NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2015 CA 0896

ANDREW BLEVINS

VERSUS

EAST BATON ROUGE PARISH HOUSING AUTHORITY

Judgment Rendered: MAR 22 2016

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Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Case No. C600079

The Honorable R. Michael Caldwell, Judge Presiding

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John S. McLindon **Baton Rouge, Louisiana**	**Counsel for Plaintiff/Appellant** **Andrew Blevins**
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David T. Butler, Jr. **Baton Rouge, Louisiana**	**Counsel for Intervenor/Appellee** **Stonetrust Commercial Insurance Company**

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McClendon, J. concurs. I agree with the result reached by the majority.

THERIOT, J.

This appeal is taken from a judgment rendered by the Nineteenth Judicial District Court, granting the appellee's motion for summary judgment and dismissing the appellants' claims with prejudice. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On or about June 6, 2010, the plaintiff-appellant, Andrew Blevins, while working in the scope of his employment with Electrical Building Services, LLC ("EBS"), was on property owned by the defendant-appellee, the East Baton Rouge Parish Housing Authority ("the Authority"), located at 999 Rosenwald Avenue in East Baton Rouge Parish. Mr. Blevins alleges that while he was walking across a strip of tall grass, he stepped into a hole that was hidden by the grass, fell down, and fractured his ankle. Mr. Blevins underwent surgery for his injuries.

Mr. Blevins filed a petition for damages on March 16, 2011, claiming that the hole, which was approximately six inches deep and completely hidden by the grass, was a vice or defect on the premises owned by the Authority, and that the Authority either knew or should have known of the hazard the hole posed. Mr. Blevins alleged the Authority had constructive notice of the hole and is therefore liable to him for the damages he sustained pursuant to Louisiana Civil Code articles 2317 and 2317.1.

On September 19, 2011, intervenor-appellant, Stonetrust Commercial Insurance Company ("Stonetrust"), the workers' compensation insurer for EBS, filed a petition of intervention in the instant case. In that petition, Stonetrust alleged that due to Mr. Blevins' injury happening while in the course and scope of his employment with EBS, Stonetrust made payments under the workers' compensation laws of Louisiana to Mr. Blevins for his

hospital and medical expenses, as well as workers' compensation benefits. Stonetrust therefore claimed it has an interest in the lawsuit to recover those payments in proportion to any recovery by Mr. Blevins.

On January 8, 2015, the Authority filed a motion for summary judgment, alleging that there were no genuine issues of material fact in Mr. Blevins's petition. The Authority attached as support for its motion Mr. Blevins's petition for damages and excerpts from Mr. Blevins's deposition of January 19, 2012. The motion was heard by the district court on March 9, 2015. On March 25, 2015, the district court signed a judgment that granted the Authority's motion for summary judgment and dismissed Mr. Blevins' petition for damages against the Authority with prejudice, and dismissed Stonetrust's petition for intervention with prejudice. Mr. Blevins timely filed a motion for devolutive appeal of the district court's judgment. Stonetrust answered the appeal, joining Mr. Blevins in his argument as appellant that the motion for summary judgment in favor of the Authority should be overturned.

ASSIGNMENTS OF ERROR

Mr. Blevins and Stonetrust raise two assignments of error:

1. Whether or not the Authority had constructive knowledge of a defect is a question of fact, which cannot be decided on a motion for summary judgment;

2. Whether or not a condition is unreasonably dangerous is a question of fact which cannot be decided on a motion for summary judgment.

STANDARD OF REVIEW

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. A summary judgment is appealed *de novo*, with the appellate court using the same criteria that govern the trial court's

determination of whether summary judgment is appropriate, i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. *Samaha v. Rau,* 2007-1726 (La. 2/26/08), 977 So.2d 880, 882-83; see *Adams v. Arceneaux*, 2000-1440 (La. App. 1 Cir. 6/22/01), 809 So.2d 190, 193-94.

A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, admitted for purposes of the 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. C.C. P. art. 966(B)(2). The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant'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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. C.C.P. art. 966(C)(2); See *Adams*, 809 So.2d at 193-94.

DISCUSSION

To recover against a public entity for damages due to a defective thing, a plaintiff must prove that: (1) the thing which caused the damage was in the custody of the public entity; (2) the thing was defective due to a condition creating an unreasonable risk of harm; (3) the entity had actual constructive notice of the condition yet failed to take corrective action within a reasonable period of time; and (4) the defect was a cause of plaintiff's harm. *Walters v. City of West Monroe*, 49,502 (La. App. 2 Cir. 2/4/15), 162 So.3d 419, 422, writ denied, 2015-0440 (La. 5/15/15), 170 So.3d 161.

Determining whether an owner of a premises had constructive notice of a hazardous condition is a question of fact. A claimant who simply shows that the condition existed without an additional showing that the condition existed for some time before the injury has not carried the burden of proving constructive notice. See *White v. Wal-Mart Stores, Inc.*, 97-0393 (La. 9/9/97), 699 So.2d 1081, 1084.

The above concepts found in *Walters* and *White* are applicable to summary judgments. In a motion for summary judgment, "once a defendant points out a lack of factual support for an essential element in the plaintiff's case, the burden shifts to the plaintiff to come forward with evidence... to demonstrate that he or she would be able to meet his or her burden at trial." *Allen v. Lockwood,* 2014-1724 (La. 2/13/15), 156 So.3d 650, 653, citing *Bufkin v. Felipe's Louisiana, LLC,* 2014-0288 (La. 10/15/14), 171 So.3d 851, 858-59.

The Authority submitted Mr. Blevins's deposition with its motion for summary judgment. In his deposition, Mr. Blevins testified that he had been on the property "several times" before the accident on walk-throughs prior to working there. In the walk-throughs, Mr. Blevins noted what he called "huge sink holes" near the adjacent road, possibly made by a truck that had its tire stuck in the mud. Mr. Blevins made sure to avoid that area. He observed the grass to be eight or nine inches tall, and he had never seen the grass mowed prior to the accident. Neither he nor anyone associated with EBS made any complaints to the Authority about the condition of the property. Mr. Blevins had been working on the property for nine days without incident before stepping into the hole, which he was unaware existed before his accident.

In opposition to the Authority's motion, Mr. Blevins submitted his deposition, citing in his exhibits many of the same excerpts used by the Authority. When doing his walk-throughs, Mr. Blevins was not actively searching for any hazards on the property. After his accident, he was made aware of a co-worker that stepped into a hole on the property and injured himself, but could not answer if it was the same hole that caused his injury. Mr. Blevins admitted that even if the grass had been cut, the hole might not have become obvious at that time because it was "pretty obscured." He had no knowledge of what might have caused the hole. Mr. Blevins also submitted an excerpt from the deposition of Patrick Hollier, an employee for JW Grand, the general contractor of the work being done on the Authority's property. Mr. Blevins had shown Mr. Hollier the hole after the date of the accident. Mr. Hollier testified that the hole appeared to have been there for an unknown period of time, long enough for the grass to have grown over it.

After reviewing the deposition testimony and other evidence submitted by both parties, we find that the Authority provided sufficient evidence to refute the element of constructive notice in Mr. Blevins's claim and that Mr. Blevins failed to provide sufficient evidence in response to show that he could meet his burden of proof at trial. Mr. Blevins did not prove the cause of the hole that he stepped in, or establish any reasonable estimate of time that the hole has existed, and therefore he cannot prove whether the Authority had any responsibility for the formation of the hole. Mr. Blevins himself walked on the property several times before the accident and, while noticing some very large holes near the road, did not notice the hole that caused his injury. The co-worker's accident occurred after Mr. Blevins's accident; thus, the record is devoid of any previous incident that would have put the Authority on notice.

Because of the lack of evidence to prove that the Authority had any constructive notice of the particular hole that he stepped into, Mr. Blevins failed to meet one of the essential elements of his burden of proof, and the trial court was correct in granting summary judgment in favor of the Authority. Since Mr. Blevins failed to meet this essential element, we pretermit any discussion as to whether the hole presented an unreasonably dangerous condition. See *McGehee v. City of Baton Rouge*, 97-0103 (La. App. 1 Cir. 2/20/98), 708 So.2d 809, n.2.

DECREE

The granting of the East Baton Rouge Parish Housing Authority's motion for summary judgment dismissing the petition for damages filed by Andrew Blevins and the petition for intervention filed by Stonetrust Commercial Insurance Company, with prejudice, is affirmed. All costs of this appeal are assessed equally between Andrew Blevins and Stonetrust Commercial Insurance Company.

AFFIRMED.