UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-1754
Summary Calendar

ROBERT RAY, ET AL.,

Plaintiffs,

ROBERT RAY and SOPHIE RAY,

Plaintiffs-Appellants,

HIGHLAND INSURANCE COMPANY,

Intervening Plaintiff-Appellant,

versus

GTE PRODUCTS CORPORATION, formerly known as GTE Sylvania, Inc., formerly known as Zinsco Electrical Products, ET AL.,

Defendants,

GTE PRODUCTS CORPORATION, formerly known as GTE Sylvania, Inc., formerly known as Zinsco Electrical Products, and GTE CORPORATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1701-X)

(January 10, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

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[1] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion

Robert and Sophie Ray challenge the summary judgment awarded GTE Corp. and GTE Products Corp (collectively, "GTE"). We **AFFIRM.**

I.

In 1990, Robert Ray, an electrician, was removing a bus duct electrical system in a high-rise office building in Dallas, Texas.[2] Allegedly, due to a design defect, he was injured when removing a disconnect switch[3] manufactured by GTE.[4]

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should not be published.

[2] In a case arising under remarkably similar circumstances, our court described a bus duct system:

> Bus duct is a metal-encased structure containing a number of rounded edge "bus bars" which transport electrical power in commercial buildings. The bus bars are enclosed within housing constructed of 14-gauge and 16-gauge steel. By transporting and distributing electricity throughout commercial buildings, the bus duct is meant to facilitate efficient power distribution.

Barnes v. Westinghouse Elec. Corp., 962 F.2d 513, 514 n.1 (5th Cir.), *cert. denied*, 113 S. Ct. 600 (1992).

[3] An affidavit by an electrical engineer describes the operation of a bus duct disconnect switch:

> To provide power to a particular location along a bus-duct run (for example, a single floor in a high-rise office building), it is necessary to take the power out of the bus-duct and connect it to the circuitry for that location. Normally, this function is accomplished by use of a "bus-duct disconnect switch." This switch is literally plugged into the bus-duct by means of metal prongs. It is then connected by electrical wiring to either step down transformers or electrical distribution panels for utilization of the power at locations throughout the floor.

[4] Ray alleged that the switch remained energized while in the "off" position, and that, in the course of removing the switch, a wire contacted the switch, resulting in an explosion and fire; Ray

In mid-1992, two years after the incident, the Rays sued GTE and others in Texas state court. GTE removed the case to federal court, and was awarded summary judgment in mid-1993 on the basis of a statute of repose.[5]

II.

The Rays contend that GTE was not entitled to repose under Tex. Civ. Prac. & Rem. Code Ann. § 16.009 (Vernon 1986).[6] That statute is in the nature of an affirmative defense, ***Dubin v. Carrier Corp.***, 731 S.W.2d 651, 653 (Tex. App. 1987); therefore, in order to prevail under it, a defendant must conclusively establish the elements of the defense. *See* ***id.***; *see also* Fed. R. Civ. P. 56(c). Its two elements are: (1) that the product was an improvement to real property and (2) that it was installed more than ten years prior to the institution of the suit. ***Id.*** The district court found both elements; the Rays challenge both findings. Of course, because we are reviewing a summary judgment,

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sustained severe burns.

[5] The Rays voluntarily dismissed the other defendants after summary judgment was awarded GTE.

[6] Section 16.009 provides in pertinent part:

> (a) A claimant must bring suit for damages for a claim listed in Subsection (b) [which includes a suit for personal injury] against a person who constructs or repairs an improvement to real property not later than 10 years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

It is undisputed that the statute is applicable to manufacturers.

our review is *de novo*. *E.g.*, ***Amburgey v. Corhart Refractories Corp.***, 936 F.2d 805, 809 (5th Cir. 1991). It goes without saying that summary judgment is proper if the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Duplantis v. Shell Offshore, Inc.***, 948 F.2d 187, 189 (5th Cir. 1991) (quoting Fed. R. Civ. P. 56(c)) (internal quotation marks omitted). A dispute regarding a material fact is not "genuine" unless "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." ***Id.*** (quoting ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 248 (1986)).

A.

Concerning the finding that the switch was an improvement to real property, the Rays rely on an affidavit in which an electrical engineer stated that because power demands on the bus duct system may change, bus duct disconnect switches

> are designed, manufactured, and installed so that they are not permanently affixed to the bus-duct.... This allows a bus-duct disconnect switch to be easily removed, replaced with a switch of a different rating, or relocated to another location or structure in order to meet any changing service requirements of the owner. The intent of the design, manufacture, and installation of a bus-duct disconnect switch is to make it completely portable.

Similarly, a Safety Manager for Ray's employer at the time of the accident testified in a deposition that the switch can be removed, and even placed in another location. Because the switch is portable, the Rays maintain that it cannot be classified as an

"improvement" to realty, at least not for summary judgment purposes.[7]

Texas courts have given some guidance as to what constitutes an improvement for § 16.009 purposes:

> The term "improvement" has been defined as having "broader significance than `fixture' and comprehending all additions and betterments to the freehold." The term includes everything that permanently enhances the value of the premises.

Dubin, 731 S.W.2d at 653 (citations omitted). Applying § 16.009, we have ruled that "[a]n improvement can be anything that permanently enhances the value of the premises, and *it can even be something easily removable provided it is attached and intended to remain permanently as part of the building*." ***Barnes***, 962 F.2d at 517 (citations omitted; emphasis added).

In fact, our court stated in ***Barnes*** that a bus duct system is an "improvement" for purposes of § 16.009. ***Id.*** at 517 n.13 ("Westinghouse manufactured the entire bus duct system -- an improvement to real property"). As GTE urges, it would be quite anomalous for our court to state that the "bus duct system" is an improvement, but not find a bus duct disconnect switch to be one. The Rays attempt to distinguish ***Barnes***, because in that case the plaintiff encountered the bus duct, rather than a bus duct

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[7] Of course, almost any object is theoretically "portable"; that alone cannot render it incapable of being an improvement to real property. For example, an automatic garage door opener, although it may be removed with no damage to a house, has been held to be an improvement. *See* ***Ablin v. Morton Southwest Co.***, 802 S.W.2d 788, 791 (Tex. App. 1990), *error denied* (May 8, 1991).

disconnect switch.[8] But, we need not rely solely on ***Barnes*** to decide this matter; inquiry into whether the switch was permanently affixed to the real property yields the same result.

Although the term "improvement" for § 16.009 purposes encompasses more personalty than the term "fixture", courts have looked to fixtures characteristics to ascertain whether personalty should be classified as an improvement. *See*, *e.g.*, ***Ablin***, 802 S.W.2d at 791. Texas courts address three factors to determine whether personalty has become a fixture:

> (1) the mode and sufficiency of annexation, either real or constructive;
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> (2) the adaptation of the article to the use or purpose of the realty; and
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> (3) the intention of the party who annexed the chattel to the realty.

Id. (citing ***Logan v. Mullis***, 686 S.W.2d 605, 607 (Tex. 1985)). Of these factors, the third is dispositive; the other two constitute additional evidence of intent. ***Ablin***, 802 S.W.2d at 791 (citing and quoting ***Logan***).

A former GTE engineering manager stated by affidavit that the "switches, such as the one involved in this case, were designed and manufactured to be integrated and permanently affixed within the

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[8] In addition, they assert that because the switch is *designed* with portability in mind, it cannot be an improvement, citing ***Conkle v. Builder's Concrete Prods. Mfg. Co.***, 749 S.W.2d 489 (Tex. 1988). We do not find ***Conkle*** controlling. It never discussed the *design* intent of the product at issue (a bin that functioned as part of a concrete plant). *See* ***id.*** at 490. Rather, the ***Conkle*** court found a material issue of fact regarding whether the bin was an improvement, because the bin was "actually portable" *and* the concrete plant *itself* (of which the bin was but a part) had been located at more than one site. ***Id.*** at 491.

structure of a building's electrical system." Likewise, the GTE sales engineer for the building stated by affidavit that he "worked with the architects, the general contractor, ... and the electrical contractor ... to determine the electrical equipment necessary to complete construction on the [building]", and that

> [he] designed the electrical system to conform with the building's plans. The electrical system was designed and intended to be installed and permanently affixed as an improvement to the ... building. In particular, the bus duct disconnect switches GTE supplied for installation in [the building] during its construction were essential to the electrical system I designed, and, therefore, intended to remain as permanent improvements.

Furthermore, the general contractor for the building stated by affidavit:

> Installation of a properly functioning electrical system was absolutely necessary to fulfill our responsibilities as general contractor .... The entire electrical system, including switchboards, bus ducts, bus duct disconnect switches, control panels and transformers, essential to providing electricity to the ... building, were installed ... with the intent that the electrical system remain a permanent addition to the ... building.

There is no material fact issue concerning the function, design, or purpose of the switches; they were intended to be permanently affixed to the building.

Other factors buttress this. In ***Ablin***, in which a garage door opener was held to be an improvement, the court noted:

> The garage door opener was appropriate and necessary to the purpose for which it was installed. Because of its nature, and because it was specially adapted for the use to which it was put, and used by both vendees of the premises, it became an accessory necessary to the enjoyment of the freehold.

Ablin, 802 S.W.2d at 791. In this case, the switches were, as noted, designed as an integral part of the building's electrical system.[9] They were conduits for electricity from the bus ducts to the transformers and other components that act to supply power to an entire floor. Needless to say, as such, they are at least "as necessary to the enjoyment of the freehold" as an automatic garage door opener. *See* ***id.*** Indeed, one cannot imagine a hypothetical vendor of the building removing the switches upon its sale (thereby effectively depriving the building of electricity), informing the vendee that the switches were not fixtures, and escaping without liability for damages. *See* ***Logan***, 686 S.W.2d at 607 ("If the culvert was a fixture, Logan had no right to remove it and subjected himself to liability for damages for its removal.")

In sum, the switch at issue was intended to be affixed permanently to the realty. That they are generally designed to allow replacement in the event of a "large demand" change in the electrical system does not detract from this; improvements, or even fixtures, can be replaced in the event that exigent circumstances require an improvement or fixture of different quality.

B.

In the alternative, the Rays contend that, even if the switches constitute improvements to realty, GTE failed to establish that they were installed more than ten years before this action was

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[9] The Rays' expert electrical engineer stated in a deposition that "[y]ou could not interchange manufacturers" of disconnect switches, an implicit recognition that such switches are not as generic as the Rays suggest.

initiated. But, affidavits submitted by GTE establish that the electrical system, including the switches, was installed between 1973-75; indeed, the building was substantially complete by July 1975. The Rays instituted this action 17 years later in July 1992.

Nevertheless, because of the portability of the switches, the Rays contend that the switch at issue could have been installed later than the "original" switch, perhaps within ten years of July 1992. But, the switch in issue was manufactured only between 1973 and 1977. Moreover, Alfred Brooks, employed as the building maintenance engineer since 1978, stated by affidavit that he was "personally familiar with all major maintenance work which has been done on the electrical system ... since 1978", and that,

> [t]o the best of my knowledge, without review of any maintenance files, the bus duct disconnect switch involved in the accident on July 29, 1990, was the original bus duct disconnect switch installed on that particular bus duct on the 7th floor during the construction of [the building] and had not been changed, removed, or otherwise replaced until the bus ducts themselves were changed out in 1990.

(Therefore, even if there is some merit to the later-installed switch theory, the evidence indicates that it would have been installed before Brooks began as Building Maintenance Engineer in 1978 -- some 12 years before the accident and 14 years prior to filing the action.)

The Rays did not present evidence that the switch was changed. Instead, on appeal, they assert for the first time that the Brooks affidavit was not proper summary judgment evidence under Rule

56(e). Assuming that we may reach this issue,[10] we disagree. In fact, the Rays seem to acknowledge implicitly in their reply brief that the affidavit was proper, *i.e.*, based on the personal knowledge of the affiant, as required by Rule 56(e); however, they assert that the evidence is too speculative. Once again, assuming that we may reach this issue, we disagree. The fact that the affidavit recites that Brooks did not review the building's maintenance records, but rather relied on his personal knowledge, does not create a material fact issue. *See* ***Anderson***, 477 U.S. at 252 ("mere existence of a scintilla of evidence" in support of party's position at summary judgment "will be insufficient" to defeat it). There is no material fact issue as to whether the switch was installed more than ten years prior to the filing of suit.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

[10] No authority need be cited for the necessary rule that we generally do not address issues raised on appeal for the first time; this rule is equally applicable to our *de novo* review of a summary judgment. The summary judgment record is fixed in the district court; it goes without saying that objections to the admissibility of evidence furnished in support of, or opposition to, summary judgment should -- if not, must -- be made in district court.