NOT DESIGNATED FOR PUBLICATION

CURTIS MAURONER	*	**NO. 2001-CA-1566**
VERSUS	*	**COURT OF APPEAL**
JOHNNY CLARK HYUNDAI, D/B/A CANAL IMPORTS, INC., RON HOWARD, WILLARD E. ROBERTSON, JAMES C. ROBERTSON, WHITNEY BANK AS TRUSTEE OF WILLARD E. ROBERTSON AND JAMES C. ROBERTSON, ABC INSURANCE COMPANY AND DEF INSURANCE COMPANY	* * * * * * *	**FOURTH CIRCUIT** **STATE OF LOUISIANA**

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-4060, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge
* * * * * *
Judge Patricia Rivet Murray
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

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AFFIRMED

Plaintiff, Curtis Mauroner, appeals the trial court's dismissal of his tort suit on defendant's motion for summary judgment. We affirm.

FACTS

On March 18, 1999, at about 4:30 p.m., Mr. Mauroner, who was then eighty-four years old, drove his friend, Aline Schepp, to the Johnny Clark Hyundai dealership located at 6101 Chef Menteur Highway, New Orleans, Louisiana. That day, Ms. Schepp had her car towed to the dealership for repairs. When they arrived at the dealership, Ms. Schepp apparently went to speak to the service department, and Mr. Mauroner waited for the tow truck to arrive. At some point, Mr. Mauroner decided to return to his car.

As he was walking down the sidewalk located in front of the dealership on the way to his car, Mr. Mauroner recognized the tow truck driver, Russell Evans. While waving and making hand signals to Mr. Evans,

Mr. Mauroner stumbled and fell backwards, breaking his hip.

The sidewalk in front of the dealership where Mr. Mauroner fell was bordered on one side by the wall of the dealership building and on the other by a landscaped flowerbed with a railroad cross-tie border. Mr. Mauroner was unsure of what caused him to stumble. Although Mr. Evans' witnessed the fall, he stated in his deposition that he was focusing on Mr. Mauroner's hands and could only assume that Mr. Mauroner must have stumbled over the railroad cross-tie bordering.

Asserting both negligence and strict liability claims, Mr. Mauroner sued the dealership, its managers, owners, and insurers. In his petition, he alleged that the hazardous condition was the narrow sidewalk and the timbers or railroad cross-tie bordering. After answering generally denying liability, both the dealership, Canal Imports, d/b/a Johnny Clark Hyundai, and its insurer, Reliance Insurance Company (collectively "Defendants"), filed a Motion for Summary Judgment. Defendants asserted that the undisputed facts do not give rise to any liability on their part. Defendants contended that under the undisputed facts no defect existed on the dealership premises that created an unreasonable risk of harm.

Defendants supported their motion for summary judgment with an affidavit of an engineering expert, Fred Vanderbrook, who inspected the accident site on May 24, 2000, and took photographs. Mr. Vanderbrook attested that he "found no defects on the property in the area of plaintiff's accident that would create an unreasonable risk of harm" and that "the design and construction of the sidewalk area is consistent with the generally accepted building standards for this type of structure."

Opposing the motion for summary judgment, Ms. Mauroner submitted the following: (1) his deposition in which he testified that he must have stepped on something that caused him to stumble; (2) his recorded statement in which he stated: "I was walking on the sidewalk and I stepped up, made a step and my foot gave way on me or whatever I stepped on"; (3) Mr. Evan's deposition in which he testified that he believes Mr. Mauroner stumbled on the railroad cross-ties; and (4) the deposition of plaintiff's expert, Neil Hall, a civil engineer and architect. As to the latter, Mr. Hall testified that he inspected the accident site on March 5, 2001 and took photographs. Mr. Hall opined that the problem with the sidewalk was the railroad cross-ties border presented a design problem in that "the timber was raised higher than

the sidewalk" and thus precluded water from draining away from the sidewalk as required by building codes. Mr. Hall further testified that the cross-ties were rotted and thus not a suitable walking surface. Still further, he testified that the cross-ties appeared to be shadowed for most of the day and thus should have been painted, like the elevated curved edge of the sidewalk border that is painted yellow, so as to warn of the tripping hazard.

The trial court granted Defendants' motion for summary judgment and designated this judgment as a final judgment for purposes of appeal. This appeal followed.

Mr. Mauroner asserts two assignment of error: namely, the trial court's failure to find (i) that a material factual issue was established regarding whether "the rotted railroad cross-ties constitute a defect on the premises," and (ii) that the issue of an unreasonable risk of harm is an issue of mixed fact and law or a policy question that is peculiarly a jury question.

ANALYSIS

On appeal, the standard of review of a trial court's decision granting summary judgment is *de novo*. *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226, 230. "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-appell[ee] is entitled to judgment as a matter of law." *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512, p. 26 (La. 7/5/94), 639 So. 2d 730, 750. We are also guided by the Legislature's admonition that "[t]he summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action" and that "[t] he procedure is favored and shall be construed to accomplish these ends." La. C. Civ. Pro. Art. 966 A(2).

As Defendants point out, another pertinent provision is La. C. Civ. Pro. Art. 966 C(2), which provides:

> 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. Thereafter, if the adverse party fails to produce factual support 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.

Applying these principles to the instant case, Mr. Mauroner asserts liability under both a negligence and strict liability theory. An essential element of both theories is cause-in-fact. Stated otherwise,

to recover under either a negligence theory under La. C.C. art. 2315 or a strict liability theory under La. C.C. art. 2317.1, "[t]here must be a causal relationship between the defendant's wrongful act and the plaintiff's injury." Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law*, §4-1 (1996).

Although Mr. Mauroner contends that the railroad cross-ties are defective, he failed to offer any support that those cross-ties were the cause-in-fact of his injury. Defendants contend that the absence of any support for this essential element is fatal to Mr. Mauroner's tort claims and fully supports the trial court's grant of summary judgment. We agree.

In his own deposition and recorded statement, Mr. Mauroner states several times that he did not "know what the hell happened," that he did not know what it was that he stepped on, and that he definitely fell on the sidewalk. Plaintiff further testified that he never saw any debris or foreign substance on the sidewalk where he fell. Likewise, the only eyewitness, Mr. Evans, testified in his deposition that he never saw any debris or foreign substance on the sidewalk where Mr. Mauroner fell. Nor could Mr. Evans identify what caused Mr. Mauroner to fall. Rather, Mr. Evans could only state that: "[h]e

either stumbled or stepped or whatever. I don't know which. But I do know for a fact that that sidewalk is very narrow. And they had this – I guess they were railroad ties or something there, and that's what he must have stumbled on, I guess."

Although Mr. Mauroner's expert opined that the railroad cross-ties presented a hazard, Dr. Hall testified in his deposition that before performing his inspection he was told the following:

> Mr. Mauroner was an elderly gentleman. He was walking in the direction at which he was walking was towards the maintenance area. At some point, he stepped towards or onto a timber, and the timber being deteriorated collapsed under the weight of his foot and he fell.

Mr. Mauroner, however, offered no factual support for his claim that it was the railroad cross-ties that caused him to fall. As Defendants point out, "[p]roof which establishes only possibility, speculation, or unsupported probability does not suffice to establish a claim." *Todd v. State Through Social Services*, 96-3090, p. 16 (La. 9/9/97), 699 So. 2d 35, 43. Such is the case here. Mr. Mauroner's inability to identify what caused him to stumble thus precludes his recovery under either a negligence or strict liability theory.

Accordingly, we affirm the trial court's judgment and assess all costs of this appeal to the appellant.

AFFIRMED.