**NOT DESIGNATED FOR PUBLICATION**

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| **MICHELLE MURRELL, WIFE OF/AND JESSE MAXWELL,** | * | **NO. 2000-CA-1389** |
| **INDIVIDUALLY AND AS ADMINISTRATOR OF THE** | * | **COURT OF APPEAL** |
| **ESTATE OF THE MINOR, MICHELLE R. MURRELL** | * | **FOURTH CIRCUIT** |
| **MAXWELL** | * | **STATE OF LOUISIANA** |
| **VERSUS** | * | |
| **JOHN H. POLLAN, P AND J** | * | |
| **TRUCKING, INC., ZURICH AMERICAN INSURANCE COMPANY, THE PARISH OF PLAQUEMINES AND THE STATE OF LOUISIANA** | * * * * * * * | |

APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 40-376, DIVISION "B"
Honorable William A. Roe, Judge
* * * * * *

**Judge Dennis R. Bagneris, Sr.**
* * * * * *

(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, and Judge Dennis R. Bagneris, Sr.)

Robert C. Stern
CULPEPPER & STERN, L.L.C.
601 Poydras Street
Suite 1825
New Orleans, LA 70130
**COUNSEL FOR APPELLANT**

Kyle L. Potts
Howard L. Murphy
DEUTSCH, KERRIGAN & STILES, L.L.P.
755 Magazine Street
New Orleans, LA 70130
**COUNSEL FOR APPELLEE**

**AFFIRMED**

Michelle Murrell and Jesse Maxwell, plaintiffs/appellants, on behalf of their minor child, Michelle R. Maxwell, ("The Maxwells") seek to reverse the trial court's judgment granting the motion for summary judgment filed by the defendants, John H. Pollan ("Pollan"), P & J Trucking, Inc. ("P & J) and its insurer, Zurich Insurance Company ("Zurich").

## FACTS

On February 8, 1995, Michelle was roller-skating with her friend, Rochelle on Milan Drive in Port Sulphur, Louisiana. The two girls skated between each other's houses as well as on the road. Another friend, Trebor who was not wearing roller skates, later joined them. Maxwell testified she initially observed the tractor/trailer when it crossed the levee at the end of Milan Drive. Maxell testified that she and her friends were standing on the walkway, situated near the street, behind a curbside mailbox in front of Rochelle's residence. As the tractor/trailer approached Trebor signaled the driver to sound his horn.

Pollan testified that he observed two groups of children playing on the same side of Milan Drive. The initial group of children were Michelle and her friends. He testified that he observed a second group of children

approximately 100 feet farther down from Michelle and her friends. Pollan testified that he assured himself both groups of children were in a safe position before he proceeded. However, as the tractor/trailer was passing, Rochelle skated down the walkway and towards the street. She grabbed the curbside mailbox and swung into the yard. Michelle followed behind Rochelle skating down the walkway, and grabbing the mailbox but released the mailbox to wipe her hair out from her face. Then Michelle rolled down the sloped curb, onto the street and into the left side of the tractor/trailer near the rear wheels. Michelle pushed herself off from the tractor/trailer at the location between the two rear wheels; she lost her balance, and fell into the last wheel. Michelle was injured sustaining a fractured right pelvis and right femur.

The tractor/trailer, which was involved in the accident, was owned by P & J, operated by Pollan and insured by Zurich. The Maxwells filed suit against Pollan, P & J and Zurich for damages on behalf of the minor child as a result of the accident on February 8, 1995.

The defendants filed a motion for summary judgment, on the grounds that the plaintiffs failed to establish that Pollan, P & J and Zurich breached any legal duty. The trial court conducted a hearing on the motion and granted the motion for summary judgment in favor of Pollan, P & J and

Zurich. The plaintiffs appeal the trial court's judgment granting the motion for summary judgment.

## DISCUSSION

As a general rule, an appellate court must review a motion for summary judgment *de novo*, using the same criteria applied by the trial court to determine whether summary judgment is appropriate. *Tybussek v. Wong,* 98-1681(La. App. 4 Cir. 2/26/97), 690 So.2d 225, *Schroeder v. Board of Supervisors*, 591 So.2d 342, 345 (La. 1991). Appellate Courts must ask the same questions, as do the trial courts: whether any genuine issues of material fact exist, and whether the mover is entitled to judgment as a matter of law. *Supra.*

Procedurally, the court's first task on a motion for summary judgment is to determine whether the moving party's supporting documents—pleadings, depositions, answers to interrogatories, admission and affidavits—are sufficient to resolve all material factual issues. LSA-C.C.P. art. 966 (B). If the court finds that a genuine issue of material fact exists,

summary judgment must be denied. *Walker v. Kroop,* 96-0618 (La. App. 4 Cir. 7/24/96), 678 So. 2d 580,584. If the court finds that the moving party established a prima facie case that no genuine issues of material facts exists, the party opposing the summary judgment must "make a showing sufficient to establish existence of proof of an element to his claim, action, or defense and on which he will bear the burden of proof at trial". Argument of counsel and briefs, no matter how artful, are not sufficient to raise a genuine issue of material fact.

Allegations without substance will not support a summary judgment. Despite the presence of disputed facts, summary judgment will be granted as a matter of law if the contested facts present no legal issues. *Davenport v. Amax Nickel, Inc., 569 So.2d 23, 27 (La. App. 4th Cir.1990)* .

A motion for summary judgment is not designed to be a substitute for a trial on the merits. *Oller v. Sharp Electric, Inc*., 451 So.2d 1235, 1237 (La. App. 4th Cir). Further, summary judgment may not be used to dispense with a case that is difficult to prove. *Holmes v. Pottharst*, 557 So.2d 1024, 1026 (La. App. 4th Cir.1990); *Bridges v. Carl E. Woodward, Inc.,* 94-2675 (La. App. 4 Cir. 10/12/95), 663 So.2d 458.

In determining whether the party moving for summary judgment has satisfied his burden, the papers supporting his position must be closely scrutinized, while the opposing papers are to be indulgently treated. *Dibos v. Bill Watson Ford, Inc*., 622 So.2d 677, 680 (La. App. 4 Cir.1993). All evidence and inferences drawn from the evidence must be construed in the

light most favorable to the party opposing the motion. *Carr v. City of New Orleans*, 622 So.2d 819, 822 (La. App. 4 Cir.1993).

On appeal, the Maxwells contend the trial court erred in granting the summary judgment in favor of the defendants. Further, the Maxwells argue that the trial court erred in finding that there was no genuine issue of material fact. The Maxwells contend that Pollan and P& J's negligence caused the injuries sustained by Michelle. Also, that Zurich is directly liable pursuant to LSA-R.S. 22:655 and contractually liable to indemnify Pollan and P & J. We disagree.

LSA-C.C. Article 2315 states, in pertinent part:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. "…

This article is the basis for tort liability in Louisiana. For a plaintiff to recover damages in Louisiana, the damages must have been caused by the "fault" of another. There must be a duty owed by the defendant, or by someone for whom the defendant is answerable, to the plaintiff; a breach of this duty; and this duty must be the cause-in-fact of the damages suffered by the plaintiff. *Hill v. Lundin & Associates, Inc*., 260 La. 542, 256 So.2d 620 (1972); *Dixie Drive It Yourself System v. American Beverage Co*., 242 La. 471, 137 So.2d 298 (1962); *Ferdinand F. Stone, Tort Doctrine*, *12 Louisiana Civil Law Treatises 270 (1977).*

"Fault" as used in Article 2315 encompasses more than negligence. It is the breach of a duty owed by one party to another under particular facts and circumstances of a given case. *United States Fidelity & Guaranty Co. v. State*, *Through Department of Highways*, 339 So.2d 780 (La.1976). "Fault" is a broad concept embracing all conduct falling below a proper standard *Kahoe v. State Farm Mutual Automobile Insurance Co*., 349 So.2d 1345 (La. App. 1 Cir. 1977).

The standard of care to be applied to the case sub judice is found in LSA-C.C. Article 2316, which states:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

The operator of a motor vehicle, a dangerous instrumentality, has the constant duty to watch out for the possible negligent acts of pedestrians and avoid injuring them. A higher standard of care than that required of pedestrians is imposed upon the motorist commensurate with the hazards his conduct inflicts upon the public safety. .... It must be noted, however, that a motorist who exercises all reasonable care to protect a pedestrian, who nonetheless suffers injury, is not at fault. *Baumgartner v. State Farm Mut. Auto. Ins. Co.,* 356 So.2d 400, 406 (La.1978); *Bogan on Behalf of Bogan v. O'Connor on Behalf of O'Connor*, 97-1205 (La. App. 4 Cir. 12/17/97), 703

So.2d 1382.
Although the law does not make a driver of a vehicle the insurer of a child's safety, it does impose a high degree of care upon the driver and a duty to anticipate that a child, possessed with limited judgment, might be unable to appreciate impending danger, is likely to be inattentive, and might suddenly place himself in a position of peril. *Torres v. U.S. Fidelity and Guar. Co.,* 499 So.2d 1293 (La. App. 4th Cir.1986). Upon seeing children near the roadside, a motorist is expected to react appropriately, but a driver does not necessarily have a duty to stop. *Ordon v. Nash,* 411 So 2d 1111, 1112 (La. App.4th Cir. 1982). Motorists driving near children are charged with a high degree of care, but the driver is not an insurer of every child's safety. *Dorsey v. Williams*, 525 So.2d 542, 544 (La. App. 3rd Cir. 1988).
When a driver has employed all reasonable precautions to avoid an accident, and a sudden act of a child creates an emergency rendering it impossible for the motorist to avoid striking the child, the accident is considered unavoidable and the motorist is not liable. *Keel v. Thompson*, 392 So.2d 713, 717 (La. App. 3rd Cir.1980). In other words, if a motorist is proceeding at a lawful and reasonable rate of speed, maintaining a proper lookout, and otherwise obeying the rules of the road, he will not be held liable for injuries to a child who suddenly darts or dashes into the path of his vehicle from a concealed position in such a way that an accident cannot be avoided. *Keel v. Thompson*, 392 So.2d at 717. Each case must be considered in light of its particular set of circumstances. *Scardina v. State Farm Mutual Auto. Ins. Co*., (La. App.1 Cir.4/10/92) 597 So.2d 1148.
In the instant case, there was sufficient evidence adduced at the hearing to allow the trial court to conclude that Pollan was exercising a heightened degree of care. The evidence showed that Pollan was traveling east on Milan Drive; he observed the group of children playing in the yard, one of the children
gestured for him to blow his horn, he sounded his horn and then proceeded ahead on to the intersection of Milan Drive and La.Hwy. 23, where he stopped at a convenience store. At the time of the accident Pollan was traveling 15 m.p.h., the posted speed limit in the area.

There were two witnesses to the accident. Both witnesses testified in their depositions that Maxwell was standing on the sidewalk when she and

Rochelle decided to move off of the sidewalk. Rochelle skated down the walkway towards the street. She grabbed the mailbox and swung into the yard. Michelle followed Rochelle grabbed the mailbox; however she released it to wipe her hair out of her face. Upon releasing the mailbox she rolled down the sloped curve into the streets, colliding with the left side of the tractor/trailer near the rear wheels. Michelle then pushed off from the tractor/trailer, loss her balance and fell, colliding with the last wheel.

Sergeant John Machella, of the Plaquemine Parish Sheriff's Office, investigated the accident, took the witnesses' statements and wrote the traffic accident report. Machella spoke with Michelle who informed him that she was on the walkway and was rolling skating when "the rubber stops on the skates did not hold and she went into the streets and ran into the side of the trailer and was knocked down by the tires".

Detective Curtis Bowers, of the Plaquemine Parish Sheriff's Office, obtained recorded statements from Trebor and Rochelle, the two witnesses. Trebor stated that they were outside playing when the truck was coming down the street. He stated the truck honked his horn at them as he proceeded down the road. The truck was almost gone when Michelle slipped and slid out into the road colliding with the trailer and sliding underneath it and the tires rolled over her leg.

The evidence established that Pollan did not strike Michelle, but she collided with the truck Pollan was driving.

After careful review of the record in its entirety and the jurisprudence, we find that the evidence adduced at the hearing on the motion for summary judgment was sufficient for the trial court to have concluded that Pollan was exercising the appropriate heightened degree of care.

Further, the defendants sustained their burden of proof on the motion for summary judgment; thus the burden shifted to the Maxwells to show a genuine issue of material exists. We find that the Maxwells failed to sustain their burden of proof.

## CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed.

**AFFIRMED**