NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 0474

TILINDA GROTE AND KARL GROTE

VERSUS

FEDERAL INSURANCE COMPANY AND SMG GENERAL PARTNERSHIP

Judgment Rendered: DEC 22 2016

* * * * *

On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. C563737, Sec. 26

The Honorable Donald R. Johnson, Judge Presiding

* * * * *

Gregory Webb
Baton Rouge, Louisiana

Attorney for Appellants
Plaintiffs – Tilinda Grote and Karl Grote

Lea Anne Batson
Parish Attorney
Arthur Howell Andrews
Gwendolyn K. Brown
Special Assistant Parish Attorneys
Baton Rouge, Louisiana

Attorneys for Appellee
Defendant – The City of Baton Rouge/ Parish of East Baton Rouge

John P. Wolff, III
Tori S. Bowling
Baton Rouge, Louisiana

Attorneys for Appellees
Defendants – SMG and Federal Insurance Company

* * * * *

BEFORE: PETTIGREW, McDONALD, AND CALLOWAY,[1] JJ.

PJP Pettigrew, J. dissents and assigns Reasons.

[1] Hon. Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.

CALLOWAY, J.

Plaintiffs, Tilinda Grote and Karl Grote, appeal from a summary judgment in favor of the defendants, the City of Baton Rouge/Parish of East Baton Rouge (City/Parish), SMG, and Federal Insurance Company (Federal), and dismissing their claims against the defendants with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

The Grotes filed a petition for damages on February 4, 2008, naming as defendants SMG, its insurer Federal Insurance Company, and the City/Parish.[2] They allege that on May 25, 2007, while attending a conference at the River Center Convention Center in downtown Baton Rouge, Mrs. Grote tripped and fell on an "abrupt elevation of approximately 1" between two (2) sections of concrete walkway" near the entrance of the River Center. As a result of Mrs. Grote's alleged trip and fall, the Grotes argued the defendants were liable for damages arising from the injuries she sustained. Karl Grote, Mrs. Grote's husband, alleged that he suffered loss of consortium due to his wife's injuries.

In January 2012, the Grotes filed a motion for summary judgment wherein they argued that the alleged defect in the sidewalk over which Ms. Grote tripped was unreasonably dangerous. *See* La. C.C.P. art. 966(E).[3] Following a hearing, the trial court denied summary judgment.

Thereafter, in September 2012, the City/Parish, SMG, and Federal filed a motion for summary judgment, arguing that the alleged defect was not

---

[2] The Grotes filed an amending petition for damages in July 2014.

[3] See the former version of La. C.C.P. art. 966(E), prior to its amendment by 2015 La. Acts, No. 422, effective January 1, 2016. We note, however, the new version of Article 966 does not alter Section E, which states, "[a] summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case as to that party or parties."

unreasonably dangerous and that the condition was open and obvious. That motion was not heard by the trial court.

In November 2013, the Grotes filed another motion for summary judgment, again arguing that the alleged defect in the sidewalk over which Ms. Grote tripped was unreasonably dangerous. *See* La. C.C.P. art. 966(E).[4]

In January 2015, SMG and Federal filed a motion for summary judgment on the issue of ownership, custody, and control of the alleged defect, arguing that SMG did not manage the exterior of the River Center and had no responsibility for the alleged defect built into the exterior concrete walkway. *See* La. C.C.P. art. 966(E).

Then, in March 2015, the City/Parish re-urged the motion for summary judgment it previously filed in September 2012. SMG and Federal joined the City/Parish's re-urged motion for summary judgment.[5]

On August 17, 2015, the trial court held a hearing on the motion for summary judgment filed in September 2012 and re-urged in March 2015 by the City/Parish, SMG, and Federal, as well as the motion for summary judgment filed in January 2015 by SMG and Federal (on the issue of custody of the alleged defect). In a judgment signed September 15, 2015, the trial court granted summary judgment in favor of the City/Parish, SMG, and Federal, and against the Grotes, dismissing their suit, with prejudice. The judgment stated that SMG and Federal's motion for summary judgment, on the issue of custody of the allegedly defective sidewalk, was rendered moot. The trial court issued written reasons for judgment on October 1, 2015. The Grotes now devolutively appeal.

---

[4] The record does not indicate whether the trial court set this motion for summary judgment filed by the Grotes for hearing. By virtue of the trial court's ruling on the defendants' motion for summary judgment, discussed fully herein, the trial court "mooted all other motions...."

[5] At the outset of litigation, the City/Parish's attorney's office also represented SMG and Federal. The City/Parish's attorney office later withdrew from representing SMG and Federal, who employed counsel that enrolled on their behalf.

JURISDICTION

A final judgment of the trial court can be appealed. La. C.C.P. art. 2083. A judgment that determines the merits in whole or in part is a final judgment. La. C.C.P. art. 1841. It is appropriate for us to examine the basis for our jurisdiction before addressing the merits of this appeal as appellate courts have the duty to examine subject matter jurisdiction *sua sponte,* even when the parties do not raise the issue. *Motorola, Inc. v. Associated Indem. Corp.,* 2002-0716 (La. App. 1 Cir. 4/30/03), 867 So. 2d 715, 717.

The record reflects that after the September 15, 2015 judgment was signed, the trial court issued an order of appeal "of the judgment rendered on 08/17/15," which appears to be a clerical error relative to the date since the record does not contain a judgment rendered on August 17, 2015.

A party wishing to appeal an adverse judgment must obtain an order of appeal. There can be no appeal absent an order of appeal because the order is jurisdictional; this lack of jurisdiction can be noticed by the court on its own motion at any time. *Noyel v. City of St. Gabriel*, 2015-1890 (La. App. 1 Cir. 9/1/16), ___ So. 3d ___, 3 (citing *Snearl v. Mercer,* 99-1738 (La. App. 1 Cir. 2/16/01), 780 So. 2d 563, 571, *writ denied,* 2001-1319, 1320 (La. 6/22/01), 794 So. 2d 800, 801). Based on the apparent defect in the appeal, this court, *ex proprio motu,* issued an interim order on November 16, 2016, remanding the case to the trial court for the limited purpose of issuing an amended order of appeal with the correct dates of the original judgment.

Following this court's issuance of the interim order, the trial court supplemented the record with an amended order for devolutive appeal, signed on November 30, 2016, from the judgment rendered in this matter signed on September 15, 2015. As the amended order of appeal contains the correct dates of the original judgment, the jurisdiction of this court now attaches upon the granting

of the amended order of appeal. La. C.C.P. art. 2088; *see also Noyel*, ____ So. 3d at 3.

LAW AND DISCUSSION

The Grotes argue the district court erred in granting summary judgment in favor of the defendants because material issues of fact exist regarding whether the alleged defect built into the concrete walkway presented an unreasonable risk of harm.

Summary Judgment

A determination of whether a condition presents an unreasonable risk of harm is appropriate for summary judgment. *See Allen v. Lockwood,* 2014-1724 (La. 2/13/15), 156 So. 3d 650, 652-53 (*per curiam*); *Rodriguez v. Dolgencorp, LLC*, 2014-1725 (La. 11/14/14), 152 So. 3d 871, 872 (*per curiam*); *Bufkin v. Felipe's Louisiana, LLC*, 2014-0288 (La. 10/15/14), 171 So. 3d 851, 859 n.3; and *Moore v. Murphy Oil USA, Inc.*, 2015-0096 (La. App. 1 Cir. 12/23/15), 186 So. 3d 135, 146 n.7, *writ denied*, 2016-00444 (La. 5/20/16), 191 So. 3d 1066.

After adequate discovery, a motion for summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, if any, admitted for purposes of the motion, 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. 966(B)(2) and (C)(1) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016).[6] The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. *See* La. C.C.P. art. 966(A)(2).

The mover bears the burden of proving that he is entitled to summary judgment. However, if the mover will not bear the burden of proof at trial on the

[6] Now, *see* La. C.C.P. art. 966(A)(3).

subject matter of the motion, he need only demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016).[7] If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016). If the nonmoving party fails to make this requisite showing, there is no genuine issue of material fact, and summary judgment should be granted. La. C.C.P. art. 966(C)(2) (prior to amendment by 2015 La. Acts, No. 422, effective January 1, 2016). If, however, the mover fails in his burden to show an absence of factual support for one or more of the elements of the adverse party's claim, the burden never shifts to the adverse party, and the mover is not entitled to summary judgment. *LeBlanc v. Bouchereau Oil Co., Inc.*, 2008-2064 (La. App. 1 Cir. 5/8/09), 15 So. 3d 152, 155, *writ denied*, 2009-1624 (La. 10/16/09), 19 So. 3d 481.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. *Hines v. Garrett*, 2004-0806 (La. 6/25/04), 876 So. 2d 764, 765 (*per curiam*). A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue 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. *Hines*, 876 So. 2d at 765-66. Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and

[7] Now, *see* La. C.C.P. art. 966(D)(1).

all doubt must be resolved in the opponent's favor. *Willis v. Medders*, 2000-2507 (La. 12/8/00), 775 So. 2d 1049, 1050 (*per curiam*).

In determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *East Tangipahoa Development Company, LLC v. Bedico Junction, LLC*, 2008-1262 (La. App. 1 Cir. 12/23/08), 5 So. 3d 238, 243-44, *writ denied*, 2009-0166 (La. 3/27/09), 5 So. 3d 146. 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 this case. *Pumphrey v. Harris*, 2012-0405 (La. App. 1 Cir. 11/2/12), 111 So. 3d 86, 89.

The Custodial Liability of a Public Entity

The substantive law applicable to the underlying facts is La. R.S. 9:2800, which limits the liability of public entities. The City/Parish is a public entity. *See* La. Const. art. 6, §44 and La. R.S. 9:2800(G)(1). A public entity is responsible under La. C.C. art. 2317 for damages caused by the condition of things within its care and custody. *See* La. R.S. 9:2800(A) and (C). A "public site or area" means any publicly owned or common thing, or any privately owned property over which the public's access is not prohibited, limited, or restricted in some manner including those areas of unrestricted access such as streets, sidewalks, parks, or public squares. La. R.S. 9:2800(G)(2).

In actions against a public entity, the plaintiff must establish that: (1) the public entity had custody of the thing that caused the plaintiff's damages; (2) the thing was defective because it had a condition that created an unreasonable risk of harm; (3) the public entity had actual or constructive notice of the defect and failed to take corrective measures within a reasonable time; and (4) the defect was a

cause-in-fact of the plaintiff's injuries. La. R.S. 9:2800(C); *see also Cormier v. Comeaux*, 98-2378 (La. 7/7/99), 748 So. 2d 1123, 1127.

In determining whether a thing is in one's custody, courts should consider: (1) whether the person bears such a relationship as to have the right of direction and control over the thing; and (2) what, if any, kind of benefit the person derives from the thing. *Davis v. Riverside Court Condominium Ass'n Phase II, Inc.*, 2014-0023 (La. App. 4 Cir. 11/12/14), 154 So. 3d 643, 648; *see also Zeno v. Grady Crawford Const. Co., Inc.*, 94-0858 (La. App. 1 Cir. 3/3/95), 652 So. 2d 590, 592, *writ denied.* 95-0857 (La. 5/19/95), 654 So. 2d 695. Although there is a presumption that an owner has custody of his property, this presumption is rebuttable. *Doughty v. Insured Lloyds Ins. Co.*, 576 So. 2d 461, 464 (La. 1991). One way to rebut the presumption is by establishing a contractual undertaking by another to maintain and control the property. *Davis*, 154 So. 3d at 648.

Courts have adopted a risk-utility balancing test to determine whether a condition is unreasonably dangerous under which the trier of fact must balance the gravity and risk of harm against the individual and societal rights and obligations, and societal utility, and the cost and feasibility of repair. *Pryor v. Iberia Par. Sch. Bd.*, 2010-1683 (La. 3/15/11), 60 So. 3d 594, 596 (*per curiam*). The vice or defect must be of such a nature as to constitute a dangerous condition that would be reasonably expected to cause injury to a prudent person using ordinary care under the circumstances. *Forbes v. Cockerham*, 2008-0762 (La. 1/21/09), 5 So. 3d 839, 859-60. While there is no fixed rule regarding deviations of elevation in a sidewalk, deviations of one-half to two inches have been held not to present an unreasonable risk of harm. *See Chambers v. Village of Moreauville*, 2011-898 (La.

1/24/12), 85 So. 3d 593, 598-600 (there is a substantial cost of repairing every minor sidewalk deviation) and the cases cited therein.[8]

Constructive notice is defined as the existence of facts which infer actual knowledge. La. R.S. 9:2800(D). Constructive notice can be found if the conditions that caused the injury existed for such a period of time that those responsible, by the exercise of ordinary care and diligence, must have known of their existence in general and could have guarded the public from injury. *See Goza v. Parish of West Baton Rouge*, 2008-0086 (La. App. 1 Cir. 5/5/09), 21 So. 3d 320, 329, *writ denied*, 2009-2146 (La. 12/11/09), 23 So. 3d 919. While the City/Parish cannot be imputed with knowledge of every defect on its sidewalks, neither can the City/Parish escape liability by negligently failing to discover that which is easily discoverable. *Goza*, 21 So. 3d at 329.

In September 2012, the City/Parish, SMG, and Federal filed a motion for summary judgment, a statement of uncontested facts, and a memorandum. As noted, the City/Parish, and SMG and Federal, also filed respective supplemental memorandums, after re-urging the motion for summary judgment in March 2015. The defendants argued that the plaintiffs lacked factual support for at least one, if not more, essential elements of their action against a public body: whether the alleged defect—the "abrupt elevation of approximately 1" between two (2) sections of concrete walkway" near the entrance of the River Center over which Ms. Grote tripped and fell—was unreasonably dangerous. In support of the motion for summary judgment, the defendants submitted the following exhibits:

---

[8] *See Shavers v. City of Baton Rouge/Parish of East Baton Rouge,* 2000-1682 (La. App. 1 Cir. 9/28/01), 807 So. 2d 883, 885, *writ denied*, 2001-2848 (La. 1/4/02), 805 So. 2d 207 (affirmed trial court ruling that a one and three-fourths inch raised portion of a sidewalk did not present an unreasonable risk of harm); *Williams v. Leonard Chabert Medical Center,* 98-1029 (La. App. 1 Cir. 9/26/99), 744 So. 2d 206, 210, *writ denied*, 2000-0011 (La. 2/18/00), 754 So. 2d 974 (a one-and-one-half inch deviation in a parking lot did not create an unreasonable risk of harm); *Hughes v. Sewerage & Water Bd. of City of New Orleans,* 70 So. 2d 760, 762 (La. App. Orleans 1954) (affirmed trial court ruling finding that a two to three inch concavity in a sidewalk did not create an unreasonable risk of harm); and *Jones v. City of Baton Rouge,* 191 So. 734, 735 (La. App. 1 Cir. 1939) (affirmed trial court ruling that a three to four inch depression in the sidewalk did not create an unreasonable risk of harm).

(A) copy of the Louisiana Supreme Court opinion, *Chambers v. Village of Moreauville*, 2011-898 (La. 1/24/12), 85 So. 3d 593;

(B) affidavit of Scotty Southall, the Building Services and Security Manager for the City/Parish; and

(C) affidavit of the plaintiff, Tilinda Grote.

The Grotes opposed the motion for summary judgment. In support of their opposition, the Grotes attached the following exhibits:

(A) portions of the deposition of James Scott Southall, Jr., the Building Services and Security Manager for the City/Parish;

(B) affidavit of the plaintiff, Tilinda Grote;

(C) affidavit of Marty Beth Riggs;

(D) deposition of Philip W. Beard, expert witness for the plaintiffs;

(E) (1) transcript of a recorded telephone statement of T[i]linda Grote, taken August 7, 2010, and (2) copy of a SMG/Baton Rouge River Center incident report dated December 8, 2006 filed by injured party Diane Corty;

(F) affidavit and curriculum vitae of Mitchell Allen Wood; copies of portions of the third edition of *Building Codes Illustrated: A Guide to Understanding the 2009 International Building Code*; and

(G) portions of the deposition of Michael Frenzel.

SMG and Federal replied to the Grotes' opposition, in support of the motion for summary judgment, and attached Exhibit 1, a portion of the deposition of the plaintiffs' expert, Phillip W. Beard.

In January 2015, SMG and Federal also filed a motion for summary judgment on the issue of ownership, custody, and control of the alleged defect as well as a statement of uncontested facts. SMG and Federal argued that SMG did not manage the exterior of the River Center and had no responsibility for the

alleged defect built into the exterior concrete walkway. In support of the motion for summary judgment, SMG and Federal submitted the following exhibits:

> (1) affidavit of Scotty Southall, the Building Services and Security Manager for the City/Parish;
>
> (2) Management Agreement between the City/Parish and SMG, effective January 1, 2007;
>
> (3) affidavit of Tilinda Grote; and
>
> (4) plaintiffs' amending petition for damages, filed July 8, 2014.

The Grotes opposed SMG and Federal's motion for summary judgment. In support of their opposition, the Grotes filed a statement of contested facts and attached the following exhibits:

> (A) copies of portions of the Management Agreement between the City/Parish and SMG, effective January 1, 2007;
>
> (B) copy of Exhibit A to the Management Agreement between the City/Parish and SMG;
>
> (C) copy of a SMG/Baton Rouge River Center incident report dated December 8, 2006 filed by injured party Diane Corty;
>
> (D) portions of the deposition of James Scott Southall, Jr., the Building Services and Security Manager for the City/Parish; and
>
> (E) copy of a SMG/Baton Rouge River Center incident report dated May 25, 2007, filed by injured party Tilinda Grote.

SMG and Federal replied to the Grotes' opposition, in support of their motion for summary judgment on the custody issue, and attached Exhibit 1, a portion of the deposition of the plaintiffs' expert, Phillip Beard.

Following a hearing, the trial court ruled in favor of the defendants and against the Grotes. In its written reasons, the trial court stated:

> This Court finds that there is no genuine issue of material fact that a deviation in the concrete of this sort does not create an unreasonable risk of harm, which is an

> essential element plaintiffs would have to prove in order to prevail at trial on the merits. Additionally, the Court finds that plaintiffs failed to produce factual support sufficient to establish that they would be able to satisfy their evidentiary burden of proof at trial.

The trial court also rendered moot "all other motions," including SMG and Federal's motion for summary judgment on the issue of custody of the alleged defect, "in light of its ruling on the [m]otion for [s]ummary [j]udgment filed by" the defendants.

Following our *de novo* review of the record, we hold that under the particular facts of the matter before us, after applying the risk-utility balancing test and applicable substantive law, the deviation in the sidewalk does not rise to the level of an unreasonably dangerous condition. The deviation "of approximately 1" between two (2) sections of concrete walkway" near the River Center entrance over which Ms. Grote allegedly tripped is not of such a nature as to constitute a dangerous condition that would be reasonably expected to cause injury to a prudent person using ordinary care under the circumstances. *See Forbes*, 5 So. 3d at 859-60. A pedestrian has a duty to see that which should have been seen. She is not required to look for hidden dangers, but she is bound to observe her course to see if her pathway is clear. A pedestrian is held to have seen those obstructions in her pathway which would be discovered by a reasonably prudent person exercising ordinary care under the circumstances. *See Carr v. City of Covington*, 477 So. 2d 1202, 1204 (La. App. 1 Cir. 1985), *writ denied*, 481 So. 2d 631 (La. 1986). The evidence submitted in support of the defendants' motion for summary judgment indicates that at the time of the alleged incident, Mrs. Grote was walking in the middle of a group of people, and she could not, and did not, observe her foot path while walking. The defendants cannot be held liable for Mrs. Grote's injury, which resulted from a condition that she should have observed in the exercise of her reasonable care.

We also note that Mrs. Grote admitted that the elevation change in the sidewalk was "between one (1) inch and one and one [fourth] inch." Courts of this state have held that deviations of one-half to two inches do not present an unreasonable risk of harm. *See Chambers,* 85 So. 3d at 598-600. While this is not a fixed rule, in this case, weighing the gravity and risk of harm against the individual and societal utility, and the cost and feasibility of repair, there is a *substantial* cost to the City/Parish to repair every minor sidewalk deviation when weighed against the relatively low risk of harm to the public traversing the sidewalks. Thus, no genuine issue of material fact exists regarding whether the alleged defect in this case constitutes an unreasonable risk of harm. It is therefore unnecessary to examine whether the defendants had custody or constructive notice of the alleged defect. *See* La. R.S. 9:2800(C). We pretermit discussion of any further errors alleged on appeal.

DECREE

Based on the foregoing, we affirm the September 15, 2015 judgment of the trial court. All costs of this appeal are assessed to the plaintiffs, Tilinda Grote and Karl Grote.

AFFIRMED.

TILINDA GROTE AND KARL GROTE

VERSUS

FEDERAL INSURANCE COMPANY AND SMG GENERAL PARTNERSHIP

NUMBER 2016 CA 0474

COURT OF APPEAL

FIRST CIRCUIT

STATE OF LOUISIANA

BEFORE: PETTIGREW, McDONALD, AND CALLOWAY,[1] JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

I am of the opinion that the trial court impermissibly weighed the evidence and made credibility determinations, which is inappropriate for a summary judgment. I agree with the majority that there is no fixed rule in Louisiana regarding deviations of elevations in a sidewalk. Whether a deviation in the elevation of a sidewalk creates an unreasonable risk of harm must be determined by the unique facts of each individual case.

The majority acknowledges Ms. Grote was walking in the middle of a group of people and she could not observe her footpath while she walked. The walkway is to and from a public center that at times has heavy walking traffic. I am of the opinion this creates a material issue of fact as to whether under these particular facts that the deviation created an unreasonable risk of harm.

I further note the prior incident report of December 8, 2006, filed by an injured party known as Diane Corty. I am of the opinion this creates a material issue of fact in dispute as to the knowledge or constructive knowledge of the City/Parish. The trial court also pretermitted any issues on the ownership, custody, and control as between SMG and the City/Parish, which was pending before it.

I would reverse the granting of summary judgment in favor of the defendants and remand the matter to the trial court to consider the issues of ownership, custody, and control as between SMG and the City/Parish.

---

[1] Hon. Curtis A. Calloway, retired, is serving as judge *pro tempore* by special appointment of the Louisiana Supreme Court.