and fever. A few days later, Petitioner visited the Lake after Hours Medical Clinic and was diagnosed with Acute Respiratory Infection. Further, on March 15, 2016, Petitioner made an appointment with his primary care physician and was further diagnosed with Asthmatic Bronchitis and Fungal Ringworm, conditions directly attributable to the mold infestation and rat feces inside the Leased Premises. The same day, while still in possession of the Leased Premises, Petitioner called in a report to Respondent advising his agents of a water stain above the window in the dining room which was wet to the touch. Respondent never came to remedy the water stain.

Petitioner subsequently hired a mold remediation expert, Wilmer Environmental, LLC, who conducted a mold test on the Leased Premises towards the end of March, 2016. Said report indicates that the Leased Premises was "contaminated with molds." Respondent and his agents knew of the condition of the Leased Premises prior to Petitioner taking possession. As demonstrated by the Work Order submitted to the trial court, and completely disregarded and minimized by the court of appeals, the prior tenant of the Leased Premises reported problems with water leaks, electrical outlets not working and rat infestation on December 3, 2015. Additionally, on December 22, 2015, the prior tenant reported a leak coming from the bathroom. These problems were reported to Respondent approximately 3-4 months prior to Petitioner taking possession of the Leased Premises. Interestingly enough, per the Work Order, these issues were not even remotely addressed by Respondent until April 28, 2016, a month after the filing of the

Complaint herein.

The Court of Appeals, in affirming the trial court's award of summary judgment to Respondent and dismissing Petitioner's claims with prejudice, shifted the burden from Respondent (the moving party) to Petitioner (the non-moving party). This is completely contrary to established precedent in this State as it relates to summary judgment. A motion for summary judgment shall be granted only if "the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La.Code Civ. Pro. art. 966D(1). **The party seeking summary judgment has the burden of proving an absence of a genuine issue of material fact.** La.Code Civ. Pro. art. 966D. (emphasis added). Here, the trial court granted judgment to Respondent in spite of remaining issues of material fact, which were ripe for trial. The court of appeals affirmed, stating that "...the evidence presented by Mr. Montgomery was insufficient to create a genuine issue of material fact as to the causation element of his claim." (Appendix A, Page 7). However, the court of appeals then goes on to say that "The evidence submitted indicates that mold was present in the apartment Mr. Montgomery leased and that Mr. Montgomery experienced symptoms consistent with health ailments causes by mold..." (Appendix A, Page 7). The Court of Appeals appears to contradict itself by stating that there were no genuine issues of material fact, but then emphatically holding that there was mold present in the Leased Premises and that Petitioner experienced health ailments consistent with

mold exposure, two triable material facts which were in dispute at the trial court level.

Brief Procedural History.

Petitioner filed his initial Complaint against Respondent on or about March 29, 2016, bringing forth claims surrounding Respondent's negligence in renting the uninhabitable Leased Premises. After several exceptions filed by Respondent, Petitioner filed his Amended Petition with Demand for Jury Trial on November 29, 2016. Petitioner's Amended Petition sought redress for claims of Negligence, Breach of Contract, Breach of Implied Warranty of Habitability, and Negligent Infliction of Emotional Distress. Respondent responded and discovery between the parties began. A pretrial conference had been set by the Court for August 17, 2017, however Respondent filed its Motion for Final Summary Judgment prior to the close of discovery. Depositions had been set for September into October, 2017. In spite of the untimeliness of Respondent's Motion for Final Summary Judgment, Petitioner duly and timely filed his opposition to Motion for Final Summary Judgment. At hearing on August 28, 2017, Respondent's Motion for Final Summary Judgment was heard and on September 21, 2017, the trial court issued its Judgment awarding Summary Judgment to Respondent and dismissing all of Petitioner's claims with prejudice. Petitioner timely appealed to the Louisiana Court of Appeal, First Circuit, which on August 10, 2018 affirmed the lower court's judgment. Petitioner's Petition for Rehearing was subsequently denied by the Court of Appeal, as was his petition for Writ of Certiorari to the Louisiana Supreme Court. Interestingly enough, however, Justice J. Genovese of the Louisiana Supreme Court noted in the

denial of certiorari that he/she would grant the writ of certiorari. The Louisiana Supreme Court denied certiorari on December 17, 2018, thus the instant petition for writ of certiorari falls into the 90-day statutory time frame and is timely before this Court.

#### **REASONS FOR GRANTING THE PETITION**

##### **I. THE DECISION BELOW ERRONEOUSLY SHIFTS THE BURDEN OF PROOF ONTO A NON-MOVING PARTY IN REVIEW OF A MOTION FOR FINAL SUMMARY JUDGMENT.**

In its opinion, the Court of Appeal stated on more than one occasion that "...the evidence submitted by Mr. Montgomery fails to create a genuine issue of material fact in this case." (Appendix 1). However, contrary to existing legal precedent, the burden was not on Petitioner to prove the existence of a genuine issue of material fact; rather, the burden laid with Respondent to prove the non-existence of genuine issues of material fact. The opinion below has far-reaching implications. As is the case here, litigants seeking a fair and equitable disposition on the merits are now unduly burdened by having to prove the non-existence of material facts even before discovery is complete, all evidence has been submitted and a trial has been held. Petitioner here was blindsided by the order of summary judgment as discovery was ongoing and trial preparations were underway when the lower tribunal granted summary judgment in Respondent's favor.

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant.

*Duncan v. U.S.A.A. Ins. Co.*, 06-363 p. 3 (La. 11/29/06), 950 So.2d 544, 546, see La. Code Civ. P. art. 966. Further, review is limited to whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. *Wright v. Louisiana Power & Light*, 06-1181, p. 17 (La. 3/9/07), 951 So.2d 1058, 1070; *King v. Parish National Bank*, 04-0337, p. 7 (La. 10/19/04), 885 So.2d 540, 545; *Jones v. Estate of Santiago*, 03-1424, p. 5 (La. 4/14/04), 870 So.2d 1002, 1006. The burden of proof is on the mover. See La. Code Civ. Pro. art. 966 D(1).

Further, and more applicable to this case and cases similar to Petitioner's, "a genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate." See *Hines v. Garrett*, 876 So.2d at 765-66. Here, the record clearly indicates that reasonable persons could disagree as to whether or not Petitioner's various health ailments were directly attributable to the mold found in the Leased Premises. The court of appeal found that based upon the evidence, it is undisputed that mold was present in the Leased Premises and that Petitioner experienced symptoms consistent with health ailments caused by mold. These two material facts created an issue of fact for determination of Respondent's liability. Reasonable persons could not reach only one conclusion from the facts gleaned in the case at bar. The trial court erred by shifting the burden of proof onto Petitioner (non-movant) and the court of appeal further erred by affirming the entry of summary judgment.

Though Courts in this state have held that in regards to the burden of proof on a summary judgment motion that the movant bears the burden that however, if

the movant will not bear the burden of proof at trial, the movant's burden on a motion for summary judgment does not require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. *Patrick v. Iberia Bank*, 05-783, pp. 3-4 (La.App. 5 Cir. 3/14/06), 926 So.2d 632, 634.

The court's first task on a motion for summary judgment is determining whether the moving party's supporting documents — pleadings, depositions, answers to interrogatories, admissions and affidavits — are sufficient to resolve all material factual issues. *Murphy v. L & L Marine Transp., Inc.*, 97-33 (La.App. 5 Cir. 5/28/97), 695 So.2d 1045, 1047 (citing LSA-C.C.P. Art. 966(B)). To satisfy this burden, the mover must meet a strict standard of showing that it is quite clear as to what is the truth and that there has been excluded any real doubt as to the existence of a genuine issue of material fact. *Id.* In making this determination, the mover's supporting documents must be closely scrutinized and the non-mover's indulgently treated. *Id.* Since the moving party bears the burden of proving the lack of a material issue of fact, inferences to be drawn from the underlying facts before the court must be viewed in light most favorable to the non-moving party. *Id.*

Here, Respondent failed to meet its initial burden in demonstrating to the trial court that his supporting documents are sufficient to resolve all material factual issues. Respondent produced affidavits from his Property Manager and Maintenance Manager. Neither of these individuals is certified or qualified to attest to the presence of mold and its affects upon exposure. Both individuals

completed affidavits to show that Respondent did not know there was mold in the Leased Premises. However, this evidence is clearly contradicted by Petitioner's expert witness affidavit who found extensive mold in the Leased Premises. Additionally, Petitioner produced a lab report to support the expert witness's affidavit.

Additionally, Respondent failed to carry its burden of proving that Petitioner could not produce factual support for the elements of his claims. Petitioner brought forth evidence that (1) there was mold in the Leased Premises; (2) Petitioner suffered health ailments consistent with mold exposure; and (3) Respondent knew of the uninhabitable condition of the Leased Premises. Petitioner produced health records, an affidavit from a certified residential mold inspector and work orders demonstrating Respondent's knowledge of water leaks in the Leased Premises. Respondent failed to meet its burden at summary judgment and the burden was not on Petitioner to prove otherwise. The decision below is erroneous by concluding that Petitioner failed to proffer sufficient evidence to carry his burden at trial on the claims brought forth against Respondent. The court of appeals erred by shifting the burden of proof, contrary to established law, meriting a writ.

By shifting the burden of proof onto the non-movant in summary judgment cases such as this, the court of appeals places a new, heavy and erroneous burden on tenants who find themselves in the same circumstances as Petitioner. Tenants aggrieved by the actions (or inactions) of slum landlords would now be required to carry the evidentiary burden of proof before trial should the landlord request summary judgment without adequate discovery. In addition to the various health

ailments Petitioner suffered, he had to uproot his family, move to a new habitable living space, and endure additional financial and emotional stresses. The burden of proof on a summary judgment motion is on the movant. The movant in this case (Respondent) did not satisfy his burden. The court of appeal's decision makes it that much unjust and difficult for tenants such as Petitioner, who have been aggrieved by slum landlords, to seek recovery for damages caused by a landlord's neglectful upkeep and preservation of property, meriting a writ.

## **II. THE DECISION BELOW ERRONEOUSLY HEIGHTENS THE BURDEN OF PROOF NECESSARY TO PREVAIL ON A STRICT LIABILITY CLAIM.**

Generally, the owner or lessor of a building is liable for the condition of the leased premises. See La. C.C. arts. 2317, 2322, 2696, and 2697; *Pillow v. Roymar Ltd. P'ship*, 15-730 (La. App. 5 Cir. 06/30/16), 197 So.3d 348, 354, writ denied, 16-1465 (La. 11/15/16), 209 So.3d 780; *Simon v. Hillensbeck*, 12-87 (La. App. 4 Cir. 09/19/12), 100 So.3d 946, 951. Under La. C.C. art. 2696, the lessor warrants the lessee that the thing is suitable for the purpose for which it was leased and that it is free of vices or defects that prevent its use for that purpose. This warranty also extends to vices or defects that arise after the delivery of the thing and are not attributable to the fault of the lessee. La. C.C. art. 2697 provides that this warranty also encompasses vices or defects that are not known to the lessor.

Additionally, under La. C.C. art. 2699, the warranties owed by a lessor, as provided in La. C.C. arts. 2696 and 2697, may be waived, but only by clear and

unambiguous language that is brought to the attention of the lessee. Nevertheless, a waiver of warranty is ineffective: (1) to the extent it pertains to vices or defects of which the lessee did not know and the lessor knew or should have known; (2) to the extent it is contrary to the provisions of article 2004; or (3) in a *residential* or consumer lease, to the extent it purports to waive the warranty for vices or defects that seriously affect health or safety. (Emphasis added). La. C.C. art. 2699. Therefore, "to the extent that a waiver purports to encompass those vices or defects that seriously affect health or safety, the waiver is ineffective." *Shubert v. Tonti Dev. Corp.*, 09-348 (La. App. 5 Cir. 12/29/09), 30 So.3d 977, 985-986.

It is well settled in Louisiana, and in many other jurisdictions nationwide, that to prevail on a strict liability claim, the plaintiff must prove that the defendant had custody of the thing causing the injury; that it contained a defect, that is, a condition creating an unreasonable risk of harm; and that the defective condition caused plaintiff's injury. *Wells v. Norris*, 46,458 (La. App. 2 Cir. 08/10/11), 71 So.3d 1165, writ denied, 2011-1949 (La. 11/18/11), 75 So.3d 465. Here, Petitioner proved all of the elements necessary under a theory of strict liability. Evidence was submitted that Respondent, as the landlord, had custody of the Leased Premises. The condition of the Leased Premises caused Petitioner's injury (i.e., illness and health ailments from the mold). Petitioner submitted an expert witness report and affidavit which demonstrated that the Leased Premises contained a defect – i.e., was contaminated by mold. Mold creates an unreasonable risk of harm. Thus, all elements of a strict liability claim were met by Petitioner. For unknown reasons, this was not enough to satisfy either of the lower tribunals. Specifically the Court of

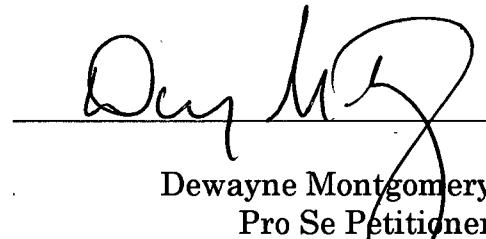
Appeal took the claims a step further in requiring Petitioner to prove "that an injury was caused by mold, a plaintiff must establish causation on five different levels: (i) the presence of mold, (ii) the cause of the mold and the relationship of that cause to a specific defendant, (iii) actual exposure to the mold, (iv) the exposure was a dose sufficient to cause health effects (general causation), and (v) a sufficient causative link between the alleged health problems and the specific type of mold found (specific causation)." (Appendix 1, Pages 4-5). This heightened standard, in essence, heightens the standard necessary for a litigant to prevail under a theory of strict liability, and went against decades of precedent in Louisiana and other circuits around the nation. In fact, the Court of Appeal found on Page 7 of its opinion (Appendix A): "The evidence submitted indicates that mold was present in the apartment Mr. Montgomery leased and that Mr. Montgomery experiences symptoms consistent with health ailments caused by mold..." Thus, it is perplexing that the court of appeal in the same opinion heightened the standard for Petitioner to prove Respondent's liability and at the same time finding that all necessary elements of a strict liability and/or negligence claim had been met by the evidence submitted. The contradictory findings in the opinion below warrant a writ.

## CONCLUSION

For the reasons herein, the petition for writ of certiorari should be granted.

Dated: February 27, 2019.

Respectfully submitted,



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