

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 CA 0867

**PATRICIA THOMAS AND RUBY IVY ON BEHALF
OF HER MINOR SON, JEREMY RUFFIN**

VERSUS

**RECREATION AND PARK COMMISSION FOR THE
PARISH OF EAST BATON ROUGE**

—
**On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 520,354, Division "M," Section 26
Honorable Kay Bates, Judge Presiding**
—

**Gregory J. Miller
Baton Rouge, LA**

**Attorney for
Plaintiffs-Appellants
Patricia Thomas and Ruby Ivy,
on behalf of her minor son, Jeremy Ruffin**

**Murphy J. Foster, III
A. Todd Caruso
Breazeale, Sachse & Wilson, L.L.P.
Baton Rouge, LA**

**Attorneys for
Defendant-Appellee
Recreation and Park Commission for the
Parish of East Baton Rouge**

BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

Judgment rendered May 4, 2007

Handwritten signatures in black ink, including what appears to be 'GJM' and 'ATC'.

PARRO, J.

Patricia Thomas and Ruby Ivy, on behalf of her minor son, Jeremy Ruffin, appeal a judgment granting a motion for summary judgment in favor of the Recreation and Park Commission for the Parish of East Baton Rouge (BREC) and dismissing their personal injury claims against it. Based on our *de novo* review of the evidence, we reverse the judgment and remand this matter to the district court.

FACTUAL AND PROCEDURAL BACKGROUND

On June 13, 2003, Patricia Thomas and her younger brother, Jeremy Ruffin, were walking eastbound on Industriplex Boulevard near Siegen Lane in Baton Rouge, Louisiana. They walked on the sidewalk until they reached an area where an overgrowth of vegetation from BREC's adjoining property completely blocked a long stretch of the sidewalk. The grassy area between the sidewalk and the street was also obstructed by a large orange sign showing "Construction Ahead." Therefore, the two pedestrians stepped into the street to move around these obstacles, where they were hit by a car driven by Travis Robinson. Both of them were injured as a result of this accident.

Ms. Thomas and Jeremy's mother, Ruby Ivy, filed suit against BREC, alleging that its failure to maintain its property contributed to the pedestrian/vehicle accident and the resulting injuries to Ms. Thomas and Jeremy. In a supplemental and amending petition, the City/Parish of East Baton Rouge was added as a defendant. Both defendants answered, denying liability and pleading the fault of the plaintiffs and the third-party driver of the vehicle. BREC then filed a motion for summary judgment, admitting it owned the property next to the sidewalk, but claiming its alleged failure to maintain that property did not cause or contribute to the plaintiffs' injuries, which were caused solely by the negligence of Mr. Robinson. The motion was supported with photographs of the accident site and excerpts from the depositions of Ms. Thomas and Jeremy. No opposition was filed. Following a hearing on October 24, 2005, judgment was rendered in favor of BREC. The judgment dismissing the plaintiffs' claims was signed on December 14, 2005, and this appeal followed.

The plaintiffs allege that the court erred in making factual determinations that there was room on the grassy area for the plaintiffs to walk; therefore, there was no need for them to walk in the street. In oral reasons for judgment, the court stated:

In examining the photos, this court acknowledges that shrubbery was growing over the sidewalk. However, the court finds that there was room in the grass for the plaintiff to walk in the grass even with the sign ... and not in the street. And also, the court finds that the plaintiff was familiar with the area. For these reasons, the court will grant the motion for summary judgment filed by defendants.

BREC argues that the "uncontradicted evidence" supports the court's decision and also re-urges its argument that the negligence of Mr. Robinson was a superceding cause of the accident.

APPLICABLE LAW

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. Johnson v. Evan Hall Sugar Co-op., Inc., 01-2956 (La. App. 1st Cir. 12/30/02), 836 So.2d 484, 486. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

On a motion for summary judgment, if the moving party will not bear the burden of proof at trial on the matter that is before the court on the motion, the moving party must 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, action, or defense. If the adverse party then fails to produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. See LSA-C.C.P. art. 966(C)(2); Gisclair v. Bonneval, 04-2474 (La. App. 1st Cir. 12/22/05), 928 So.2d 39, 41.

Summary judgments are reviewed on appeal *de novo*. An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate--whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. Ernest v. Petroleum

Serv. Corp., 02-2482 (La. App. 1st Cir. 11/19/03), 868 So.2d 96, 97, writ denied, 03-3439 (La. 2/20/04), 866 So.2d 830. A "genuine issue" is a "triable issue," or one on which reasonable persons could disagree. Champagne v. Ward, 03-3211 (La. 1/19/05), 893 So.2d 773, 777. A "material fact" is a fact, the existence or non-existence of which may be essential to plaintiff's cause of action under the applicable theory of recovery. Kennedy v. Sheriff of East Baton Rouge, 05-1418 (La. 7/10/06), 935 So.2d 669, 687. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. Boudreaux v. Mid-Continent Cas. Co., 05-2453 (La. App. 1st Cir. 11/3/06), 950 So.2d 839, 843, writ denied, 06-2775 (La. 1/26/07), 948 So.2d 171.

Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under the general negligence principles of Louisiana Civil Code article 2315. For liability to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard of care (the breach of duty element); (3) the defendant's substandard conduct was a cause in fact of the plaintiff's injuries (the cause in fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of protection element); and (5) actual damages (the damage element). Pinsonneault v. Merchants & Farmers Bank & Trust Co., 01-2217 (La. 4/3/02), 816 So.2d 270, 275-76. Duty is a question of law. The inquiry is whether a plaintiff has any law--statutory, jurisprudential, or arising from general principles of fault--to support his or her claim. Bowman v. City of Baton Rouge/Parish of East Baton Rouge, 02-1376 (La. App. 1st Cir. 5/9/03), 849 So.2d 622, 627, writ denied, 03-1579 (La. 10/3/03), 855 So.2d 315. When no factual dispute exists and no credibility determinations are required, the legal question of the existence of a duty is appropriately addressed by summary judgment. Boland v. West Feliciana Parish Police Jury, 03-1297 (La. App. 1st Cir. 6/25/04), 878 So.2d 808, 816, writ denied, 04-2286 (La. 11/24/04), 888 So.2d 231. However, breach of duty, cause in fact, and actual

damages are all factual issues. Snearl v. Mercer, 99-1738 (La. App. 1st Cir. 2/16/01), 780 So.2d 563, 574, writs denied, 01-1319 (La. 6/22/01), 794 So.2d 800, and 01-1320 (La. 6/22/01), 794 So.2d 801. Where there are concurrent causes of an accident, the proper inquiry is whether the conduct in question was a substantial factor in bringing about the accident. Whether the defendant's conduct was a substantial factor in bringing about the harm, and thus, a cause in fact of the injuries, is a factual question to be determined by the fact finder. Bonin v. Ferrellgas, Inc., 03-3024 (La. 7/2/04), 877 So.2d 89, 94; Manno v. Gutierrez, 05-0476 (La. App. 1st Cir. 3/29/06), 934 So.2d 112, 116-17.

ANALYSIS

This court has reviewed the photographs and deposition excerpts submitted in support of BREC's motion for summary judgment. Since the plaintiffs will bear the burden of proof at trial on all elements of their claims, BREC's motion and supporting proof had to point out to the court that there was an absence of factual support for one or more of those elements. BREC has acknowledged that it owned the adjacent property and implicitly acknowledged its duty to maintain that property. It has not contended that it did not breach that duty by allowing the bushes to grow completely over the sidewalk, making it impossible for pedestrians to use. Rather, the argument made by BREC was that Mr. Robinson's fault was the sole or superceding cause of the accident. BREC claims its alleged failure to properly maintain the property adjacent to Industriplex Boulevard did not cause the plaintiffs to walk on the street, nor did it cause Mr. Robinson to run into them.

It is apparent from the phrasing of their arguments that BREC's position is based on whether its conduct was a cause in fact of the accident, or to put it another way, whether its conduct was a substantial factor in bringing about the harm. These are essentially factual issues, which, for that reason, are inappropriate for summary judgment. Moreover, although BREC states that its evidence is uncontradicted, that statement is inaccurate. The photographs show that for a distance of about half a block, the sidewalk was completely blocked by overgrown bushes on the BREC

property. These bushes were dense and impassable. The photographs also show a large construction sign in the grassy area between the sidewalk and the street. Ms. Thomas was asked in her deposition why she had not simply walked on the grassy area between the sidewalk and the street when she encountered the overgrown bushes. She stated that there was a sign right there, a construction sign, "and then the trees were grown over the sidewalk where I couldn't walk over." She said that to get to the other side of the bushes, she had to walk on the street, where she tried to stay near the curb.

The question of whether or not Ms. Thomas and Jeremy had sufficient room to walk on the grass is a factual issue. From the court's oral reasons, it appears the resolution of this factual issue in BREC's favor was the primary reason for granting the motion for summary judgment. Summary judgment on this basis was inappropriate. Whether it was reasonable for Ms. Thomas and Jeremy to step off the curb and walk in the street is also an issue to be decided by the finder of fact. See Price v. Exxon Corp., 95-0392 (La. App. 1st Cir. 11/9/95), 664 So.2d 1273, 1281. BREC has failed to point out to the court that there was an absence of factual support for one or more of the elements of plaintiffs' claims.

BREC's alternative argument is that Mr. Robinson's negligence so directly caused the accident that it superceded whatever causal relationship its failure to maintain the property might have had. The allocation of fault among Mr. Robinson, BREC, and the plaintiffs is also an issue for the finder of fact. See Williams v. City of Baton Rouge, 02-0682 (La. App. 1st Cir. 3/28/03), 844 So.2d 360, 371. While the finder of fact might ultimately conclude that this argument has merit, it again is a fact-based issue on which summary judgment would not be appropriate in this case.

CONCLUSION

For these reasons, we reverse the judgment of December 14, 2005, and remand this case to the district court for further proceedings. All costs of this appeal, in the amount of \$465.06, are assessed to BREC.

REVERSED AND REMANDED.