**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2012 CA 0930

RODDY CHIASSON

VERSUS

V.E.L., LLC., ABC INSURANCE COMPANY, PAPA BEAR'S PIZZA, LLC. D/B/A MIKE'S DAIQUIRIS AND GRILL, DEF INSURANCE COMPANY, CIRCLE K STORES, INC., AND XYZ INSURANCE COMPANY

***DATE OF JUDGMENT:*** MAR 2 1 2013

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 574,840, SEC. 27, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TODD HERNANDEZ, JUDGE

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BEFORE: KUHN, PETTIGREW, AND McDONALD, JJ.

**Disposition: AFFIRMED.**

KUHN, J.

Plaintiff-appellant, Roddy Chiasson, appeals the trial court's judgment, granting summary judgment in favor of defendants-appellees, Carolyn Sobert, Robert Sobert, and Todd Sobert (collectively the Soberts) and dismissing his claims for damages after he sustained personal injuries in a bicycle accident. We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

On January 1, 2009, Chiasson was riding his mountain bike, in an area known as Tigertown in Baton Rouge, generally traveling in an easterly direction to the Circle K Stores, Inc. convenience store (Circle K) located at 4405 Alvin Dark Avenue to pick up some bread and milk. He traversed a vacant lot adjacent to the Circle K premises on one side and a shopping center located on Bob Pettit Blvd on the other where two bars, JL's Place and Mike's Daiquiris, were housed. Chiasson drove over a speed bump allegedly situated primarily on the western side of the vacant lot and partially on the eastern side of the Circle K premises. Once his front tire crossed over the speed bump, he encountered a pothole, and Chiasson was thrown off his bike approximately 6-8 feet. He put his hand out to break the fall and landed on the ground. Chiasson sustained injuries to his left arm, neck, and back.

On January 29, 2009, Chiasson filed this lawsuit, naming the Soberts as defendants in their capacities as owners of the property upon which the two bars were situated, and specifying Todd Sobert in his capacity as lessee of the vacant lot, as well as their insurers.[1] After answering the lawsuit, the Soberts filed a motion for summary judgment, averring that Chiasson failed his burden of proving

[1] In his original and amending petition, Chiasson named various other defendants including the owners of the two bars and their respective insurers and the owners and lessees of the Circle K premises. At the time Chiasson filed his lawsuit, the Soberts had ownership interests in the two bars and Todd was the titled lessee of the vacant lot. But by the time of the hearing, the Soberts had sold their respective ownership interests in the bars, and Todd had transferred his lessee interest in the vacant lot to his brother, Robert.

all the elements of his claim, and, therefore, they were entitled to be dismissed from the lawsuit. The motion was continued to allow Chiasson more time to conduct discovery. On October 17, 2011, the trial court heard the motion and granted summary judgment in favor of the Soberts, dismissing Chiasson's claims with prejudice.[2] This appeal followed.

## DISCUSSION

Summary judgment is proper 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 initial burden of producing evidence at the hearing on the motion for summary judgment is on the mover. ***Schultz v. Guoth***, 2010-0343 (La. 1/19/11), 57 So.3d 1002, 1006. If the mover will not bear the burden of proof at trial on the subject matter of the motion, they need only demonstrate the absence of factual support for one or more essential elements of their opponent's claim, action, or defense. If the moving parties point 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. 966C(2). A summary judgment is reviewed on appeal *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., determining whether there is any

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[2] Motions for summary judgment filed by defendants Papa Bear's Pizza LLC d/b/a Mike's Daiquiris and Grill, Darin Adams, John Landry, and Gaffney Yonan LLC, as owners of Mike's Daiquiris; defendants JEL, LLC, Darin Adams, and John Landry as owners of JL's Place; and defendant Circle K as lessee of the Circle K premises were also granted by the trial court as a result of the October 17, 2011 hearing. Chiasson has appealed the trial court's dismissal of these defendants in separate appeals. See ***Chiasson v. JEL, Inc.***, 2012-0929, 2012-0931, and 2012-0932 (La. App 1st Cir. --/--/--) (unpublished opinions). The trial court denied a similar motion for dismissal by summary judgment filed by the Circle K premises owners, Rose Vaughan, Robert Bennett, Glynn Hadskey, Margaret Sisson, and (now deceased) Norman Sisson. That action has not yet been the subject of judicial review. See La. C.C.P. arts. 968 and 2083.

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.

The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. ***Lemann v. Essen Lane Daiquiris, Inc.***, 2005-1095 (La. 3/10/06), 923 So.2d 627, 633. Whether a duty is owed is a question of law. ***Id.*** As a general rule, the owner or occupier of land has a duty to keep the property in a reasonably safe condition. ***Pryor v. Iberia Parish School Bd.***, 2010-1683 (La. 3/15/11), 60 So.3d 594, 596. This includes a duty to discover any unreasonably dangerous conditions on the premises and either correct the condition or warn potential victims of its existence. ***Vinccinelli v. Musso***, 2001-0557 (La. App. 1st Cir. 2/27/02), 818 So.2d 163, 165, writ denied, 2002-0961 (La. 6/7/02), 818 So.2d 767.

There are two theories of liability available to a plaintiff who claims he was injured as a result of the condition of a thing: negligence, under La. C.C. arts. 2315, and strict liability, under La. C.C. arts 2317 and 2317.1. Under either theory, a plaintiff must prove that the condition of the thing presented an unreasonable risk of harm, or was defective, and that this condition of the thing was a cause-in-fact of her injuries. ***Vinccinelli v. Musso***, 818 So.2d at 165.

The trial court concluded that the Soberts did not owe a duty to Chiasson because all of the evidence admitted at the hearing showed that the alleged cause of the accident was a pothole that it is undisputed was located wholly on the Circle K premises. On appeal, Chiasson asserts that genuine issues of material fact preclude that conclusion.

Among the evidence Chiasson introduced at the hearing was the affidavit of Dr. Olin Dart, a civil engineer, who is a professor emeritus of civil engineering at

LSU with "recognized expertise" in traffic engineering, highway design, traffic safety, and accident reconstruction. Dr. Dart stated:

> The concrete "speed bump" between the two parking lots is a "two-faced" device. From the east it gives the appearance of a normal speed bump (which [is] 2" high and 9 to 24" wide) that could be easily traversed. From the west, it appears more like a barrier being some 9" higher than the Circle K lot level. ... I assume that the tire marks on the device are from vehicles going west and bottoming out on the top. Those vehicles going over the "barrier" were responsible for creating the potholes most probably when the gravel was wet. ...
>
> There is no question but that this faulty "speed bump"/"barrier" was defective and along with the potholed gravel surface abutting the Circle K parking lot were the direct causes of [Chiasson's] bicycle crash.... Approaching this device at a reasonable speed and traversing it with his front wheel in contact with the surface, the sudden drop into the pothole did retard the forward movement of the bicycle and catapulted [Chiasson] onto the concrete parking lot of the Circle K store.

While Dr. Dart attested that it was his opinion that the speed bump was "defective," a careful review of his conclusion actually supports the trial court's determination that it was the pothole -- located wholly in the Circle K parking lot -- that was the cause-in-fact of Chiasson's accident.

This conclusion was underscored by the deposition testimony of Chiasson. Chiasson candidly admitted that on the night of the accident, he did not see exactly what caused him to be catapulted from his bicycle; he just knew that he hit something. It was subsequent to his release from the hospital 14 days later that Chiasson returned to the accident site and, based on his observations that day, surmised that it must have been the pothole that abruptly stopped him. Chiasson testified:

> I knew when I got to the top of the speed bump, there was a drop off... . And I went over the drop off and something stopped me abruptly. I hit something like that was the side of a curb. If I wouldn't have hit something that was the side of a curb, I would have been alright. I'm a pretty good athlete. I would have ridden through.

Although Chiasson adamantly asserts that because the speed bump was located on the vacant lot and, therefore, who had custody, control, or garde of the speed bump is an outstanding issue of material fact that precludes summary judgment, he has offered no evidence to support a finding by the trier of fact that the cause-in-fact of the accident was anything other than the pothole located on the Circle K premises. Thus, the Soberts have demonstrated a lack of support for the cause-in-fact element of Chiasson's claim. And because the cause-in-fact of the accident was the pothole located wholly on the Circle K premises, the trial court correctly determined that the Soberts did not owe a duty to Chiasson arising from any interests they may have in the speed bump and did not err by granting summary judgment in their favor and dismissing them from this lawsuit.[3]

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[3] In their motion for summary judgment, the Soberts averred a lack of evidence to support a finding of an unreasonable risk of harm, see ***McCloud v. Housing Authority of New Orleans***, 2008-0094 (La. App. 4th Cir. 6/11/08), 987 So.2d 360, 362, entitled them to dismissal from this litigation. Chiasson offered the deposition testimony of Professional Land Surveyor Ralph Gibson who provided a topographic survey that was admitted into evidence. The parties agreed that the survey was the most accurate depiction of the property line between the vacant lot and the Circle K premises lot. But Gibson admitted that the survey was prepared for a "limited use" relative to this lawsuit and that he had not done a property boundary survey. While Gibson believed that the survey depicting the line between the two lots was "awfully close," he conceded that the line could be "inches off." Moreover, Gibson was ambivalent about testifying that the survey's lot line -- showing the vast majority of the speed bump located on the vacant lot and a small portion of the most southeastern part of the speed bump situated on the Circle K premises -- was more likely than not an accurate representation. Thus, we note that even if the *entire* speed bump were located on the vacant lot that Robert Sobert leased on the day of the accident (whose use it was undisputed was as additional parking for the bars in the area), Chiasson could nevertheless not avoid dismissal of his claims against the Soberts by summary judgment. While Dr. Dart may have suggested that the speed bump was defective for vehicular use, he did not specifically address Chiasson's use on a bicycle. Chiasson testified that had he not encountered the pothole, he would have cleared the speed bump. Dr. Dart's criticism was of the height of the speed bump from the western approach. It is clear to us that the mechanics of a multi-axle vehicle are sufficiently different from those of a bicycle to make that criticism inapplicable under the facts of this case. In general, the courts have found the social utility of speed bumps sufficient to warrant their presence. See ***Heflin v. American Home Wildwood Estates, L.P.***, 41,073 (La. App. 2d Cir. 7/12/06), 936 So.2d 226, 231-32 (and cases cited therein). Thus, whether most or all of the speed bump was located on the vacant lot for which Chiasson alleged that the Soberts and/or their respective tenants may have been liable, mindful that Chiasson approached the speed bump from the east and on a bicycle, in our *de novo* review we conclude that the trial court correctly dismissed the Soberts from the lawsuit since they pointed out Chiasson's lack of evidence to support a finding that the speed bump constituted an unreasonable risk of harm to support liability under La. C.C. arts. 2315, 2317, and 2317.1.

## DECREE

For these reasons, the trial court correctly granted summary judgment and dismissed the Soberts from this litigation. Appeal costs are assessed against plaintiff-appellant, Roddy Chiasson.

**AFFIRMED.**