NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1909

SANDRA G. SIMON, WIFE OF/AND RENÉ J. SIMON

VERSUS

LOOMIS ARMORED US, INC., JOE DOE, MARSHALLS OF MA, INC., STIRLING MANDEVILLE, L.L.C., STIRLING 21, L.L.C., ABC INSURANCE COMPANY, AND XYZ INSURANCE COMPANY

DATE OF JUDGMENT: JUL 22 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2008-16055, DIVISION J, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

* * * * * *

Stephen C. Aertker, Jr.
Covington, Louisiana

Counsel for Plaintiffs-Appellants
Sandra G. Simon, Wife of/and
René J. Simon

Clare W. Trinchard
Jacob S. Stephens
New Orleans, Louisiana

Counsel for Defendant-Appellee
Loomis Armored US, Inc.

PETTIGREW, J. DISSENTS BY JGL

HIGGINBOTHAM, J. DISSENTS ****** ASSIGNS REASONS BY JGL

BEFORE: CARTER, C.J., KUHN, PETTIGREW, HUGHES,
AND HIGGINBOTHAM, JJ.

Disposition: JUDGMENT MODIFIED AND, AS MODIFIED, AFFIRMED.

Kuhn, J.

In this personal injury case, plaintiffs, Sandra and René Simon, appeal a judgment that granted a motion for summary judgment filed by defendant, Loomis Armored US, Inc. ("Loomis"), and dismissed "plaintiff's claims." We modify the judgment to provide for the dismissal of both plaintiffs' claims and, as modified, we affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

In their petition, the Simons alleged that on November 14, 2007, Ms. Simon was shopping at the Stirling Mandeville Shopping Center in Covington, Louisiana. She utilized the pedestrian ramp located in front of Marshalls as she entered the store. After shopping, she exited the store and began walking towards the pedestrian ramp. At that time, an armored vehicle owned by Loomis was parked in front of the Marshalls store, in a position that blocked use of the pedestrian ramp. Ms. Simon "attempted to walk around the Loomis vehicle," and as she stepped from the curb, she "tripped and/or misstepped on the curb and fell into the parking lot," injuring her left ankle.

On November 14, 2008, the Simons filed suit against Loomis, alleging it is vicariously liable for the negligence of its driver, who improperly parked the armored vehicle so as to block the pedestrian ramp.[1] Loomis answered the suit, generally denying the Simons' allegations, and further answering to assert that Ms. Simon was negligent in failing to observe an open and obvious condition and in failing to exercise reasonable care. On October 14, 2009, Loomis filed a motion for summary judgment, urging in pertinent part as follows:

> The pleadings and discovery on file, together with attached depositions, affidavits, and exhibits, show that no genuine issue as to any material fact exists and that [it] is entitled to judgment as a matter of law. Plaintiff cannot establish that [it] was a cause-in-fact or legal

[1] The Simons also named other defendants who are not relevant to this appeal.

> cause of her alleged accident nor can she establish that [it] breached any duty owed to her.

The Simons opposed Loomis's motion for summary judgment and filed an affidavit by Ms. Simon, which stated, in pertinent part, that on the day in question: 1) she parked her car in the parking lot; 2) she walked from her vehicle, crossed the crosswalk of the parking lot, went up the pedestrian ramp, and entered Marshalls without incident; 3) upon exiting Marshalls, she noticed that a Loomis vehicle was blocking the pedestrian ramp; 4) she attempted to walk around the Loomis vehicle; 5) she stepped down off of a curb and fell into the parking lot; 6) she always looks for and uses pedestrian ramps to and from parking lots when entering and exiting stores; 7) if the Loomis vehicle would not have been blocking the pedestrian ramp, she would have used the ramp to walk into the parking lot; 8) if she had used the ramp to walk into the parking lot, she would not have fallen; and 9) if the Loomis vehicle would not have been blocking the pedestrian ramp, she would not have fallen.

After hearing the arguments presented by counsel, the trial court found that "Ms. Simon made the choice of how to proceed" and "no duty was breached to Ms. Simon which was the cause[-]in[-]fact of this accident." By judgment dated April 27, 2010, the trial court granted Loomis's motion for summary judgment and dismissed "plaintiff's claims against [Loomis] with prejudice." The Simons have appealed this judgment, asserting that the trial court erred in granting the motion for summary judgment because there are "numerous genuine issues of material fact" regarding whether Loomis's driver was negligent in blocking the pedestrian ramp.

II. ANALYSIS

A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966B. The summary judgment procedure is favored in Louisiana and is designed to secure the just, speedy, and inexpensive determination of actions. La. C.C.P. art. 966A(2). Summary judgments are reviewed on appeal *de novo*, using the same criteria that govern the trial court's consideration of whether a summary judgment is appropriate, and in the light most favorable to the non-movant. ***Yokum v. 615 Bourbon Street, L.L.C.***, 07-1785, p. 25 (La. 2/26/08), 977 So.2d 859, 876. Thus, appellate courts must ask the same questions the trial court does 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. ***Hood v. Cotter***, 08-0215, p. 9 (La. 12/2/08), 5 So.3d 819, 824. A "genuine issue" is a "triable issue." ***Smith v. Our Lady of the Lake Hospital, Inc.***, 93-2512 (La. 7/5/94), 639 So.2d 730, 751. An issue is genuine if reasonable persons could disagree. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. ***Id.*** A fact is "material" when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. ***Jones v. Estate of Santiago,*** 03-1424, p. 6 (La. 4/14/04), 870 So.2d 1002, 1006. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. ***Richard v. Hall***, 03-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137.

The initial burden of proof remains with the mover to point out that no genuine issue of material fact exists. La. C.C.P. art. 966C(2); see ***Jones***, 03-1424 at p. 5, 870 So.2d at 1006. If the mover has made a prima facie showing that the motion should

be granted, the burden shifts to the non-moving party to present evidence demonstrating that a genuine issue of material fact remains. ***Id.*** The failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. La. C .C.P. art. 966C(2); ***Jones***, 03-1424 at p. 5, 870 So.2d at 1006.

The Simons' claim against Loomis is based on negligence. This negligence case is resolved by employing a duty-risk analysis, which involves five elements: (1) that the defendant's conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (2) that the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) that the defendant had a duty to conform his conduct to a specific standard (the duty element); (4) that the defendant's conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) that the plaintiff suffered actual damages (the damages element). ***Goins v. Wal-Mart Stores, Inc.***, 01-1136, p. 6 (La. 11/28/01), 800 So.2d 783, 788. If the plaintiff fails to prove any one element by a preponderance of the evidence, the defendant is not liable. ***Perkins v. Entergy Corp.***, 00-1372, p. 7 (La. 3/23/01), 782 So.2d 606, 611.

Whether a duty is owed is a question of law. ***Brooks v. State ex rel. Dep't of Transp. and Dev.***, 10-1908, p. 9 (La. 7/1/11), ___ So.3d ___. Legal cause requires a proximate relation between the actions of a defendant and the harm which occurs, and such relation must be substantial in character. ***Bellanger v. Webre***, 10-0720, p. 5 (La. App. 1st Cir. 5/6/11), ___ So.3d ___.

In the proceedings below and in this court, Loomis argued that no statute or jurisprudence creates liability for the owner of a vehicle parked on private property. Loomis further argued that its truck's presence near the store entrance in the shopping center parking lot in no way breached the duty of "reasonable care" that its driver owed to other drivers and pedestrians. Further, Loomis asserts that

its truck's presence was not hidden or dangerous, as evidenced by the fact that plaintiff consciously walked around the Loomis truck. Loomis contends that because there was no proximate relationship between the actions of Loomis and the harm which occurred to plaintiff, its conduct was not a legal cause of Ms. Simon's injuries.

The Simons counter by arguing that Loomis violated Louisiana Revised Statutes 32:143, which they assert is applicable to private parking lots as well as public roadways, based on the provisions of Louisiana Revised Statutes 32:867.[2] They assert that the Loomis vehicle blocked the crosswalk connecting the parking lot to the pedestrian ramp, and that this conduct was the cause-in-fact of Ms. Simon's injuries. The Simons contend there is a genuine issue of material fact, but they do not identify any particular factual issue that is essential to their cause of action. They assert only that there is "conflicting evidence" because Loomis asserts that the incident was caused by Ms. Simon's negligence and plaintiffs allege that Ms. Simon's incident and resulting injuries were caused by Loomis.

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[2] Louisiana Revised Statutes 32:143A provides, in pertinent part, as follows:

> No person shall stand, or park a vehicle, except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or traffic control device, in any of the following places:
>
> . . .
>
> (5) On a cross walk;
>
> . . .
>
> (8) Between a safety zone and the adjacent curb, or within twenty feet of points on the curb immediately opposite the ends of a safety zone[.]

Louisiana Revised Statutes 32:867 provides, in pertinent part, as follows:

> A. The provisions of this Part shall apply to the operation of a motor vehicle in any privately owned parking lot that is utilized for commercial or retail activities.
>
> . . .
>
> C. The provisions of this Part shall not apply to any legally parked vehicle.

"[Part I-A of the Compulsory Motor Vehicle Liability Security" Law] referenced in La. R.S. 32:867A does not encompass La. R.S. 32:143, which is found in Part IV of the Louisiana Highway Regulatory Act. As such, La. R.S. 32:867 does not provide that La. R.S. 32:143 applies to privately owned parking lots. Further, no violations of La. R.S. 32:143A(5) and (8) occurred based on the undisputed facts of this case. See the definitions of "crosswalk" and "safety zone" in La. R.S. 32:1(13) and (61), which refer to "roadway and "highway" as defined in La. R.S. 32:1(25) and (59), rather than a "parking area" as defined in La. R.S. 32:1(46.1).[3] The parking lot in question does not contain a "crosswalk" or a safety

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[3] Louisiana Revised Statutes 32:1 provides, "When used in [the Louisiana Highway Regulatory Act]," the enumerated "words and phrases" contained therein have the meaning ascribed to them, as set forth below, in pertinent part:

. . .

> (13) "Cross-walk" means: (a) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or, in absence of curbs, from the edges of the traversable roadway.
>
> (b) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface.

. . .

> (25) "Highway" means the entire width between the boundary lines of every way or place of whatever nature publicly maintained and open to the use of the public for the purpose of vehicular travel, including bridges, causeways, tunnels and ferries; synonymous with the word "street."

. . .

> (46.1) "Parking area" means an area used by the public as a means of access to and egress from, and for the free parking of motor vehicles by patrons of a shopping center...."
>
> (59) "Roadway" means that portion of a highway improved, designed, or ordinarily used for vehicular traffic, exclusive of the berm or shoulder. A divided highway has two or more roadways.

. . .

> (61) "Safety zone" means the area or space officially set apart within a highway for the exclusive use of pedestrians and which is protected or is so marked or indicated by adequate signs as to be plainly visible at all times while set apart as a safety zone.

zone" because the parking lot is not a "roadway" or a "highway" as referenced within the meaning of La. R.S. 32:143.

Further, Loomis generally had no duty to protect against the open and obvious condition of its parked vehicle. If the facts of a particular case show that the complained-of condition should be obvious to all, the defendant may owe no duty to the plaintiff. See ***Pryor v. Iberia Parish School Bd.***, 10-1683, pp. 4-5 (La. 3/15/11), 60 So.3d 594, 596. The evidence establishes plaintiff was aware of the presence of the Loomis truck.[4] She could have easily avoided any risk presented to her by its open and obvious presence by using additional care as she stepped from the curb into the parking lot or by choosing to take a different path than the one she took. See ***Pryor***, 10-1683 at p. 6, 60 So.3d at 598. Further, the record contains no evidence that Ms. Simon was handicapped or otherwise needed to use the pedestrian ramp to safely traverse the parking lot. Although the Loomis driver owed a duty of reasonable care to other motorists and pedestrians that utilized the parking lot, the scope of that duty did not extend to protect against Ms. Simon's conduct of "tripp[ing] and/or misstepp[ing] on the curb and falling into the parking lot."

After a *de novo* review of the case, we find no genuine issues of material fact and find that Loomis is entitled to judgment as a matter of law. Loomis pointed out the absence of support for the scope of protection element of plaintiffs' claim. The burden then shifted to plaintiffs to produce support sufficient to establish that they would be able to satisfy their evidentiary burden at trial. La. C.C.P. art. 966(C)(2). They failed to meet this burden. Accordingly, there is no genuine issue of material fact, and Loomis is entitled to judgment as a matter of law.

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[4] Plaintiffs did not put forth any evidence or even allege that Ms. Simon had any physical contact with the Loomis vehicle or that it obstructed her view of the sidewalk, curb, or area of the parking lot where she fell.

III. CONCLUSION

For the above reasons, we modify the trial court's judgment to dismiss the claims of both Mr. and Ms. Simon, and as modified, we affirm the trial court's judgment. All costs of this appeal are assessed against the Simons.

JUDGMENT MODIFIED AND, AS MODIFIED, AFFIRMED.

SANDRA G. SIMON, WIFE OF/AND RENÉ J. SIMON

VERSUS

LOOMIS ARMORED US, INC., JOHN DOE, MARSHALLS OF MA, INC., STIRLING MANDEVILLE, LLC, STIRLING 21, LLC, ABC INSURANCE COMPANY, AND XYZ INSURANCE COMPANY

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BEFORE: CARTER, C.J., KUHN, PETTIGREW, HUGHES, AND HIGGINBOTHAM, JJ.

TMH by QEK

HIGGINBOTHAM, J., DISSENTS AND ASSIGNS REASONS.

HIGGINBOTHAM, J., dissenting.

I respectfully disagree with the majority opinion. I would reverse the summary judgment granted in favor of Loomis and remand the matter for further proceedings. After a *de novo* review, I conclude that Loomis failed to carry its initial burden by failing to point out that Ms. Simon would not be able to prove that the Loomis truck blocking the pedestrian ramp caused her fall and injury.

While I agree that the Louisiana Highway Regulatory Act does not apply to the facts of this case since the accident occurred on a private parking lot rather than a public highway, it is well settled that the highway regulatory provisions are persuasive in determining the degree of care expected of a motorist in the operation of his vehicle. See **Chaney v. Brumfield**, 333 So.2d 256, 258 (La. App. 1st Cir. 1976); **Cheramie v. Pierce**, 261 So.2d 380, 382 (La. App. 1st Cir. 1972); **Dwyer v. Travelers Ins. Co.**, 253 So.2d 679, 681 (La. App. 1st Cir. 1971); **Day v. Allstate Ins. Co.**, 223 So.2d 461, 463 (La. App. 1st Cir. 1969); **Hinegardner v.**

Dickey's Potato Chip Co., 205 So.2d 157, 162 (La. App. 1st Cir. 1967), writ denied, 206 So.2d 94 (La. 1968).

Using the highway regulatory provisions as a guide, it is apparent that parking a vehicle on a crosswalk is dangerous and should be prohibited. See LSA-R.S. 32:143A(5). The parties do not dispute that the Loomis truck was parked in a way that blocked the ramp from its intended use by pedestrians. The evidence shows that the Loomis truck was parked on the crosswalk that extended from the parking area to the ramp that led to the front door of the store.[1] Thus, while the above-cited statute is not decisive of the duty issue since this particular accident took place in a private parking area, the statute is extremely *persuasive* in determining the duty of care imposed on the driver of the Loomis vehicle. Nevertheless, this case must be adjudged under the general tort law of this State. **Hinegardner**, 205 So.2d at 162.

The question of whether a duty exists is a question of law. **Roberts v. Benoit**, 605 So.2d 1032, 1043 (La. 1991). However, breach of duty (whether an unreasonably dangerous condition existed), cause-in-fact, and actual damages are *all factual issues*. See **Brooks v. State ex rel. Dept. of Transp. and Development**, 10-1908 (La. 7/1/11), ___ So.3d ___, ___; **Walker v. Louisiana Dept. of Transp. and Development**, 10-702 (La. App. 5th Cir. 2/15/11), ___ So.3d ___, ___. A motorist in a parking lot is required to exercise a duty of "due caution." See **Chaney**, 333 So.2d at 258; **Gatheright v. State Farm Mut. Auto. Ins. Co.**, 352 So.2d 428, 431 (La. App. 3rd Cir. 1977). And under Louisiana Civil Code article 2315, there is an almost universal duty on the part of the defendant in negligence cases to

[1] Loomis and the Simons both submitted photographic evidence of the accident scene in support of and in opposition to Loomis's motion for summary judgment.

use reasonable care so as to avoid injury to another. **Bridgefield Casualty Ins. Co.**, 29 So.3d at 573. Thus, the Loomis driver clearly had a duty to use reasonable care and due caution when parking the Loomis truck in front of the store so as to avoid the risk of causing harm to someone.

In order to find negligence, the risk of harm must be both unreasonable and foreseeable. It is only that conduct that creates an appreciable range of risk for causing harm that is prohibited. **Bridgefield Casualty Ins. Co.**, 29 So.3d at 573-574. Furthermore, where a risk is obvious, there is no duty to warn or protect against it. **Id.**, 29 So.3d at 574. The determination of whether a particular risk of harm is reasonable is a matter that is wed to the facts of the case, and requires an examination of the particular plaintiff involved and the surrounding circumstances. See **LeBlanc v. Bouchereau Oil Co.**, 08-2064 (La. App. 1st Cir. 5/8/09), 15 So.3d 152, 156, writ denied, 09-1624 (La. 10/16/09), 19 So.3d 481. Even though a particular risk may be unforeseeable, it may still fall within the ambit of the duty if it is easily associated with the rule. **Carter v. City Parish Government of East Baton Rouge**, 423 So.2d 1080, 1086 (La. 1982). While I realize that the exact manner in which Ms. Simon came to harm may not have been foreseeable, it is certainly arguable that a person who ordinarily uses a pedestrian ramp when exiting a store could encounter a problem when forced to take an alternate route out of the store. Therefore, genuine issues of material fact clearly exist regarding whether Loomis's parked truck was a legal cause of Ms. Simon's injury.

The majority points out that the presence of the Loomis armored truck blocking the pedestrian ramp was patently obvious to Ms. Simon and she could have easily avoided the risk presented to her. Likewise, the trial court

reasoned that Ms. Simon "made the choice of how to proceed;" however, the majority and the trial court both fail to consider that Ms. Simon did not have much of a "choice" since her usual path out of the store was blocked by the Loomis vehicle. In her affidavit, Ms. Simon testified that she "always" looked for and used the pedestrian ramps when exiting stores to parking lots. She further stated that she would have used the ramp to walk to the parking lot if the Loomis truck had not been blocking it, and if she had used the ramp she would not have fallen. Therefore, the record reveals an obvious genuine issue of material fact regarding the cause-in-fact of Ms. Simon's injury.[2]

A party's conduct is a cause-in-fact of the harm if it was a substantial factor in bringing about the harm. **Toston v. Pardon**, 03-1747 (La. 4/23/04), 874 So.2d 791, 799. The conduct is a cause-in-fact in bringing about the injury when the harm would not have occurred without it. **Id.** Whether an action is the cause-in-fact of harm is a factual determination that is left to the fact-finder. **Id.** The cause-in-fact analysis is basically known as the but-for inquiry. The conduct can be considered a cause-in-fact if the victim probably would not have encountered the harm but-for the defendant's conduct. **Roberts**, 605 So.2d at 1042. A counter-factual hypothesis is helpful. That is, assuming that the conduct of the tortfeasor was "corrected," consider whether it is probable that the plaintiff would still have sustained the damages complained of. If so, then defendant's substandard conduct was not a cause-in-fact. **Boteler v. Rivera**, 96-1507

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[2] I do not find the rationale of the case cited in the majority opinion, **Pryor v. Iberia Parish School Bd.**, 10-1683 (La. 3/15/11), 60 So.3d 594, to be pertinent to the case before us, because **Pryor** was in a different procedural posture, having been decided after a trial on the merits, not by summary judgment. In **Pryor**, the Supreme Court concluded that the appellate court erred in reversing the trial court's *factual* determination on the breach of duty (unreasonably dangerous condition) element.

(La. App. 4th Cir. 9/17/97), 700 So.2d 913, 916, writs denied, 97-3076, 97-3102 (La. 2/13/98), 709 So.2d 756, 757.

Based on the record, I find that reasonable minds could differ as to whether the Loomis truck blocking the handicap/pedestrian ramp was the causative factor in bringing about Ms. Simon's injury. If the Loomis truck had not been blocking the handicap/pedestrian ramp, and Ms. Simon was able to use the ramp as she exited the store, there is a genuine issue of material fact regarding whether Ms. Simon would have likely fallen and been injured.

In conclusion, Loomis failed to carry its initial burden in its motion for summary judgment by failing to point out that Ms. Simon would not be able to prove that the Loomis truck blocking the pedestrian ramp caused her to fall and injure her ankle. Accordingly, I would find that the trial court erred in granting summary judgment in favor of Loomis, and that the trial court made impermissible material factual determinations on the breach of duty and cause-in-fact issues.

For all these reasons, I respectfully dissent.