NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 1695

KAY WADDELL

VERSUS

AMERICAN EMPIRE SURPLUS LINES INSURANCE COMPANY, WILLIAM AND EMILY SMITH

Judgment Rendered: JUN 2 5 2014

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On Appeal from the
22nd Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Trial Court No. 2011-14136

The Honorable Reginald T. Badeaux, III, Judge Presiding

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* * * * *

BEFORE: PARRO, GUIDRY, AND DRAKE, JJ.

DRAKE, J.

Plaintiff, Kay Waddell, appeals the trial court's grant of a motion for summary judgment in favor of defendants, William and Emily Smith and American Empire Surplus Lines Insurance Company (defendants), which judgment dismissed her claims against defendants. For the reasons stated herein, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

This matter arises out of an accident in which plaintiff fell on the premises of property she leased from Emily Smith.[1] Plaintiff leased an apartment located in Covington, Louisiana, beginning June 22, 2004. The parking area of the apartment complex was comprised of gravel. Plaintiff underwent foot surgery on June 18, 2010. Prior to the foot surgery, in order to get into her apartment, plaintiff had to traverse the gravel parking lot, step over a railroad tie, and cross the grass to get to the sidewalk. On August 15, 2010, plaintiff was in a portable wheelchair due to the previous foot surgery. While attempting to negotiate the gravel parking lot in her wheelchair, plaintiff fell, injuring herself. Plaintiff stated in her deposition that, prior to her fall, she requested that Emily and William Smith put some kind of boards down so she could easily get to the concrete. Plaintiff claims that the Smiths agreed to put down boards, but failed to do so. Plaintiff also asserts that the defendants did not provide handicap accessibility, did not provide a safe pathway from the parking area to her apartment, and did not correct an unreasonably dangerous condition of gravel in the parking lot, even though they knew she was confined to a wheelchair. The defendants filed a motion for

[1] Although only Emily Smith signed the lease as lessor, both parties refer to William and Emily Smith as the landlords. William Smith has answered the suit. To avoid any confusion, the court also refers to both William and Emily Smith as the landlords.

summary judgment and attached numerous exhibits, including the lease, medical records, and the deposition of plaintiff. The lease states, with regard to liability:

> Lessor will not be responsible for damage caused by leaks in the roof, by bursting of pipes by freezing or otherwise, or any vices or defects of the leased property, or the consequences thereof, except in the case of positive neglect or failure to take action toward the remedying of such defects and the damage caused thereby.

The evidence submitted with the motion for summary judgment showed that on the day of the incident, the plaintiff had been shopping with her adult daughter and grandchildren. Upon returning to the townhouse, the daughter parked her vehicle in the second of plaintiff's two parking spots, the one farthest from the sidewalk, since plaintiff's car occupied the closest spot. As plaintiff's daughter assisted the grandchildren from the vehicle, plaintiff exited the passenger side of the vehicle without assistance. The plaintiff sat in the wheelchair and attempted to push it with her left foot through the gravel. When she could not move through the gravel, plaintiff turned the wheelchair around, kneeled in it, and attempted to propel herself forward using her left leg. Plaintiff then pushed the wheelchair over the gravel and lifted it over the railroad tie, which was used in the gravel parking lot to mark the spots. While attempting to maneuver the wheelchair, plaintiff hung two bags of clothes from the shopping trip on the handles of the wheelchair. As plaintiff was attempting to move the wheelchair forward in the grass toward the sidewalk, she fell forward onto her hands. Plaintiff felt a twinge in her neck, and her daughter helped her back into her wheelchair.

Plaintiff filed an opposition to the motion for summary judgment, claiming that defendants owed her a duty to provide handicap accessibility, to provide a safe pathway to her apartment from the parking lot, and to use diligent care to correct an unreasonably dangerous condition existing on the premises. Plaintiff relied upon parts of her deposition and the lease agreement.

The trial court held a hearing on December 5, 2012, on the motion for summary judgment and granted the motion. The trial court concluded that the owners of the apartment did not have a duty to provide the boards plaintiff requested to be put from her parking spot to the sidewalk. The court found that the request from a tenant does not necessarily create a duty. The court also determined that the premises were in good order. A judgment was signed on January 8, 2013. Plaintiff requested supervisory review of that judgment from this court, which was denied, since the judgment lacked decretal language regarding dismissal of the defendant. The trial court signed a second judgment on April 16, 2013, which granted defendants' motion for summary judgment and dismissed them from the lawsuit. Plaintiff again filed for supervisory review, which this court granted for the limited purpose of remanding to the trial court so it could grant plaintiff's appeal. Plaintiff now appeals the April 16, 2013 judgment granting defendants' summary judgment and dismissing all defendants.

ERRORS

The plaintiff alleges that the trial court erred in granting the summary judgment and dismissing plaintiff's claim, since questions of fact remain as to whether defendants should have taken steps to correct known defects in the parking lot of the leased premises.

APPLICABLE LAW

An appellate court reviews a trial court's decision to grant a motion for summary judgment *de novo,* using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. *Smith v. Our Lady of the Lake Hosp., Inc.,* 93-2512 (La. 7/5/94), 639 So. 2d 730, 750. The motion should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, 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); *George S. May Int'l Co. v. Arrowpoint Capital Corp.,* 11-1865 (La. App. 1 Cir. 8/10/12), 97 So. 3d 1167, 1171. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material, for purposes of summary judgment, can be seen only in the light of the substantive law applicable to the case. *Gaspard v. Graves,* 05-1042 (La. App. 1 Cir. 3/29/06), 934 So. 2d 158, 160, *writs denied,* 06-0882 and 0958 (La. 6/16/06), 929 So. 2d 1286 and 1289.

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

DISCUSSION

On *de novo* review of the record before us, we are unable to say that defendants established a right to judgment in its favor as a matter of law. In reaching that conclusion, we are obligated to consider whether a defect creates an unreasonable risk of harm by applying the precepts set forth by the supreme court in *Broussard v. State, Office of State Buildings,* 12-1238 (La. 4/5/13), 113 So. 3d 175.

In this case, plaintiff is asserting a cause of action in general negligence under La. C.C. art. 2315 and a cause of action under La. C.C. art. 2317.1 against the Smiths as the owners of a defective thing. Specifically, plaintiff claimed that the parking lot, which she had to traverse to get to her apartment, was

unreasonably dangerous. She asserted that the Smiths are liable as the owners of the apartment and parking lot for failing to provide persons in a wheelchair with a reasonably safe manner of ingress and egress from the parking lot to the apartment.

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 v. The Runnels Sch., Inc.,* 04-1329 (La. App. 1 Cir. 3/24/05), 907 So. 2d 109, 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.*

There is no question that, as the landlords, the Smiths owed a duty to keep the parking lot, as well as its egress and ingress, in a reasonably safe condition. The question then becomes whether the property had a condition that created an unreasonable risk of harm to persons on the premises. Whether a defect presents an unreasonable risk of harm is "a disputed issue of mixed fact and law or policy that is peculiarly a question for the jury or trier of the facts." *Broussard,* 113 So. 3d at 183. 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. *Graupmann v. Nunamaker Family Ltd. Partnership,* 13-0580 (La. App. 1 Cir. 12/16/13), 136 So. 3d 863. Whether a defect presents an unreasonable risk of harm must be determined in light of the facts and circumstances of each particular case. *Broussard,* 113 So. 3d at 183. To aid the

trier-of-fact in making this unscientific, factual determination, the supreme court has adopted a risk-utility balancing test, wherein the fact-finder must balance the gravity and risk of harm against individual societal rights and obligations, the social utility of the thing, and the cost and feasibility of repair. *Broussard,* 113 So. 3d at 184. The supreme court has synthesized this risk-utility balancing test to a consideration of four pertinent 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 or whether it is dangerous by nature. *Id.*

The second prong of this risk-utility inquiry focuses on whether the dangerous or defective condition is obvious and apparent. Generally, a defendant does not have a duty to protect against an open and obvious hazard. *Id.; see also Pitre v. Louisiana Tech Univ.,* 95-1466 (La. 5/10/96), 673 So. 2d 585, 591, *cert. denied,* 519 U.S. 1007, 117 S.Ct. 509, 136 L.Ed.2d 399 (1996). In order for a defect to be considered open and obvious, the danger created by that defect must be apparent to all comers, *i.e.,* everyone who may potentially encounter it. *Broussard,* 113 So. 3d at 184, 192; *Caserta v. Wal-Mart Stores, Inc.,* 12-0853 (La. 6/22/12), 90 So. 3d 1042, 1043 (per curiam). If the facts and circumstances of a particular case show a dangerous condition should be open and obvious to all who encounter it, then the condition may not be unreasonably dangerous, and the defendant may owe no duty to the plaintiff. *Broussard,* 113 So. 3d at 184. 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. *Id.* at 185.

As this court determined in *Currie v. Scottsdale Indemnity Company,* 12-1666 (La. App. 1 Cir. 8/26/13), 123 So. 3d 742, 746, "the law now clearly mandates that the analysis of whether an open and obvious defect is an unreasonable risk of harm is properly a determination of *fact,* that takes into consideration the victim's own comparative fault, among other factors; and, accordingly, is not proper for summary judgment." 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, defendants owed no duty to the plaintiff. The trial court phrased the issue, stating that the defendants did not have a duty "to provide a handicapped-friendly parking lot." Based on the Louisiana Supreme Court case of *Broussard*, we find that there are genuine issues of material fact as to whether the parking lot in question gives rise to a duty on the Smiths' part to take steps to prevent it from causing damage to others.

While the trial court did not specifically rule on the issue that the parking lot was "open and obvious," we find 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,* 113 So. 3d at 185. "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." *Id.* For these reasons, we hold that defendants are not entitled to summary judgment on the purported open and obvious nature of the parking lot in question.

The law, as stated by the supreme court in *Broussard,* and this court in *Currie,* now very clearly mandates that whether an open and obvious condition presents an unreasonable risk of harm, such that liability may be imposed, is not a determination of whether a duty exists, a question of law, but rather, it is a determination of whether that duty was breached, a question of fact. Therefore, summary judgment is not proper when a genuine issue of material fact exists as to whether a duty was breached in cases where the alleged liability arises from an open and obvious condition. *Currie,* 123 So. 3d at 743. Accordingly, we find that the trial court erred in granting summary judgment in favor of defendants and dismissing plaintiff's case.[2]

CONCLUSION

For the reasons set forth above, the motion for summary judgment rendered by the trial court in favor of defendants, William and Emily Smith and American Empire Surplus Lines Insurance Company is hereby reversed. We remand this matter to the trial court for further proceedings consistent herein. Costs of the appeal are assessed to defendants, William and Emily Smith and American Empire Surplus Lines Insurance Company.

REVERSED AND REMANDED.

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[2] Given the above opinion, this court does not address the applicability of La. R.S. 49:148.1 and 49:148.3 to the facts of this case.