

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2013 CA 1619

TRIPJEET SONI

VERSUS

L.J. MARTRAIN FAMILY, LLC, SAFECO INSURANCE
COMPANY, THE BATON ROUGE WATER WORKS COMPANY

Judgment Rendered: MAR 21 2014

Appealed from the
19th Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 593,549

Honorable Janice Clark, Judge

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Works Company

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

WELCH, J.

Plaintiff, Tripjeet Soni, challenges a summary judgment entered in favor of defendant, Baton Rouge Water Works Company (BRWW), dismissing it from this personal injury litigation. We reverse and remand.

BACKGROUND

On August 13, 2010, plaintiff filed this lawsuit seeking damages against BRWW and L.J. Martrain Family, L.L.C. and its insurer, Safeco Insurance Company, arising from an alleged fall in a hole on a sidewalk in Baton Rouge, Louisiana. According to plaintiff, on August 20, 2009, at approximately 8:30 in the evening, she and a group of people exited a building located at 6250 Florida Boulevard, owned by the L.J. Martrain Family, L.L.C., following the conclusion of a night class, and walked along a sidewalk which was constructed from the building's exit to the building's parking lot. Plaintiff asserted that it was dark at the time and there was either no lighting or inadequate lighting to traverse the sidewalk. Plaintiff alleged that while traversing the sidewalk, she fell in a hole and descended a distance until her thigh was level with the surface of the sidewalk. She further alleged that the hole in which she fell was located in a structure which housed a BRWW water meter and formed part of the sidewalk. Plaintiff asserted that her accident was caused by the negligence of the defendants in failing to keep the property properly lit and maintained; in failing to keep the sidewalk and the component water meter and its housing in a safe condition; and in failing to provide adequate warning of a dangerous condition by marking or barricading the defective condition.

BRWW filed a motion for summary judgment. Therein, BRWW urged that it could not be found liable as a matter of law to plaintiff because: (1) it owed no duty to plaintiff because the complained of condition was open and obvious; (2) it did not have custody or control of the sidewalk in which the hole was located; and

(3) it did not create the alleged defective condition. In support of the motion, BRWW submitted plaintiff's deposition testimony in which she acknowledged that she assumed that because there was a water meter near the hole, the hole was made by BRWW. It also pointed to her deposition testimony in which she stated that she went to the site the day after she fell and took photographs which depict a piece of white pipe sticking out near the water meter, but could not recall if the pipe was sticking out at the time she had fallen.

In further support of its motion for summary judgment, BRWW submitted the affidavit of Hays Owen, its senior vice president and chief administrative officer. Therein, Mr. Hays attested that he is familiar with the water meter in question which provides service to 6246 Florida Boulevard and is located near the area where plaintiff claims to have fallen on August 20, 2009. According to Mr. Hays, the company's records showed that on August 10, 2009, a complaint was made to BRWW by a customer regarding water service provided to 6246 Florida Boulevard, an employee was dispatched to the property that day, and it was determined that the problem was caused by the customer's plumbing lines on the customer's property. Mr. Owen further attested that BRWW provides services to its customers under a tariff approved by the Louisiana Public Service Commission (LPSC), according to which it is not responsible for maintaining the lines and fixtures on the customer's property or for damage done by water escaping there from. Finally, Mr. Owen attested that during its August 10, 2009 inspection, BRWW did not alter or excavate the sidewalk in the area and that no alterations were made between that time and the time of the alleged incident.

Documentary evidence submitted by BRWW in support of its motion for summary judgment included a work order showing that a complaint had been received on August 10, 2009, from a customer regarding a plumbing line leak. The document contains the notation, "customer notified" and reflects that the work

order was complete in ten minutes. BRWW also submitted a document entitled "RULES AND REGULATIONS" approved by the LPSC pursuant to Order No. U-30690. The rules provide that the meter box is exclusively BRWW's property and that BRWW shall not be responsible for maintaining the lines or fixtures on customer's property or for damage done by water escaping from the lines.

In opposition to the motion, defendants L.J. Martrain Family, L.L.C. and its insurer sought to refute BRWW's contention that it did not have custody or control of the location of the accident. They relied on BRWW's rules as clear proof that BRWW has ownership of the water meter box at issue in this case. They urged that by virtue of the power BRWW derives from its tariff approved by the LPSC, it must be deemed to have the care, custody, and control of the water meter in question. According to these defendants, the hole in question extended from the inside of the water box and into the sidewalk; thus, this is not a case of a random hole in the middle of the sidewalk a couple of feet or inches away from the meter box. Furthermore, the opposition asserted that a jury should determine whether the BRWW employee actually created the hole during his August 10, 2009 visit to the site, or whether the hole was already present during that visit and what steps, if any, should have been taken to block off the water meter box and have the hole extending from the box repaired.

In plaintiff's opposition to BRWW's motion for summary judgment, she urged that there were three disputed factual questions precluding the granting of the motion: (1) whether BRWW had custody or control of the hole that encompassed their water meter; (2) whether BRWW altered or excavated the sidewalk located around the water meter prior to her accident; and (3) whether the hole was open and obvious. Plaintiff submitted her deposition testimony and affidavit, the affidavits of Patricia D'Amico and Margaret Campo, photographs of

the meter in question, along with BRWW's rules and regulations in opposition to the motion for summary judgment.

In her deposition and affidavit, plaintiff insisted that at the time she fell, it was dark and there was no lighting along side of the building which would have illuminated the hole in the sidewalk. Further, there were no barricades, orange cones, or other markers notifying anyone traversing the sidewalk to the presence of the hole. Plaintiff claimed that the area in question was not a location at which she usually worked or spent any significant amount of time. Plaintiff described the incident as follows: On the evening in question, plaintiff attended a training class with approximately 20 students, and at approximately 8:30 p.m., she and a number of people had exited the building and were walking along the sidewalk. According to plaintiff, she was looking straight ahead walking and talking and did not see the hole before she fell. She stated that when she fell into the hole, her leg went in the hole to her mid thigh. She testified that she had no warning whatsoever and that she did not stumble or trip, but fell straight down into the hole. Plaintiff stated that she was unable to get out of the hole because of her shoe, her friend told her to let the shoe drop and let it go, and her friend helped her out of the hole.

In their affidavits, Ms. D'Amico and Ms. Campo attested that they were walking along the sidewalk prior to plaintiff's fall and witnessed plaintiff fall into the hole up to her thigh. They also attested that at the time of the accident, it was dark, there was no lighting alongside the building which would have illuminated the hole in the sidewalk, and there were no barricades, orange cones, or other markers that notified anyone traveling along the sidewalk to the presence of the hole. Both affiants attested that they did not see the hole before plaintiff fell in it.

Plaintiff contended that her testimony and the affidavits of Ms. D'Amico and Ms. Campo demonstrate that there are issues of material fact as to whether the defect was open and obvious. She also argued that there is a question of fact

whether BRWW had the custody or control over the hole which encompassed the meter. In support thereof, plaintiff relied on photographs of the meter in question, which she claimed demonstrate that there is no separation between the hole and the water meter and that the hole begins in the sidewalk and extends into a raised portion of the concrete that immediately surrounds the meter cover, which is clearly a part of the meter. Plaintiff argued that given BRWW's own admission that it maintained custody and control over the meter, BRWW also had custody or control over that raised, broken portion of the concrete that encompasses the meter. Finally, plaintiff urged that a question of fact existed whether BRWW altered or excavated the sidewalk on August 10, 2009, in order to inspect the reported plumbing problem, noting that Mr. Owen, who attested that BRWW did not do so on that day, was not the employee who actually performed the inspection. Therefore, plaintiff insisted that because Mr. Owen lacked personal knowledge of the inspection activity, his affidavit could not be used to prove that BRWW did not alter or excavate the sidewalk during its August 10, 2009 inspection of the plumbing leak.

In response to the opposition to its motion for summary judgment, BRWW argued that the pictures of the area where plaintiff fell demonstrate "how readily apparent this area was." It continued to maintain that in the exercise of reasonable care, plaintiff should have seen the hole prior to stepping into it and because the hole was an open and obvious defect, it owed no duty to protect or inform plaintiff of its existence. BRWW also argued that the alleged defect in this case is the actual hole in the sidewalk, and it insists that there is no evidence that it had custody and control of the sidewalk, apparently contending that the mere proximity of the water meter and water meter box to the alleged hole in the sidewalk did not give it custody and control over the area in which plaintiff fell. Lastly, BRWW pointed out that plaintiff did not offer any evidence that BRWW actually created

the allegedly defective condition. It insisted that Mr. Owen's affidavit is competent evidence that it did not alter or excavate the sidewalk in response to its customer's plumbing complaint because Mr. Owen could make that determination by reviewing BRWW's records of the inspection. In further support of its motion for summary judgment, BRWW submitted L.J. Martrain's response to interrogatories and a copy of an invoice indicating that on August 13, 2009, three days after BRWW received a complaint of leaking water and inspected the area, Green's Plumbing of Louisiana, L.L.C. performed service work to repair a water line on behalf of L.J. Martrain at 6250 Florida Boulevard.

Following a hearing on the motion, the trial judge concluded that the care, custody, and control of the property in which the hole was located was not within the province of BRWW. Plaintiff appeals this ruling, contending that summary judgment was not appropriate because there are material issues of fact as to whether BRWW has custody or control over the hole which posed an unreasonable risk of harm to her and whether the hole was open and obvious. BRWW contends that it cannot be held liable under the facts of this case because plaintiff failed to show that it exercised direction or control over the allegedly defective sidewalk or that it derived any benefit from the area where plaintiff fell and because plaintiff is unable to show that BRWW caused the allegedly defective condition to exist.

DISCUSSION

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. **Smith v. The Runnels Schools, Inc.**, 2004-1329 (La. App. 1st Cir. 3/24/05), 907 So.2d 109, 112. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories and admissions 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. 966(B)(2). A genuine issue of material fact is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **King v. Illinois National Insurance Company**, 2008-1491 (La. 4/3/09), 9 So.3d 780, 784.

In this case, plaintiff is asserting a cause of action in general negligence under La. C.C. 2315 and a cause of action under La. C.C. 2317.1 against BRWW as the owner of a defective thing. Specifically, plaintiff claimed that the hole into which she fell was located in a concrete structure which housed a BRWW water meter and which formed part of the sidewalk. She asserted that BRWW is liable as the owner of the water meter for failing to keep that portion of the sidewalk housing its water meter in a reasonably safe condition and for failing to provide adequate warning of the dangerous condition by marking or barricading it.

The general rule is that an owner or person with custody over property has a duty to keep such property in a reasonably safe condition. He must discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence. **Smith**, 907 So.2d at 112. The duty is the same under theories of negligence or strict liability. Under either theory, a plaintiff seeking to establish liability based on the allegation of a defective thing must prove that: (1) the property which caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) the defendant had actual or constructive knowledge of the risk. *Id.*

BRWW claims that it cannot be held liable as a matter of law because the defective condition alleged by plaintiff to have caused her harm is a hole in a sidewalk and it does not have custody of the sidewalk on which plaintiff fell. We

have examined the evidence submitted on the motion for summary judgment, and we conclude that the trial court erred in concluding that as a matter of law, BRWW did not have custody of the area in which plaintiff fell. While BRWW may not have custody of the sidewalk, plaintiff has alleged that the hole in the sidewalk was located in a concrete structure that housed the meter that also formed part of the sidewalk. Because BRWW is the owner of the water meter, we find that there are genuine issues of material fact as to whether the hole in question encompassed BRWW's water meter so as to give rise to a duty on BRWW's part to take steps to prevent it from causing damage to others.

While the trial court did not specifically rule on BRWW's claim that the hole was "open and obvious," we find that plaintiff produced evidence creating a material factual dispute on this issue. Plaintiff's evidence showed she was not familiar with the area, it was dark at the time she fell, there was no lighting illuminating the sidewalk, and that two other persons, who were walking along side her that night, did not see the hole until she fell in it. Furthermore, we note that it is incumbent on the fact finder to determine which risks are unreasonable and whether those risks pose an open and obvious hazard. In other words, it is the province of the trier of fact to determine whether, under all of the circumstances of the case, the 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. **Broussard v. State, Office of State Buildings**, 2012-1238 (La. 4/5/13), 113 So.3d 175, 185. For these reasons, we hold that BRWW is not entitled to summary judgment on the purported open and obvious nature of the hole in question.

Lastly, BRWW contends that the trial court did not err in granting the summary judgment because it did not create the alleged defective condition. BRWW relies on the affidavit of Mr. Owens regarding his review of the work

order created on August 10, 2009, in response to a customer's complaint of a leaking water line, to suggest that BRWW did not alter or excavate the sidewalk near the water meter during its inspection. We note, however, that BRWW did not offer any testimony of the employee who actually conducted the inspection of the leaking water line. Moreover, even if BRWW did not in fact create the alleged defective condition, its awareness of the condition could give rise to a duty on its part to take steps to prevent that condition from causing harm to pedestrians. However, BRWW did not move for summary judgment on the knowledge element and it did not challenge plaintiff's ability to prove it had actual or constructive knowledge of the defective condition. See La. C.C.P. art. 966 (a motion for summary judgment shall be rendered or affirmed only as to those issues set forth in the motion under consideration by the court at the time). Thus, even if BRWW's evidence could be interpreted as proof that it did not actually excavate or alter the sidewalk in response to its customer's complaint, such would not mandate a finding that BRWW bore no responsibility to plaintiff, making summary judgment inappropriate on this theory as well.

Considering all of the evidence in the record on the motion for summary judgment, we are constrained to find that there are genuine issues of material fact regarding BRWW's liability, thereby precluding the entry of summary judgment in its favor. Accordingly, we conclude that the trial court erred in granting the motion for summary judgment.

CONCLUSION

For the foregoing reasons, the judgment appealed from is reversed. All costs of this appeal are assessed to appellee, Baton Rouge Water Works Company. The case is remanded to the trial court for proceedings consistent with this opinion.

REVERSED AND REMANDED.