NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2013 CA 0177

HUNTER P. HEBERT, INDIVIDUALLY, AND ANDERSON P. HEBERT AND LIZETTE A. HEBERT, INDIVIDUALLY AND AS THE CO-NATURAL TUTORS OF THEIR MINOR SON

VERSUS

IBERVILLE PARISH SCHOOL BOARD, CORGIS INSURANCE COMPANY, DEVON DUPONT AND ROBERT WOOLFOLK

Judgment Rendered: NOV 01 2013

TMH

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On Appeal from the
18th Judicial District Court,
In and for the Parish of Iberville,
State of Louisiana
Trial Court No. 61983

Honorable Alvin Batiste, Jr., Judge Presiding

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BEFORE: KUHN, HIGGINBOTHAM, AND THERIOT, JJ.

HIGGINBOTHAM, J.

The trial court granted summary judgment in favor of defendants, Iberville Parish School Board ("School Board"), Coregis Insurance Company ("Coregis"), and Devon DuPont ("Coach DuPont"), a teacher and coach employed by the School Board, and dismissed the plaintiffs' tort suit as to those defendants. The trial court also denied the plaintiffs' motion for new trial. The plaintiffs, Hunter Hebert and his parents, Anderson and Lizette Hebert, appeal the trial court's judgments.[1] For the following reasons, we affirm.

BACKGROUND

During normal school hours on January 29, 2004, Hunter Hebert was one of several students who were seniors at Plaquemine High School who were assisting Coach DuPont in preparing the baseball field for practice. After lunch that day, Coach DuPont recruited some of the students and instructed them to wait in the dugout while he took a phone call in the teachers' lounge. While they were waiting at the field, one of the students, Robert Woolfolk, picked up a baseball and either threw or hit it toward Hunter, unintentionally striking Hunter in the face.[2] Hunter's facial injuries were so severe that he needed stitches for lacerations to his nose and lips, as well as surgery to stabilize his fractured facial bones. According

[1] We note that Hunter Hebert is now an adult, but at the time of his injury, he was under eighteen years of age and considered a minor. Additionally, on our review of the record, we discovered that the plaintiffs appealed the judgment that denied their motion for new trial, rather than the summary judgment that dismissed their claims. A judgment denying a motion for new trial is an interlocutory judgment and is normally not appealable. However, the plaintiffs have clearly challenged the original summary judgment on the merits in their assignments of error, and the judgment denying their motion for new trial expressly references the summary judgment ruling that provided for the dismissal of their claims with prejudice. It is also the established practice of this court, as directed by the Louisiana Supreme Court, to treat the appeal of the denial of a motion for new trial as an appeal of the judgment on the merits, when it is clear from the appellants' brief that they intended to appeal the merits of the case. See **Smith v. Hartford Acc. & Indem. Co.**, 254 La. 341, 223 So.2d 826, 828-829 (1969); **Thomas v. Comfort Center of Monroe, LA, Inc.**, 2010-0494 (La. App. 1st Cir. 10/29/10), 48 So.3d 1228, 1233. Thus, the merits of the summary judgment of July 20, 2012, are properly before us.

[2] Hunter indicated that the ball struck him in the face after it accidentally went off track when Robert threw the ball to another student. Robert's version was different; he indicated that Hunter pitched the ball to him and he hit a line drive that inadvertently hit Hunter in the face. The discrepancy as to how Hunter was actually hit with the ball is not material to the outcome of the summary judgment issue before us.

to Robert, the entire incident was unplanned and spontaneous, and the students' actions had absolutely nothing to do with Coach DuPont's absence. Nevertheless, Hunter and his parents brought suit against the School Board, Coach DuPont, the School Board's insurer, Coregis, (collectively referred to as the "School Board defendants"), and Robert Woolfolk and his parents.[3] Hunter and his parents' claims against the School Board defendants were based in negligence, more specifically, negligent supervision.

On March 17, 2010, the School Board defendants filed a motion for summary judgment, maintaining that the plaintiffs could not prove a breach of any duty owed by the School Board and its employee, Coach DuPont, because the students described the incident as spontaneous and unforeseen, and their decision to play with a baseball was not affected by Coach DuPont's absence. The plaintiffs opposed the motion, arguing that the undisputed lack of Coach DuPont's presence at the time of the incident created a genuine issue of material fact regarding the reasonableness of supervision. After a hearing where the deposition testimony of Coach DuPont, Hunter, and Robert was introduced into evidence, the trial court ruled in favor of the School Board defendants and dismissed the plaintiffs' claims against those defendants. The plaintiffs filed a motion for new trial, which the trial court denied on October 22, 2012. This appeal followed.

DISCUSSION

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. **Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corp.**, 2007-2206 (La. App. 1st Cir. 6/6/08), 992 So.2d 527, 530, writ denied, 2008-1478 (La. 10/3/08), 992 So.2d 1018. The law governing summary judgments is well settled. Louisiana Code of Civil Procedure articles 966 and 967 set forth the guidelines.

[3] The record does not reflect the status of the plaintiffs' claims against the Woolfolk defendants, which are not at issue in this appeal.

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, admissions, and affidavits in the record 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. Code Civ. P. art. 966(B). The initial burden is on the mover to show that there is no genuine issue of material fact in dispute. See La. Code Civ. P. art. 966(C)(2). If the moving party will not bear the burden of proof at trial on the 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. At that point, the nonmoving party must produce factual support sufficient to satisfy his evidentiary burden at trial. La. Code Civ. P. art. 966(C)(2). If the mover has put forth supporting proof, the party opposing summary judgment may not rely upon its pleadings and allegations. To the contrary, the nonmoving party must affirmatively come forward with evidence placing material facts in dispute. La. Code Civ. P. art. 967(B).

Most negligence cases are resolved by employing the duty-risk analysis, which entails five separate elements: (1) whether the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) whether the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) whether the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) whether the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) whether the plaintiff was damaged (the damages element). **Hanks v. Entergy Corp.**, 2006-477 (La. 12/18/06), 944 So.2d 564, 579. A negative answer to any of the inquiries of the duty-risk analysis results in a determination of no liability. **Id.** In this case, the School Board defendants' motion for summary judgment focused upon the absence of factual support for the essential elements of duty, breach of duty, and cause-in-fact. The

threshold issue is whether the School Board defendants owed the plaintiffs a duty, which is a question of law. See **Id**. This issue may be resolved by summary judgment. **Truelove v. Bissic**, 32,883 (La. App. 2d Cir. 3/1/00), 754 So.2d 377, 380, writ denied, 2000-0950 (La. 5/26/00), 762 So.2d 1109.

It is well settled that a school board, through its agents, employees, and teachers, is responsible for *reasonable* supervision over students that is commensurate with the age of the children and attendant circumstances, but it is not obligated to maintain constant surveillance of students in order to discharge its duty to provide adequate supervision. See La. Civ. Code art. 2320; **Wallmuth v. Rapides Parish School Bd.**, 2001-1779 (La. 4/3/02), 813 So.2d 341, 346; **Creekbaum v. Livingston Parish School Bd.**, 2011-1089 (La. App. 1st Cir. 12/21/11), 80 So.3d 771, 773; **Adams v. Caddo Parish School Bd.**, 25,370 (La. App. 2d Cir. 1/19/94), 631 So.2d 70, 73, writ denied, 94-0684 (La. 4/29/94), 637 So.2d 466. Before liability can be imposed upon a school board, there must be proof of negligence in providing supervision and, also, proof of a causal connection between the lack of supervision and the accident. **Adams**, 631 So.2d at 73. Furthermore, injuries resulting from play or horseplay between discerning students, which at some stage may pose an unreasonable risk of harm to the participants, does not automatically render a school board liable. See **Henix v. George**, 465 So.2d 906, 910 (La. App. 2d Cir. 1985). The risk of injury must be reasonably foreseeable, constructively or actually known, and preventable if a requisite degree of supervision had been exercised. **Id.**

In this case, all of the depositions submitted into evidence reveal that the students' actions were sudden, spontaneous, and completely unanticipated. Robert testified in his deposition that the students were not planning on playing baseball when they went out to the baseball field that day, but they were "clowning around," found some baseballs, and decided to play "[j]ust spur of the moment."

Robert also testified that he had never been involved in an incident like this before that particular day, and there was nothing about the coach's presence or lack of presence that influenced the students' decision to play or not play baseball. Hunter's deposition testimony was similar in that he specifically pointed out that the action of playing with the baseball occurred spontaneously while they were waiting for Coach DuPont to come to the field. He also indicated that he did not have time to react to or comprehend a warning to watch out for the ball as it quickly came toward him.

There was no evidence presented that playing baseball was expected or foreseen on the day in question. Coach DuPont's deposition testimony clearly demonstrated that he told two students, Robert and his student aid, Mitchell Kelly, to proceed to the baseball field to do some work on the field, but he instructed the students to wait in the dugout while he took a phone call in the teachers' lounge. When Coach DuPont went out to the baseball field, the students did not tell him about anything that had happened, and Hunter had already left the area to seek medical treatment. Coach DuPont testified that he had no knowledge of how the incident occurred or that it had even happened until later that evening, after school hours. Coach DuPont also testified that he did not know that there were any baseballs left out on the baseball field, that he did not know of anything that would have indicated that an accident could have occurred that day, and that nothing like this particular incident or problems with those particular students had ever occurred before. Additionally, Coach DuPont stated that the students did not give him any indication that they were going to do anything other than sit in the dugout as he had instructed them to do.

The record before us does not contain evidence tending to show that Coach DuPont or the School Board had any indication that this unfortunate accident would occur. Further, there is no dispute of fact concerning the unforeseen

spontaneity of the students' actions in "clowning around" and deciding to play baseball while waiting for Coach DuPont at the baseball field. Absent constant supervision, which is not required under the jurisprudence of this state, the spontaneous nature of the students' unforeseeable actions could not have been prevented.[4] There is clearly no issue of material fact that supports a finding that a lack of supervision was a cause-in-fact of Hunter's unforeseeable injury or that there was any breach of the duty to reasonably supervise the students in this case. Thus, the trial court's grant of summary judgment in favor of the School Board defendants was proper, and the trial court did not err in denying the plaintiffs' motion for new trial.[5]

CONCLUSION

For the stated reasons, we affirm the judgments of the trial court granting summary judgment in favor of the School Board defendants and denying the plaintiffs' motion for new trial. All costs of this appeal are assessed to the plaintiffs, Hunter Hebert and his parents, Anderson and Lizette Hebert.

AFFIRMED.

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[4] Because the law does not require constant supervision, we do not consider the elementary school faculty handbook offered by the plaintiffs to be sufficient evidence to establish such a duty. For the same reason, we decline analysis of the relevancy of the evidence as it pertains to high school faculty outside of the classroom.

[5] The basis for the plaintiffs' motion for new trial was that the summary judgment was contrary to the law and evidence. Our review of the evidence in the record reveals that the summary judgment did not represent a miscarriage of justice. See La. Code Civ. P. art. 1972(1); **Burke v. Baton Rouge Metro Airport**, 97-0947 (La. App. 1st Cir. 5/15/98), 712 So.2d 1028, 1031. Accordingly, the trial court did not abuse its wide discretion in denying the motion for new trial. **Burke**, 712 So.2d at 1031.