NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 0824

LINDA R. KENNETT

VERSUS

DEPARTMENT OF PUBLIC WORKS, THROUGH THE CITY OF BOGALUSA, JAMES HALL IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS, XYZ EMPLOYEE(S), AND XYZ INSURANCE COMPANY

Judgment Rendered: December 27, 2013

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
Docket Number 102,596

The Honorable Allison H. Penzato, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, J.J.

Crain, J. concurs and assigns reasons

WHIPPLE, C.J.

This matter is before us on appeal by the plaintiff, Linda R. Kennett, from a judgment of the trial court denying her motion for partial summary judgment and granting summary judgment in favor of the defendants, the Department of Public Works through the City of Bogalusa.

For the reasons that follow, we reverse in part, affirm in part, and remand.

FACTS AND PROCEDURAL HISTORY

On April 7, 2011, Kennett exited the Bogalusa City Hall building, where she had been paying her water bill. While walking to her car, she purportedly tripped and fell on a sidewalk located directly outside of City Hall. On May 12, 2011, Kennett filed a petition for damages contending that the area of the sidewalk where she tripped and fell was uneven, and thus defective, and that, as a result of her fall, she sustained injuries to her face, wrists, and teeth. Named as defendants were the Department of Public Works through the City of Bogalusa ("the City") and James Hall, the Director of the Department of Public Works. By first and second supplemental and amending petitions, Kennett also named Risk Management, Inc. ("RMI") and Louisiana Municipal Risk Management Agency, Group Self Insurance Fund for Public Liability Risk Sharing as defendants.

RMI filed a motion to dismiss, contending: (1) that the City is a member of an interlocal risk management agency and participates in an intergovernmental agreement pursuant to LSA-R.S. 33:1343, and (2) that RMI is the administrator of the self-insurance fund. RMI contended that pursuant to LSA-R.S. 33:1345, an interlocal risk management agency is not an insurance company or an insurer under the laws of this state, and thus, was not subject to direct action as an insurer. Thus, RMI contended, as the third-party administrator of the self-insurance fund, it was not a proper defendant in this suit. The trial court granted the motion, dismissing Kennett's claims against RMI.

Louisiana Municipal Risk Management Agency ("LMRMA") likewise responded by filing an exception of no right of action and request for sanctions pursuant to LSA-C.C.P. art. 863. Therein, LMRMA contended that pursuant to LSA-R.S. 33:1345, LMRMA is unmistakably not an insurance company or insurer, that its actions do not constitute participation in an insurance business, and thus, no direct action existed against it under Louisiana's Direct Action Statute.[1] LMRMA further contended that Kennett/Kennett's attorney were made aware of this at a mediation on January 4, 2012, and also via the pending motion to dismiss filed by RMI, but, despite having knowledge of the statutory bar to recovery, Kennett/Kennett's attorney filed a second amending and supplemental petition naming LMRMA as a defendant in these proceedings. After hearing the matter, by separate judgments both signed on May 22, 2012, the trial court denied LMRMA's motion for sanctions and granted LMRMA's exception of **no cause of action**.[2]

In the interim, on March 8, 2012, Kennett filed a motion for sanctions due to spoliation. Therein, she contended that at some point between September 22, 2011 and November 29, 2011, the City had repaired the section of the sidewalk where she had fallen. Kennett contended that she had retained Darryl Fussell,

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[1]The Direct Action Statute, LSA-R.S. 22:1269, grants a procedural right of action against an insurer where the plaintiff has a substantive cause of action against the insured. The Direct Action Statute was enacted to give special rights to tort victims. In the absence of the Direct Action Statute, a plaintiff would have no right of action against an alleged tortfeasor's liability insurer because the obligation between the plaintiff and the alleged tortfeasor is delictual in nature, and the plaintiff has no contractual relationship with the tortfeasor's insurer. Soileau v. Smith True Value and Rental, 2012-1711 (La. 6/28/13), ___ So. 3d ___, ___.

[2]For purposes of determining what is precisely before us for review, we note that while LMRMA's exception is titled "no right of action," the judgment maintains an exception of "no cause of action." Moreover, we note that in briefs to this court, the parties make interchangeable references in brief to the exception of "no right of action" and of "no cause of action" when discussing the exception filed by LMRMA. The record does not contain a copy of the minute entry or transcript of the April 26, 2012 hearing on the exception, and there is only one exception (of **no right of action**) filed by LMRMA of record in this matter. In any case, because the trial court may notice an exception of no cause of action on its own motion, see LSA-C.C.P. art. 927(B), we will consider and review the propriety of the court's ruling on an exception of **no cause of action** as granted by the trial court.

P.E. of Arrow Engineering & Consulting for the purpose of conducting and performing an analysis of the subject premises, but that he was unable to do so because the premises had been altered. Contending that the defendants had intentionally destroyed significant evidence, which presumes that the structure of the sidewalk was damaging to their defense and additionally suggests that the sidewalk was defective, Kennett also sought to have the court apply an adverse presumption that the evidence would have been detrimental to the City of Bogalusa's case. On May 22, 2012, the trial court signed a judgment denying Kennett's motion for sanctions.

On August 22, 2012, the City filed a motion for summary judgment contending that Kennett could not establish that the sidewalk crack at issue herein created an unreasonable risk of harm, which was necessary to prevail on a liability claim against public entities under LSA-R.S. 9:2800. Thus, the City sought dismissal of Kennett's claims with prejudice. On September 26, 2012, Kennett likewise filed a motion for partial summary judgment as to the City's liability under LSA-R. S. 9:2800.

The cross-motions for summary judgment were heard by the trial court on October 22, 2012,[3] and November 29, 2012. At the conclusion of the hearings, the trial court issued oral reasons, denying Kennett's motion for partial summary judgment, maintaining the City's motion for summary judgment, and dismissing Kennett's case with prejudice. The trial court signed a written judgment to that effect on November 29, 2012.

Kennett now appeals, contending that the trial court erred in: (1) maintaining LMRMA's exception of no cause of action; (2) denying Kennett's motion for sanctions due to spoliation of evidence; (3) granting the City's motion

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[3]The record before us on appeal also does not contain a transcript of the October 22, 2012 hearing.

for summary judgment; and (4) denying Kennett's motion for partial summary judgment.

DISCUSSION

Assignment of Error Number One

In her first assignment of error, Kennett contends that the trial court erred in maintaining the exception of no cause of action urged by LMRMA. At the outset, we will address the City's contention that Kennett's appeal of the trial court's grant of LMRMA's exception is untimely, and thus, not properly before us for review.

The trial court maintained the exception in favor of LMRMA by judgment dated May 22, 2012, which provides as follows:

> **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the exception of no cause of action on behalf of LMRMA is hereby granted, and costs of this proceeding to be cast against the plaintiff, for reasons orally decreed.

Although the judgment maintained LMRMA's exception and assessed costs, it did not dismiss a party from the litigation or dismiss any of Kennett's claims.

This Court's jurisdiction extends to final judgments. See LSA-C.C.P. art. 2083. A judgment must be precise, definite, and certain. Vanderbrook v. Coachmen Industries, Inc., 2001-0809 (La. App. 1st Cir. 5/10/02), 818 So. 2d 906, 913. A final appealable judgment must contain decretal language, and it must name the party in favor of whom the ruling is ordered, the party against whom the ruling is ordered, and the relief that is granted or denied. Johnson v. Mount Pilgrim Baptist Church, 2005-0337 (La. App. 1st Cir. 3/24/06), 934 So. 2d 66, 67. A judgment that grants an exception of no cause of action, yet fails to contain decretal language, cannot be considered as a final judgment for purpose of an immediate appeal. See Johnson v. Mount Pilgrim Baptist Church, 934 So. 2d at

67. Because the May 22, 2012 judgment does not contain proper decretal language, it is defective and cannot be considered as a final appealable judgment for purposes of an immediate appeal. See LSA-C.C.P. art. 1915(B).

However, as this Court has previously held, when an unrestricted appeal is taken from a final judgment, the appellant is entitled to seek review of all adverse interlocutory judgments prejudicial to him, in addition to the review of the final judgment. Judson v. Davis, 2004-1699 (La. App. 1st Cir. 6/29/05), 916 So. 2d 1106, 1112-1113, writ denied, 2005-1998 (La. 2/10/06), 924 So. 2d 167. Thus, since plaintiff's entire suit was ultimately dismissed by the trial court in the November 29, 2012 appealable judgment before us on review, she is entitled to seek review of all adverse interlocutory judgments prejudicial to her. As such, her challenge to the trial court's granting of LMRMA's exception of no cause of action is properly before us in this appeal.

With regard to Kennett's contention that the trial court erred in maintaining LMRMA's exception, we note that the objection that a petition fails to state a cause of action is properly raised by the peremptory exception. LSA-C.C.P. art. 927(A)(5). The purpose of the peremptory exception raising the objection of no cause of action is to test the legal sufficiency of a petition by determining whether the law affords a remedy on the facts alleged in the pleading. Ourso v. Wal-Mart Stores, Inc., 2008-0780 (La. App. 1st Cir. 11/14/08), 998 So. 2d 295, 298, writ denied, 2008-2885 (La. 2/6/09), 999 So. 2d 785.

Generally, no evidence may be introduced to support or controvert the objection that the petition fails to state a cause of action. LSA-C.C.P. art. 931. However, as set forth in City National Bank of Baton Rouge v. Brown, 599 So. 2d 787, 789 (La. App. 1st Cir.), writ denied, 604 So. 2d 999 (La. 1992), the jurisprudence has recognized an exception to this rule, which allows the court to

consider evidence which is admitted without objection to enlarge the pleadings. Treasure Chest Casino, L.L.C. v. Parish of Jefferson, 96-1010 (La. App. 1st Cir. 3/27/97), 691 So. 2d 751, 754, writ denied, 97-1066 (La. 6/13/97), 695 So. 2d 982. Otherwise, the exception is triable on the face of the pleadings, and, for the purposes of determining the issues raised by the exception, the well-pleaded facts in the petition must be accepted as true. The court must determine if the law affords plaintiff a remedy under those facts. Stroscher v. Stroscher, 2001-2769 (La. App. 1st Cir. 2/14/03), 845 So. 2d 518, 523. Any doubts are resolved in favor of the sufficiency of the petition. Stroscher v. Stroscher, 845 So. 2d at 523.

The burden of demonstrating that a petition fails to state a cause of action is upon the mover. Foti v. Holliday, 2009-0093 (La. 10/30/09), 27 So. 3d 813, 817. In reviewing a trial court's ruling sustaining an exception of no cause of action, appellate courts conduct a *de novo* review, because the exception raises a question of law, and the trial court's decision is based only on the sufficiency of the petition. Torbert Land Company, L.L.C. v. Montgomery, 2009-1955 (La. App. 1st Cir. 7/9/10), 42 So. 3d 1132, 1135, writ denied, 2010-2009 (La. 12/17/10), 51 So. 3d 16.

In Kennett's second amending and supplemental petition naming LMRMA as a defendant herein, she alleged the following:

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> Based upon all available information and belief obtained through discovery to date, there is coverage available to the City of Bogalusa for the incident in question. The funds are administered by Risk Management Incorporated as the service agent for the Louisiana Municipal Risk Management Agency which issued a Declaration of Indemnification to the City of Bogalusa which was in effect at the time of the subject incident and said **Policy bearing Number 100-0330-00013730**. Accordingly, the said entity is solidarily liable for the damages caused by its participant as set forth herein.

The exception urged by LMRMA sought dismissal of Kennett's claims against it on the grounds that it was not an insurer pursuant to LSA-R.S. 33:1345, and therefore no direct action existed against it under LSA-R.S. 22:1269.

Kennett argues on appeal that she named LMRMA as a party defendant to the litigation "just as any plaintiff would name all solidary obligors as party defendants." Kennett argues that "If LMRMA is responsible for any and all payments rendered against Bogalusa up to the policy limits found in the above-referenced indemnification agreement, then LMRMA must be a party to the lawsuit or else Ms. Kennett is faced with the unenviable position of obtaining a judgment against Bogalusa, and then filing a separate action to obtain payment of the judgment from a responsible third party indemnitor." Thus, Kennett contends, LMRMA is a proper defendant herein.

The City counters that LMRMA undisputedly was created pursuant to the Local Governmental Subdivision Self Insurance Act of 1979, codified in LSA-R.S. 33:1341, et seq. As such, the City maintains that Kennett cannot proceed directly against LMRMA, since, pursuant to LSA-R.S. 33:1345, LMRMA is not an insurer or an insurance company. We agree. Pursuant to LSA-R.S. 33:1345:

> An interlocal risk management agency is not an insurance company or an insurer under the laws of this state and the development and administration by such agency of one or more group self insurance funds shall not constitute doing an insurance business. Intergovernmental agreements providing for the creation and maintenance of an interlocal risk management agency shall not be deemed to constitute insurance as defined by R.S. 22:46, nor shall the interlocal risk management agency or the development of a group self insurance fund be subject to the provisions of Title 22, Chapter 1, of the Louisiana Revised Statutes of 1950.

By these clear, express and unequivocal terms, interlocal risk management and group self-insurance funds for various Louisiana municipalities and political subdivisions are unmistakably not insurance

companies or insurers, their actions do not constitute participation in an insurance business, and they are not subject to the provisions of Title 22, Chapter 1 of the Louisiana Revised Statutes. LSA-R.S. 33:1345; Tugger v. Continental Casualty Insurance Company, 27,047 (La. App. 2nd Cir. 6/21/95), 658 So. 2d 769, 771, writs denied, 95-1829, 95-1868 (La. 11/3/95), 661 So. 2d 1380; Logan v. Hollier, 424 So. 2d 1279, 1281 (La. App. 3rd Cir. 1982); Lonzo v. Town of Marksville, 430 So. 2d 1088, 1094 (La. App. 3rd Cir. 1983), writs denied, 438 So. 2d 573, 576 (La. 1983); see and compare Basco v. Dorothy R. Racine Trucking, Incorporated, 97-2740 (La. App. 1st Cir. 12/28/98), 725 So. 2d 606, 608-609, writ denied, 99-0263 (La. 3/19/99), 740 So. 2d 119. Thus, inasmuch as LMRMA is not an insurance company, nor Kennett a party to the indemnity agreement between the City and LMRMA, she cannot proceed directly against LMRMA.

On *de novo* review, we find the trial court correctly dismissed Kennett's claims against LMRMA.

This assignment of error lacks merit.

Assignment of Error Number Two

In her second assignment of error, Kennett contends that the trial court erred in denying her motion for sanctions due to spoliation of evidence and for entry of an adverse presumption.[4]

The theory of "spoliation" of evidence refers to an intentional destruction of evidence for the purpose of depriving opposing parties of its use. Clavier v. Our Lady of the Lake Hospital, Inc., 2012-0560 (La. App. 1st Cir. 12/28/12), 112 So. 3d 881, 885, writ denied, 2013-0264 (La. 3/15/13), 109 So. 3d 384. A

[4]We again note that although an interlocutory judgment, such as a denial of a motion for sanctions, is generally not appealable, it is subject to review on appeal when an appealable judgment has been rendered in the same case. See LSA-C.C.P. art. 1841; Armelise Planting Company v. Liberty Oil and Gas Corporation, BP, 2005-1250 (La. App. 1st Cir. 6/9/06), 938 So. 2d 178, 179; Ballard v. Waitz, 2006-0307 (La. App. 1st Cir. 12/28/06), 951 So. 2d 335, 338, writ denied, 2007-0846 (La. 6/15/07), 958 So. 2d 1193.

plaintiff asserting a claim for spoliation of evidence must allege that the defendant intentionally destroyed evidence. Allegations of negligent conduct are insufficient. Barthel v. State, Department of Transportation and Development, 2004-1619 (La. App. 1st Cir. 6/10/05), 917 So. 2d 15, 20. Moreover, the presumption that the evidence which has been destroyed is detrimental to the defendant's case is not applicable when the failure to produce the evidence is adequately explained. Randolph v. General Motors Corporation, 93-1983 (La. App. 1st Cir. 11/10/94), 646 So. 2d 1019, 1027, writ denied, 95-0194 (La. 3/17/95), 651 So. 2d 276. The obligation or duty to preserve evidence arises from the foreseeability of the need for the evidence in the future. Dennis v. Wiley, 2009-0236 (La. App. 1st Cir. 9/11/09), 22 So. 3d 189, 195, writ denied, 2009-2222 (La. 12/18/09), 23 So. 3d 949.

In her motion for sanctions due to spoliation of evidence, Kennett contended that after she filed suit in this matter on May 12, 2011, without notice to her, and at sometime between September 22, 2011, and November 29, 2011, the portion of the sidewalk where the accident occurred was repaired. Kennett further contended that the defendants intentionally destroyed significant evidence, which presumes that the structure of the sidewalk was damaging to their defense and additionally suggests that the sidewalk was defective. Although Kennett acknowledges that she was able to obtain photographs of the portion of the sidewalk where she fell, she contends that she had retained a professional engineering firm for the purpose of conducting and performing an analysis of the premises, and that since the premises has been altered by the defendants, she was prevented from conducting an analysis.

The City counters that plaintiff failed to set forth any evidence that would tend to show the City's sidewalk repair was for the purpose of destroying evidence. The City contends that at no time did plaintiff request that the City

keep the sidewalk in the same condition that it was at the time of her fall, or otherwise advise the City that she had retained an expert for the purpose of conducting an analysis. Further, the City contends that plaintiff cannot rightfully argue that the City should be assessed with an adverse presumption where plaintiff fell in April of 2011, filed suit in May of 2011, and then waited nearly six months to have the sidewalk inspected. The City argues that in repairing the sidewalk, it was taking precautionary measures to prevent future possible injuries to the public. Thus, the City contends, Kennett's motion was properly denied, as the record reveals no intentional destruction of evidence for the purpose of depriving the opposing party of its use.

On review, we agree. The record contains no evidence to support a conclusion that the City intentionally destroyed evidence to deprive plaintiff of its use. Furthermore, the presumption of spoliation is not applicable where, as here, the failure to produce the evidence is adequately explained and the City had no indication Kennett would need the evidence in the future. See Randolph v. General Motors Corporation, 646 So. 2d at 1027 and Dennis v. Wiley, 22 So. 3d at 195.

This assignment lacks merit.

Assignments of Error Numbers Three and Four

In her final assignments of error, Kennett contends that the trial court erred in granting the City's motion for summary judgment and in denying her motion for partial summary judgment as to the City's liability.

In the instant case, the trial court was presented with cross-motions for summary judgment. In the November 29, 2012 judgment, the trial court denied plaintiff's motion for partial summary judgment, but granted the City's motion for summary judgment. Although the denial of a motion for summary judgment is generally non-appealable, see LSA-C.C.P. art. 968, because the same issues

lie at the heart of the cross-motions for summary judgment, review of the opposing motions is appropriate. See Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority, 2007-0107 (La. App. 1st Cir. 2/8/08), 984 So. 2d 72, 78, n.1.

A motion for summary judgment is a procedural device used to avoid a full scale trial when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. All Crane Rental of Georgia, Inc. v. Vincent, 2010-0116 (La. App. 1st Cir. 9/10/10), 47 So. 3d 1024, 1027, writ denied, 2010-2227 (La. 11/19/10), 49 So. 3d 387. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories, and admissions, together with the affidavits, if any, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact, and that the movant is entitled to summary judgment as a matter of law. LSA-C.C.P. art. 966(B)(2).[5]

A summary judgment may be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at that time. LSA-C.C.P. art. 966(F)(1). Evidence cited in and attached to the motion for summary judgment or memorandum filed by an adverse party is deemed admitted for purposes of the motion for summary judgment unless excluded in response to an objection made in accordance with LSA-C.C.P. art. 966(F)(3). Only evidence admitted for purposes of the motion for summary judgment may be considered by the court in its ruling on the motion. LSA-C.C.P. art. 966(F)(2).

[5]Louisiana Code of Civil Procedure article 966 was recently amended by Acts 2013, No. 391, § 1, to provide for submission and objections to evidence for motions for summary judgment. These procedural amendments to LSA-C.C.P. art. 966 are not implicated in the issues presented on appeal.

The burden of proof on a motion for summary judgment 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. LSA-C.C.P. art. 966(C)(2).

Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. LSA-C.C.P. art. 967(B); Pugh v. St. Tammany Parish School Board, 2007-1856 (La. App. 1st Cir. 8/21/08), 994 So. 2d 95, 97 (on rehearing), writ denied, 2008-2316 (La. 11/21/08), 996 So. 2d 1113. When a motion for summary judgment is made and supported as provided above, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B).

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. Sanders v. Ashland Oil, Inc., 96-1751 (La. App. 1st Cir. 6/20/97), 696 So. 2d 1031, 1035, writ denied, 97-1911 (La. 10/31/97), 703 So. 2d 29. 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. Christakis v. Clipper Construction, L.L.C., 2012-1638 (La. App. 1st Cir. 4/26/13), 117 So. 3d 168, 170, writ denied, 2013-1913 (La. 11/8/13), ___ So. 3d ___."

In the instant case, the City of Bogalusa undisputedly is a public entity. In order to hold a public entity liable under LSA-R.S. 9:2800(C), a plaintiff must prove the following: (1) custody or ownership of the defective thing by the public entity, i.e., garde; (2) the defect created an unreasonable risk of harm; (3) the public entity had actual or constructive notice of the defect; (4) the public entity failed to take corrective action within a reasonable time; and (5) causation. Chambers v. Village of Moreauville, 2011-898 (La. 1/24/12), 85 So. 3d 593, 597. The issue raised by both the City and Kennett on summary judgment is whether the sidewalk deviation herein created an unreasonable risk of harm.[6]

The Supreme Court has applied the risk-utility balancing test to determine whether a defect in a sidewalk creates an unreasonable risk of harm, and has determined there is no fixed rule in determining whether a defect in a sidewalk is unreasonably dangerous. Chambers v. Village of Moreauville, 85 So. 3d at 598, citing Boyle v. Board of Supervisors, Louisiana State University, 96-1158 (La. 1/14/97), 685 So. 2d 1080, 1083. Instead, the facts and surrounding circumstances of each case control. However, the test applied requires the consideration of whether or not the sidewalk was maintained in a reasonably safe condition for persons exercising ordinary care and prudence. Therefore, although municipalities have a duty to maintain sidewalks in a reasonably safe condition, they are not insurers of the safety of pedestrians and

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[6]The parties also do not dispute that the City owned the sidewalk and was responsible for its maintenance, and that the City had prior notice of the cracks in the sidewalk area at issue herein.

are not required to maintain sidewalks in perfect condition. To be liable for damages caused by a defect, the defect must be dangerous or calculated to cause injury. Moreover, while a pedestrian traveling down a sidewalk is not required to exercise the care required in traversing a jungle, he nonetheless must exercise ordinary care, keeping in mind that irregularities exist in sidewalks. Chambers v. Village of Moreauville, 85 So. 3d at 598.

In support of its motion for summary judgment, the City presented: (1) the first page of Kennett's petition for damages; (2) Kennett's deposition testimony; (3) photographs of the sidewalk area; (4) the deposition testimony of James Hall, the Director of Public Works for the City of Bogalusa; (5) the deposition testimony and affidavit of Elbert Buckley; (6) a medical report from Dr. Jacobo W. Chodakiewitz; and (7) photographs of Kennett's injuries.

The City contends that, under the evidence it presented, the trial court's decision to grant summary judgment in its favor was appropriate, where the area containing the 1 1/2 inch sidewalk crack had been in that condition for at least 16 years, the City had no prior complaints and was aware of no prior accidents, and that Kennett concedes that the sidewalk in question was the sidewalk located directly outside of Bogalusa City Hall, and was arguably one of the most used sidewalks in all of Bogalusa. In support, the City relies on Chambers, where, under the facts set forth therein, the Supreme Court reversed the trial court's finding of 100% liability to the Village and determined that a 1 1/2 inch deviation in a sidewalk did not present an unreasonable risk of harm, where plaintiff was aware of the general condition of the sidewalk and, at the time of the accident, was not looking down, but instead, was looking straight ahead talking to someone. Chambers v. Village of Moreauville, 85 So. 3d at 601-602.

In support of her partial motion for summary judgment, Kennett offered: (1) her own affidavit; (2) the deposition testimony of James Hall, with attached photos of the sidewalk area; (3) the deposition testimony of Jerry Bailey, the Director of Administration for the City of Bogalusa; (4) the affidavit of Kennett's expert, Darrell Fussell, P.E. of Arrow Engineering and Consulting, Inc. Civil and Structural Engineering; (5) her deposition; (6) the affidavit of Elbert Buckley; and (7) the City's answers to interrogatories and responses to requests for production of documents.

In deposition testimony, Kennett stated that at the time of the alleged incident herein, she had exited City Hall and was walking on the sidewalk, heading in the direction of her car. She testified that she had receipts in her hand and was looking down and watching where she was going, when someone that she did not recognize called for her from across the street. Kennett stated that when she started to wave at them "to notice them," she tripped and fell. The photographs introduced by Kennett show an area with cracks in the concrete sidewalk of approximately 1 1/2 inches in height.

The deposition testimony of James Hall, the Director of Public Works for the City of Bogalusa, was that in the fifteen years he had been employed by the City, he had not received any complaints about the sidewalk area in front of City Hall where Kennett contends she fell. He had seen that particular area of sidewalk and testified it was easily observable to him and any other pedestrians. He stated that his department followed the guidelines of the International Building Code ("IBC").

Darrell Fussell, a professional engineer, stated that he understood Kennett fell in the area of the "substandard sidewalk" depicted in the photos and that the sidewalk area had recently been repaired. He further stated that most trip-and-fall accidents are caused by unexpected changes in the walking

surfaces, and that the unlevel and cracked area in the sidewalk certainly created an unexpected change. He found it "significant" that the substandard sidewalk area was adjacent to a handicap parking area marked for handicap access. Fussell noted that the Americans with Disabilities Act ("ADA") provided guidelines for the proper construction of sidewalks and required local and state governments to prioritize the installation of curb ramps on sidewalks serving governmental facilities. After setting forth several provisions of those guidelines, Fussell concluded that it was clear that the substandard area of sidewalk created a hazard in an area of public access and that the area of substandard concrete was not properly constructed to meet ADA standards.

On *de novo* review of the record before us, we are unable to say that either party established a right to judgment in its favor as a matter of law. At a minimum, we find that contrary to the trial court's ruling, Fussell's expert opinion, as set forth in his affidavit, clearly discloses that genuine issues of fact remain, precluding summary judgment regarding the City's liability. See MSOF Corporation v. Exxon Corporation, 2004-0988 (La. App. 1st Cir. 12/22/05), 934 So. 2d 708, 721, writ denied, 2006-1669 (La. 10/6/06), 938 So. 2d 78.

In reaching that conclusion, we are obligated to consider whether a defect creates an unreasonable risk of harm herein by applying the guiding precepts recently set forth in Broussard v. State, Office of State Buildings,[7] 2012-1238

[7]In Broussard, a UPS delivery driver sustained injuries when he admittedly and voluntarily chose to attempt to traverse a building's visibly misaligned elevators, while maneuvering a loaded dolly (weighing approximately three hundred pounds), by attempting to push the dolly over a one and one-half to three-inch elevation caused by the elevator's misalignment. After his attempt was unsuccessful, he turned around, stepped backwards into the elevator, and attempted to pull the dolly over the elevation. "[T]he inertia created by the pull caused him to lose control of the load and forcefully pushed him into the back wall of the elevator," causing him to sustain a serious back injury. The victim sued, and after a jury trial, the jury awarded him approximately one and one-half million dollars, subject to reduction by the 38% fault the jury assigned to the victim. Broussard v. State, Office of State Buildings, 113 So. 3d at 180-181.

(La. 4/5/13), 113 So. 2d 175, 183-185, where the Supreme Court held, as follows:

> [T]he question of whether a defect presents an unreasonable risk of harm [i]s "a disputed issue of mixed fact and law or policy that is peculiarly a question for the jury or trier of the facts." Reed v. Wal-Mart Stores, Inc., 97-1174, p. 4 (La. 3/4/98), 708 So. 2d 362, 364 (quoting Tillman v. Johnson, 612 So. 2d 70 (La. 1993) (per curiam)). As a mixed question of law and fact, it is the fact-finder's role—either the jury or the court in a bench trial—to determine whether a defect is unreasonably dangerous. Thus, whether a defect presents an unreasonable risk of harm is "a matter wed to the facts" and must be determined in light of facts and circumstances of each particular case. *E.g.*, Dupree v. City of New Orleans, 99-3651, pp.13-14 (La. 8/31/00), 765 So. 2d 1002, 1012 (citation omitted); Reed, 97-1174 at p. 4, 708 So. 2d at 364.
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> In order to avoid further overlap between the jury's role as fact-finder and the judge's role as lawgiver, we find the analytic framework for evaluating an unreasonable risk of harm is properly classified as a determination of whether a defendant breached a duty owed, rather than a determination of whether a duty is owed *ab initio.* It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. *E.g.*, Brewer v. J.B. Hunt Transp., Inc., 09-1408, p. 14 (La. 3/16/10), 35 So. 3d 230, 240 (citing Mundy v. Dep't of Health and Human Res., 620 So. 2d 811, 813 (La. 1993)). The judge decides the former, and the fact-finder—judge or jury—decides the latter. "In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of 'no liability' or 'no breach of duty.' " Pitre, 95-1466 at p. 22, 673 So. 2d at 596 (Lemmon, J., concurring). Because the determination of whether a defect is unreasonably dangerous necessarily involves a myriad of factual considerations, varying

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On appeal, this Court, reversed, finding the jury's conclusion that the elevator offset created an unreasonable risk of harm was erroneous on the basis that because the defect was open and obvious, and thus, did not present a serious risk of harm. In doing so, this court noted that the victim could have avoided his injuries by acting more reasonably under the circumstances. Broussard v. State, Office of State Buildings, under Division of Administration, 2011-0479 (La. App. 1st Cir. 3/30/12)(unpublished opinion). That opinion, based primarily on a line of jurisprudence (emerging from the circuit courts as well as the Supreme Court), focused on the degree to which a dangerous condition should be observed by a potential victim in determining whether a duty was owed. Broussard v. State, Office of State Buildings, Under Division of Administration, 2011-0479 at pp. 7-8 (Whipple, J., concurring). The Supreme Court granted certiorari (Broussard v. State, Office of State Buildings, 2012-1238 (La. 10/26/12), 99 So. 3d 50), "to further examine, under the manifest error doctrine, whether a defective condition is more properly considered an open and obvious hazard where no duty is owed, rather than an unreasonably dangerous condition where comparative fault is applicable." Broussard v. State, Office of State Buildings, 113 So. 3d at 179.

> from case to case, Reed, 97-1174 at p. 4, 708 So. 2d at 364, the cost-benefit analysis employed by the fact-finder in making this determination is more properly associated with the breach, rather than the duty, element of our duty-risk analysis. *See* Maraist, et. al., *Answering a Fool*, 70 LA. L.REV. at 1120 ("[O]ne might persuasively argue that the cost-benefit analysis used to determine whether a risk is reasonable or unreasonable is the heart of the breach decision and is one that should be conducted by the fact-finder, rather than by the court...."). Thus, while a defendant only has a duty to protect against unreasonable risks that are not obvious or apparent, the fact-finder, employing a risk-utility balancing test, determines which risks are unreasonable and whether those risks pose an open and obvious hazard. In other words, the fact-finder determines whether defendant has breached a duty to keep its property in a reasonably safe condition by failing to discover, obviate, or warn of a defect that presents an unreasonable risk of harm.

(Footnotes omitted.)

Broussard was recently interpreted by this Court in Currie v. Scottsdale Indemnity Company, 2012-1666 (La. App. 1st Cir. 8/26/13), 123 So. 3d 742, where this Court was called to review cross motions for summary judgment on whether a sidewalk with an uneven depression causing rain water to accumulate created an unreasonable risk of harm. After discussing the precepts in Broussard as set forth above, this Court found that the trial court, which granted summary judgment in favor of the defendant based on a finding that the sidewalk defect was an open and obvious defect, erred, stating as follows:

> [W]hether . . . the condition presented an unreasonable risk of harm, under the particular facts and circumstances of this case, are all genuine issues of material fact remaining and properly determined by the trier of fact employing a duty risk analysis. And, again, guided by the supreme court's *Broussard* opinion, this determination will include inquiry regarding the social utility of the sidewalk at issue, the likelihood and magnitude of harm, including whether it was an open and obvious condition, the cost of preventing the harm, and the nature of the plaintiff's activity, including any comparative fault that may attach to the plaintiff's conduct.

Currie v. Scottsdale Indemnity Company, 123 So. 3d at 747.

Thus, whether a defect presents an unreasonable risk of harm is a determination of fact that takes into consideration the utility of the complained-

of condition; the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; the cost of preventing the harm; and the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature. Broussard, 113 So. 3d at 184. This determination of fact is not proper for summary judgment. Currie v. Scottsdale Indemnity Company, 123 So. 3d at 746.

To the extent that the City relies on Chambers v. City of Moreauville, we note that the procedural posture of Chambers is distinguishable from the instant case in that the factual findings and determinations therein were rendered after a trial on the merits, not on a motion for summary judgment. Thus, while Chambers provides guidance to the trier of fact on the merits, under Broussard and Currie, we are constrained to find that the analysis of whether an open and obvious defect presents an unreasonable risk of harm is now held to involve a determination of fact, that must take into consideration the victim's own comparative fault, among other factors; and accordingly, is not appropriate for summary judgment.[8] See Currie v. Scottsdale Indemnity Company, 123 So. 3d at 746.

Accordingly, we find the trial court erred in granting summary judgment in favor of the City and in dismissing plaintiff's case with prejudice.

CONCLUSION

For the above and foregoing reasons, the portion of the November 29, 2012 judgment of the trial court granting the City's motion for summary judgment is

[8]In Broussard, the Supreme Court cautioned specifically that its "opinion does not contain a bright-line rule because the issue has to be examined on a case-by-case, fact-driven inquiry." Broussard v. State, Office of State Buildings, 113 So. 3d at 181, n.3. Moreover, we are compelled to note that the Broussard court distinguished the "significant and likely risk of harm" presented by a malfunctioning elevator, noting "we are not addressing an ordinary trip-and-fall case, wherein we generally state pedestrians must exercise ordinary care, keeping in mind irregularities frequently exist in sidewalks." Broussard v. State, Office of State Buildings, 113 So. 3d at 187 (citing Chambers v. Village of Moreauville, 85 So. 3d at 598). Nonetheless, under this court's internal rules, we are obligated to follow this circuit's ruling in Currie, absent en banc consideration.

hereby reversed. The portion of the November 29, 2012 judgment denying Kennett's partial motion for summary judgment is hereby affirmed. This matter is remanded to the trial court for further proceedings.

Costs of this appeal in the amount of $3,637.25 are assessed equally to the City of Bogalusa and Linda R. Kennett.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

LINDA R. KENNETT

VERSUS

DEPARTMENT OF PUBLIC WORKS, THROUGH THE CITY OF BOGALUSA, JAMES HALL IN HIS CAPACITY AS DIRECTOR OF THE DEPARTMENT OF PUBLIC WORKS, XYZ EMPLOYEE(S), AND XYZ INSURANCE COMPANY

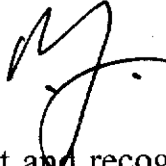
FIRST CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

2013 CA 0824

CRAIN, J., concurs.



I concur in the result and recognize that the majority's opinion is in accord with *Currie v. Scottsdale Indemnity Company*, 12-1666 (La. App. 1 Cir. 8/26/13), 123 So. 3d 742; however, I write separately because I respectfully disagree with certain statements contained in *Currie*, which were unnecessary for that result, but which are repeated in the majority opinion herein and misconstrue the holding of *Broussard v. State ex rel. Office of State Buildings*, 12-1238 (La. 4/5/13), 113 So. 3d 175.

Citing *Currie*, the majority opinion states that "under *Broussard* and *Currie*, we are constrained to find that the analysis of whether an open and obvious defect presents an unreasonable risk of harm is now held to involve a determination of fact, that must take into consideration the victim's own comparative fault, among other factors; and accordingly, is not appropriate for summary judgment." *Kennett v. Department of Public Works*, 2013 CA 0824, *___ (La. App. 1 Cir. ___, 2013) (unpublished opinion). I respectfully submit that this statement is an erroneous interpretation of *Broussard* that adds further uncertainty to an area of the law that *Broussard* sought to clarify.

The issue in *Broussard* was whether a defect presented an unreasonable risk of harm. *Broussard*, 113 So. 3d at 184. The court repeated the well-established rule that in making this factual determination, the fact-finder is to use a "risk-utility" balancing test that includes four factors: (1) the utility of the complained-of

condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility and whether it is dangerous by nature. *Broussard*, 113 So. 3d at 184.

Much of the opinion in *Broussard* is devoted to the second factor, which includes consideration of whether the defect was "open and obvious." According to the court, "Although the 'open and obvious' argument suggests a disguised application of contributory negligence or assumption of the risk, when the risk is open and obvious to everyone, the probability of injury is low and the thing's utility may outweigh the risks caused by its defective condition." *Broussard*, 113 So. 3d at 184 (citing Maraist & Galligan, Louisiana Tort Law § 14.03, p. 14-9). Utilizing this "open and obvious to all" standard, the court found a reasonable factual basis for the jury to conclude that the misaligned elevator was *not* an open and obvious defect. *Broussard*, 113 So. 3d at 188-189.

After reviewing and weighing the remaining three factors, the court held that the record contained a reasonable basis for the jury's finding that the defect presented an unreasonable risk of harm, concluding, "Under this risk-utility balancing, the elevator's defective condition was not open and obvious to all, and thus the risk of harm created by this condition was significant in comparison to the elevators' social utility and the relatively low cost to the State of preventing the harm." *Broussard*, 113 So. 3d at 193.

Based upon the foregoing, I respectfully disagree with the statements in *Currie*, repeated in the majority opinion herein, that (1) the issue before the court in *Broussard* was whether an open and obvious defect constituted an unreasonable risk of harm, (2) that *Broussard* held that the plaintiff's comparative fault should be considered in determining whether a defect creates an unreasonable risk of

harm, and (3) that a summary judgment is never appropriate for determining whether a defect presents an unreasonable risk of harm.

The *Broussard* court found that the defect in that case was *not* open and obvious. *Broussard*, 113 So. 3d at 188-189. Thus, *Broussard* does not involve a claim based upon an "open and obvious" defect, and the court did not opine when, if ever, an open and obvious defect would present an unreasonable risk of harm.

Broussard also did not incorporate the plaintiff's comparative fault into the analysis of whether a defect presents an unreasonable risk of harm. The only consideration to be given to the plaintiff's activities in the determination is the social utility of the activity and whether the activity is dangerous by nature. *Broussard*, 113 So. 3d at 184. The court found that Broussard's activity of delivering office supplies "is highly useful to society" and that the record supported a finding that the activity was not inherently dangerous. *Broussard*, 113 So. 3d at 193. The extent of Broussard's comparative fault was not before the court nor was it considered in the court's analysis of whether the defective elevator presented an unreasonable risk of harm. Instead, the plaintiff's knowledge of the defect and considerations such as the extent of the risk created by the actor's conduct are more appropriate considerations for apportioning comparative fault pursuant to Louisiana Civil Code article 2323. *Broussard*, 113 So. 3d at 188-189, 193. As stated by the court, "The open and obvious inquiry . . . focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge." *Broussard*, 113 So. 3d at 188. Accordingly, while a plaintiff's knowledge of the defective condition may warrant an allocation of comparative fault, his awareness of the risk is not a factor in determining whether the defect presents an unreasonable risk of harm.

Finally, the *Broussard* court's characterization of the analysis as "fact-intensive" does not foreclose the possibility that a summary judgment may be appropriate in some cases. Notably, the court favorably cited and discussed *Dauzat v. Curnest Guillot Logging Inc.*, 08-0528 (La. 12/2/08), 995 So. 2d 1184, wherein the supreme court reversed the trial court and granted a summary judgment dismissing a premises defect case filed by a truck driver based upon a hole in a logging road. The *Broussard* court distinguished *Dauzat* as a case involving a defect that was "open and obvious to all," and for the reason that the truck driver was engaged in an inherently dangerous activity. *Broussard,* 113 So. 3d at 190-191. While the *Broussard* court emphasized that the unreasonable risk of harm determination is "a matter wed to the facts," *Broussard,* 113 So. 3d at 183, the court's holding does not preclude a summary judgment in an exceptional case where the undisputed facts establish that a defect does not present an unreasonable risk of harm, or, as the case may be, does present an unreasonable risk of harm. The present case does not fall within that category, and, for that reason, I concur in the result reached by the majority.