NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1834

ROSS LYNCH

VERSUS

THE CITY OF MANDEVILLE,
JAMES S. CONNER, JR. AND REBECCA A. DEANO,
ABC INSURANCE COMPANY,
AND XYZ INSURANCE COMPANY

Judgment Rendered: JUN 05 2015

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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. 2011-13196

Honorable Scott Gardner, Judge Presiding

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BEFORE: WHIPPLE, C.J., McCLENDON, AND HIGGINBOTHAM, JJ.

McClendon, J. concurs.

HIGGINBOTHAM, J.

Ross Lynch appeals the dismissal on summary judgment of his personal injury claims against the City of Mandeville (the City), James Conner, Jr., and Rebecca Deano. From our *de novo* review, we find there are no genuine issues of material fact regarding actual or constructive notice or knowledge, and thus, summary judgment was proper as a matter of law.

BACKGROUND

Ross Lynch is the owner of property located at 122 Girard (sometimes spelled as Girod in the record) Street in Mandeville, Louisiana. Lynch's neighbors, James Conner, Jr. and Rebecca Deano, own property immediately adjacent to Lynch's property at 124 Girard Street. The City owns and operates a public parking lot that fronts Girard Street and is located adjacent to Conner and Deano's property. In June 2010, Lynch unilaterally decided to enter Conner and Deano's property, without permission, in order to trim and mow unsightly and overgrown grass and weeds growing along the fence that separated the two pieces of property. In the process of mowing the grass and weeds on Conner and Deano's property, Lynch was pulling his lawnmower and walking backwards when he unknowingly and inadvertently stepped and fell into an approximate four-foot-deep hole that was hidden by overgrown grass and weeds. As a result of the fall, Lynch sustained a small cut on his foot and a chipped bone in his ankle that eventually required surgery. Believing that the hidden hole on Conner and Deano's property was caused by a damaged water meter or eroded sewer line located under the overgrown grass, Lynch reported his injury and complained to the City about the existence of the hidden hole. The City responded to Lynch's complaint by repairing a damaged sewer pipe inside the hole and then filling the hole with dirt.

Lynch filed suit against the City, Conner, and Deano, and their unknown insurers, asserting a claim for personal injury damages arising out of his fall into the

unmaintained and unreasonably dangerous hidden hole. After answering Lynch's lawsuit, the City filed a motion for summary judgment on the grounds that Lynch would be unable to prove that the City had actual or constructive notice of any defective condition on property that was within its custody and control. In support of its motion for summary judgment, the City relied on an affidavit of the City's employee, Glenn Craddock, who had knowledge of all complaints and service requests regarding the City's property. Craddock attested that he had searched the City's records for a report or complaint about a hole near the fence line between Lynch's property and Conner and Deano's property. Craddock stated that the City's first notice or complaint regarding the hole came from Lynch *after* he had fallen into the hole. Conner and Deano also filed a motion for summary judgment, joining and adopting the City's motion for summary judgment for the same reasons – lack of knowledge – as set forth by the City. Essentially, Conner and Deano asserted that Lynch could not prove that they knew or should have known of the hidden hole beneath the grass on their property, and that Lynch's injuries were the direct result of him trespassing onto their property and attempting to mow their grass without their permission.

Lynch opposed the motions for summary judgment by offering excerpts of his deposition testimony and an affidavit, in which he explained that the overgrown grass and weeds on Conner and Deano's property constituted an unsightly nuisance and had not been cut or maintained in years. Lynch acknowledged that he sought to unilaterally remedy the obvious nuisance situation by attempting to clear the excessive and overgrown grass and weeds without notifying Conner and Deano that he was doing so. Lynch stated that he had never notified anyone about the overgrown and unmaintained property, and he could not have notified anyone about the broken sewer pipe, because he did not know about it or the existence of the hidden hole until he actually fell into the hole. However, Lynch insisted that Conner

and Deano, as well as the City, had constructive notice or should have known of the defective condition because of the excessive and unmaintained grass and weed growth that totally obscured the hidden hole, which in turn, posed an unreasonable risk of injury to the public. Lynch insisted that the area in which he fell was open to the public for parking and, thus, was under the custody and control of both the City and the property owners, Conner and Deano.

The trial court heard the motions for summary judgment and rendered judgment in favor of the City, Conner, and Deano on July 11, 2014, dismissing Lynch's claims with prejudice. Lynch appealed, asserting that the trial court erred in granting summary judgment because the longstanding, unmaintained condition of overgrown grass and weeds on Conner and Deano's property amounted to constructive notice to the City of a hidden and dangerous hole beneath the grass and weeds, and because Conner and Deano should have known about the hole if they had exercised reasonable care in maintaining the property.

STANDARD OF REVIEW

An appellate court's review of a grant of summary judgment is *de novo* under the same criteria that govern the trial court's consideration of whether a summary judgment is appropriate. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181 (La. 2/29/00), 755 So.2d 226, 230; **Smith v. Terrebonne Parish Consol. Government**, 2002-1423 (La. App. 1st Cir. 7/2/03), 858 So.2d 671, 673. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action and shall be construed to accomplish these ends. La. Code Civ. P. art. 966(A)(2). A motion for summary judgment is properly granted when 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 of material fact, and that the mover is entitled to summary judgment as a matter of law. La. Code Civ. P. art. 966(B)(2).

On a motion for summary judgment, the mover has the burden of proof. However, a mover who will not bear the burden of proof at trial on the matter before the court on the motion is not required to negate all essential elements of the adverse party's claim, action, or defense. Rather, the mover need only point out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. If the adverse party then 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 and summary judgment is appropriate. See La. Code Civ. P. art. 966(C)(2). An issue is genuine if reasonable persons could disagree after considering the evidence. **Jones v. Estate of Santiago**, 2003-1424 (La. 4/14/04), 870 So.2d 1002, 1006. If on the state of the evidence, reasonable persons could reach only one conclusion, there is no need for a trial on that issue. **Id.** Further, a fact is material when its existence is essential to a cause of action under the applicable theory of recovery. **Id.**

DISCUSSION AND ANALYSIS

It is undisputed that no one had actual knowledge of the existence of the hidden hole located under the overgrown grass and weeds on Conner and Deano's property. The crux of the issue on appeal is whether the longstanding existence of the overgrown grass and weeds constituted constructive notice of the hole to the City or whether Conner and Deano should have known about the hole on their property.

At the outset, we note that Lynch's personal injury claim against Conner and Deano, as owners of the property where the hole was located, is primarily based on a theory of delictual liability for defective things under La. Civ. Code arts. 2317 and 2317.1. Louisiana Civil Code art. 2317 sets forth the principle that we are responsible for the damage caused by things in our custody. This principle is modified by La. Civ. Code art. 2317.1, which provides:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, **only upon a showing that he knew or, in the exercise of reasonable care, should have known** of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. [Emphasis added.]

Knowledge is key to Lynch's claim against Conner and Deano – he must prove that Conner and Deano knew or, in the exercise of reasonable care, should have known of the defective condition, *i.e.*, the hidden hole and broken sewer pipe.

Similarly, for a public entity such as the City to be liable for damage caused by a defective thing within its care and custody, it must be proven that the City had actual or constructive notice of the particular defect prior to the occurrence, and a reasonable opportunity to remedy the defect but failed to do so. See La. R.S. 9:2800(C). "Constructive notice" is defined as the existence of facts which infer actual knowledge. La. R.S. 9:2800(D). For Lynch's personal injury claim against the City, the burden is on him to prove that: (1) the City had custody or ownership of the defective thing; (2) the defective thing created an unreasonable risk of harm; (3) the City had actual or constructive notice of the defective thing; (4) the City failed to act to correct the defective thing in a reasonable time; and (5) the defective thing caused the damages. La. R.S. 9:2800; **Chambers v. Village of Moreauville**, 2011-898 (La. 1/24/12), 85 So.3d 593, 597. Failure to meet any one of the elements will defeat a claim against the public entity. **Benson v. State**, 48,300 (La. App. 2d Cir. 10/9/13), 124 So.3d 544, 546. Ordinarily, to establish constructive notice, it must be proven that the defect causing the injury existed over a sufficient length of time to establish that reasonable diligence would have led to its discovery and repair. **Stevens v. City of Shreveport**, 49,437 (La. App. 2d Cir. 11/19/14), 152 So.3d 1071, 1078, writ denied, 2015-0197 (La. 4/17/15), ___ So.3d ___.

While Lynch concedes that there was no actual notice given to anyone concerning the hidden hole and/or overgrown condition of Conner and Deano's property, he argues that constructive notice or knowledge is presumed when a defect has existed for a long period of time. The concept of constructive knowledge imposes a reasonable duty to discover apparent defects in things under a defendant's legal custody. **Broussard v. Voorhies**, 2006-2306 (La. App. 1st Cir. 9/19/07), 970 So.2d 1038, 1045, writ denied, 2007-2052 (La. 12/14/07), 970 So.2d 535. Constructive knowledge can be found if the conditions that caused the injury existed for such a period of time that those responsible, by the exercise of ordinary care and diligence, must have known of their existence in general and could have guarded the public from injury. **Boutin v. Roman Catholic Church of the Diocese of Baton Rouge**, 2014-313 (La. App. 5th Cir. 10/29/14), ___ So.3d ___, ___, writ denied, 2014-2495 (La. 2/13/15), 159 So.3d 469.

In his deposition testimony and affidavit, Lynch attests that the longstanding unmaintained condition of Conner and Deano's property, with overgrown weeds and grass, obviously served to obstruct from view the dangerous hole that was hidden beneath the weeds and grass. However, the City points out that Lynch offered no evidence that the City had supervision, custody, or control concerning the overgrown condition of Conner and Deano's property simply because the property was located near a public parking area, or that the City somehow should have known of the hidden hole and/or broken sewer line under the surface of Conner and Deano's property.

While Lynch testified that the overgrown grass and weeds were present for a long period of time, he did not offer any evidence of an apparent problem regarding a broken sewer pipe and/or hole with any longstanding existence. Lynch theorized that the hidden hole must have been present for some unspecified period of time, but speculation falls far short of the factual support required to establish an evidentiary

burden of proof at trial. See **Gifford v. Arrington**, 2014-2058 (La. 11/26/14), 153 So.3d 999, 1000; **Babin v. Winn-Dixie Louisiana, Inc.**, 2000-0078 (La. 6/30/00), 764 So.2d 37, 40. It takes more than mere argument of a possibility to raise a genuine issue of fact. **Hawkins v. Fowler**, 2011-1495 (La. App. 1st Cir. 5/2/12), 92 So.3d 544, 547-48, writ denied, 2012-1449 (La. 10/8/12), 93 So.3d 860. Evidence was lacking as to how or when the broken sewer pipe and/or hidden hole occurred, and there was no evidence that routine mowing of the grass next to the fence line would have allowed for the discovery of the hidden hole or the broken sewer pipe. In the absence of any factual support showing that Lynch could meet his burden at trial regarding knowledge of the defective condition, summary judgment is mandated. See **Gifford**, 153 So.3d at 1000. Furthermore, Lynch's testimony merely touched on the unsightly nuisance that the overgrown condition of the property presented. No evidence was produced to show that the overgrown grass and weeds actually posed any unreasonable harm to anyone. Additionally, Lynch conceded that he had never reported the unmaintained and overgrown condition of the property to the City or anyone else, including Conner and Deano, and he did not report the existence of the hidden hole until *after* he fell.

All of the evidence indicates that while the hole under the overgrown weeds and grass on Conner and Deano's property was hidden and known to no one, the unmaintained condition of the property was obvious to everyone, including Lynch. However, the unsightly and unmaintained condition of the property is not what caused Lynch's injury. Lynch's uninvited entrance onto Conner and Deano's property, walking backwards through overgrown grass and weeds, and the existence of the broken sewer pipe inside the hidden hole is what caused the injury. But not every defect gives rise to liability. **Breaux v. Fresh Start Properties. L.L.C.**, 2011-262 (La. App. 5th Cir. 11/29/11), 78 So.3d 849, 853. Given the undisputed facts and testimony in this case, we find no error in the trial court's grant of summary

judgment in favor of the City, because Lynch failed to prove the essential element of actual or constructive notice as to the City. Likewise, we cannot say the trial court erred in finding that Lynch failed to prove that Conner and Deano should have known about the hidden hole and broken sewer pipe beneath the surface of the grass on their property. We therefore affirm the trial court's judgment dismissing all of Lynch's claims.

CONCLUSION

For the assigned reasons, we affirm the trial court's grant of summary judgments in favor of the City of Mandeville, James S. Conner, Jr., and Rebecca A. Deano, and dismissal of all claims of Ross Lynch. All costs of this appeal are assessed against Ross Lynch.

AFFIRMED.