NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1473

TALISHA J. DAVIS AND JOHN DAVIS, JR.

VERSUS

THE CITY OF BATON ROUGE, EAST BATON ROUGE PARISH AND DEPARTMENT OF PUBLIC WORKS

DATE OF JUDGMENT: APR 0 9 2018

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT NUMBER 630007, SECTION 22, DIVISION F, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA

HONORABLE TIMOTHY E. KELLEY, JUDGE

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

Disposition: AFFIRMED.

McDonald, J. agrees and assigns additional reasons.

CHUTZ, J.

In this trip and fall case, plaintiffs-appellees, Talisha J. and John Davis, Jr., appeal from a summary judgment dismissing their claims with prejudice. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On April 27, 2013, Talisha Davis, attended a wedding reception at the Lyceum Ballroom, which is located on the east side of Third Street in Baton Rouge, Louisiana. Mrs. Davis left the reception at approximately 9:45 p.m. accompanied by several family members. She was carrying her infant son on her left shoulder and her purse and a diaper bag on her right shoulder. Mrs. Davis was wearing five-inch stiletto heels, which she stated she was accustomed to wearing.

Mrs. Davis' group had parked their vehicles at a garage located less than a block away on the west side of Third Street at its intersection with Convention Street. They could have walked on the sidewalk on the east side of Third Street to reach the designated crosswalk located at the intersection. Instead, they decided to cross Third Street in front of the Lyceum Ballroom, where no crosswalk was located, to reach the west side of Third Street. Mrs. Davis indicated she did not notice anything that appeared unusual or hazardous before stepping into the street. After she stepped off the curb and walked a few steps, she fell to the street. Mrs. Davis' son was not injured, but she sustained a broken right foot.

Subsequently, Mrs. Davis and her husband filed a personal injury suit against defendant, the City of Baton Rouge, the Parish of East Baton Rouge, which together comprise a consolidated governmental body,[1] and the Department of Public Works, a department thereof (collectively, "the City/Parish"). Plaintiffs alleged Mrs. Davis' fall occurred when a portion of her shoe became stuck in a

[1] See City of Baton Rouge/Parish of East Baton Rouge Plan of Government, Section 2.01; ***City of Baton Rouge v. Bernard***, 01-2468 (La. App. 1st Cir. 1/22/03), 840 So.2d 4, 5, writ denied, 03-1005 (La. 6/27/03), 847 So.2d 1278.

crack the City/Parish had negligently allowed to "develop, spread and remain" on the surface of Third Street. They further alleged the City/Parish had a duty to warn persons of the hazardous condition created by the crack.

On November 9, 2016, the City/Parish filed a motion for summary judgment alleging plaintiffs would be unable to sustain their burden of proving that the crack presented an unreasonably dangerous condition. Additionally, the City/Parish pointed out that plaintiffs also bore the burden of proving the City/Parish had actual or constructive notice of the alleged defect and failed to act to correct it in a reasonable time. The City/Parish maintains it had no actual or constructive notice of the complained of condition on Third Street until plaintiffs filed their suit.

In support of its motion for summary judgment, the City/Parish presented an affidavit from Reginal L. Brumfield, who is the street maintenance manager for the City/Parish, as well as excerpts from his deposition. According to Mr. Brumfield, his inspection of the crack where Mrs. Davis' accident occurred indicated the crack was less than one-half inch in width, with "spalling" on certain portions of the crack of less than four inches. Mr. Brumfield explained that "spalling" occurred when the edges of a crack begin to break and erode due to wear from traffic passing over it.[2] For purposes of vehicular traffic, Mr. Brumfield classified the crack and spalling as being of low severity. Mr. Brumfield further indicated the City/Parish had received no calls concerning the condition of Third Street at the location in question prior to Mrs. Davis' accident.

Following a hearing on the motion, the district court granted summary judgment in favor of the City/Parish dismissing plaintiffs' claims with prejudice. In its oral reasons for judgment, the district court noted Mrs. Davis was walking in an area not intended for pedestrian traffic and the crack did not present an

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[2] Specifically, Mr. Brumfield attested in his affidavit that "[s]palling is a breakdown of the slab edge resulting from traffic stress, incompressible in crack or freeze thaw action from water accumulation," and that "[s]palling is standard deficiency for rigid pavement."

unreasonable risk of harm to the intended user, which is vehicular traffic. The district court also concluded the City/Parish had no notice of the crack so as to give it an opportunity to correct it. Plaintiffs now appeal, contending the district court erred in finding the fact that Mrs. Davis crossed the street outside of the designated crosswalk was dispositive of plaintiffs' claims, as well as in finding the City/Parish lacked notice of the defect in Third Street.

SUMMARY JUDGMENT LAW

On appeal, appellate courts review the grant or denial of a motion for summary judgment *de novo* under the same criteria governing the district court's consideration of whether summary judgment is appropriate. ***Schultz v. Guoth***, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005-06. A motion for summary judgment shall be granted only if the pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions admitted for purposes of the motion for summary judgment show there is no genuine issue of material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(A)(3) & (4); ***Apache Corporation v. Talen's Marine & Fuel, LLC***, 2017-0714 (La. App. 1st Cir. 2/7/18), ____ So.3d ____, ____. A genuine issue is one as to which reasonable persons could disagree. All doubts should be resolved in the non-moving party's favor in determining whether an issue of material fact exists. ***Hines v. Garrett***, 04-0806 (La. 6/25/04), 876 So.2d 764, 765 (*per curiam*).

The burden of proof rests with the mover. La. C.C.P. art. 966(D)(1). But if the moving party will not bear the burden of proof at trial on the issue before the court on the motion, the moving party's burden is satisfied by pointing out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, the adverse party may not rest on the mere allegations or denials of his pleadings but must produce factual support sufficient

to establish he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and, if appropriate, summary judgment shall be rendered against him. La. C.C.P. arts. 966(D)(1) & 967(B); ***Schultz***, 57 So.3d at 1006.

DISCUSSION

Plaintiffs argue the district court erred in granting summary judgment dismissing their claims on the basis that Mrs. Davis' accident occurred as she was crossing Third Street outside of a crosswalk. They contend the section of Third Street where Mrs. Davis fell was one where the City/Parish "expected and invited persons to come" to visit various attractions. Thus, they argue it was foreseeable "that persons, such as Mrs. Davis, would walk around, about, and throughout the roadway of Third Street," especially since "it is a one-way street to vehicular traffic." They note the Downtown Development District,[3] a public entity that promotes the development of downtown Baton Rouge, even has drawings in its promotional materials depicting people walking across Third Street to enter into buildings. They argue the fact that the accident occurred outside of a crosswalk should not be dispositive, particularly given the circumstances present. Additionally, plaintiffs contend that constructive knowledge of the defect in Third Street should be imputed to the City/Parish since the City/Parish had knowledge that persons crossed Third Street outside of the designated crosswalks.

The City/Parish is a public entity. La. R.S. 9:2800(G)(1). In order to prove a public entity is liable for damages caused by a defective thing, the plaintiff must establish: (1) custody or ownership of the defective thing by the public entity; (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

[3] As a public entity, the Downtown Development District works on behalf of the City/Parish for the benefit of downtown Baton Rouge.

action within a reasonable time; and (5) causation. La. C.C. arts. 2317 and 2317.1; La. R.S. 9:2800; ***Chambers v. Village of Moreauville,*** 11-898 (La. 1/24/12), 85 So.3d 593, 597. In this case, the disputed elements are whether the crack in Third Street was a defect that created an unreasonable risk of harm[4] and whether the City/Parish had actual or constructive notice of the defect.

The existence of a defect alone is not sufficient to establish liability. ***Boyle v. Board of Supervisors, Louisiana State University,*** 96-1158 (La. 1/14/97), 685 So.2d 1080, 1082-83. To determine whether a defect creates an unreasonable risk of harm, courts utilize a risk-utility balancing test weighing the gravity and risk of harm against individual and societal utility and the cost and feasibility of repairs. ***Chambers***, 85 So.3d at 597-98.

Public entities are not liable for every irregularity in a street or sidewalk. See ***Boyle***, 685 So.2d at 1082. The Louisiana Supreme Court has made it clear that "[municipalities] are not insurers of the safety of pedestrians." ***Chambers***, 85 So.3d at 598. Even in the case of sidewalks, which are intended primarily for pedestrian use, it is unnecessary for a municipality to maintain them in perfect condition, but only to keep the sidewalks reasonably safe. See ***Chambers***, 85 So.3d at 598; ***Boyle*** 685 So.2d at 1082. While a pedestrian walking down a sidewalk is not required to exercise the care required in traversing a jungle, she must exercise ordinary care, keeping in mind that irregularities exist in sidewalks. ***Chambers***, 85 So.3d at 598. As recognized by this court in ***Williams v. Leonard***

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[4] Although the question of whether a defect presents an unreasonable risk of harm is a disputed issue of mixed fact and law or policy, the granting of a motion for summary judgment is not precluded in cases where the plaintiffs are unable to produce factual support for their claim that a complained-of condition or thing is unreasonably dangerous. ***Allen v. Lockwood***, 14-1724 (La. 2/13/15), 156 So.3d 650, 653. Therefore, once the defendant points out a lack of factual support for an essential element in the plaintiffs' case, the burden then shifts to the plaintiffs to come forward with evidence to demonstrate that they will be able to meet their burden at trial. ***Allen***, 156 So.3d at 653; ***Cheramie v. Port Fourchon Marina, Inc.***, 16-0895 (La. App. 1st Cir. 2/17/17), 211 So.3d 1212, 1216, writ denied, 17-0499 (La. 5/12/17), 221 So.3d 73.

Chabert Medical Center, 98-1029 (La. App. 1st Cir. 9/26/99), 744 So.2d 206, 211, writ denied, 00-0011 (La. 2/18/00), 754 So.2d 974:

> [W]e do not live in a perfect world. We cannot impose a duty on a landowner to have perfectly flawless premises. Sidewalks and parking lots are not always level, and individuals must assume *some* responsibility for their own safety. Everyday life presents risks which must be encountered and negotiated.

We believe a pedestrian has at least the same duty of care for her own safety when walking in a street as she does when walking on a sidewalk. As the Louisiana Supreme Court explained in ***Reed v. Wal-Mart Stores, Inc.***, 97-1174 (La. 3/4/98), 708 So. 2d 362, 363:

> It is common for the surfaces of streets, sidewalks, and parking lots to be irregular. It is not the duty of the party having garde of the same to eliminate all variations in elevations existing along the countless cracks, seams, joints, and curbs. These surfaces are not required to be smooth and lacking in deviations, and indeed, such a requirement would be impossible to meet. Rather, a party may only be held liable for those defects which present an unreasonable risk of harm.

While the fact that the accident occurred outside of a designated crosswalk is a factor, we agree with plaintiffs that this fact alone is not dispositive of plaintiffs' claims. Each case is dependent on its own facts and circumstances. See ***Chambers***, 85 So.3d at 598. Nevertheless, based on our *de novo* review of the supporting and opposing evidence presented in this case, we conclude the evidence establishes the crack in question did not create an unreasonable risk of harm to a person exercising ordinary care and prudence.

The evidence reveals that the crack was less than one-half inch in width with some "low severity" spalling. The crack was in plain view in the street and did not constitute a hidden trap. Plaintiffs suggest that since the accident occurred at night, the lack of natural light may have hindered Mrs. Davis' ability to appreciate the risk created by the crack. In such case, Mrs. Davis would have had a duty, as a prudent pedestrian, to exercise extra caution in observing the safety of her path if

she chose to cross the street outside of a designated crosswalk in an unfamiliar area. "[O]ne cannot expect paved surfaces of streets, sidewalks, and parking lots to be free of all deviations and defects." ***Reed***, 708 So.2d at 365. A pedestrian has a duty to observe her course to see if her pathway is clear. ***Melancon v. Perkins Rowe Associates, LLC***, 16-0219 (La. App. 1st Cir. 12/14/19), 208 So.3d 925, 931. Significantly, the City/Parish received no reports or complaints concerning the condition of Third Street where the crack was located prior to Mrs. Davis' accident. Even plaintiffs admit in brief that they can point out no prior "incidents" that occurred at this location.

As support for their position, plaintiffs point to the deposition testimony of Mr. Brumfield opining that the crack would constitute a "trip hazard" if it had been located in a crosswalk. In his deposition, Mr. Brumfield declined to classify the severity of such a hypothetical crosswalk hazard as being of low, medium, or high severity because there was "a different index for that [pedestrian traffic] and [he did not] have it off of the top of [his] head." Thus, Mr. Brumfield's testimony, in essence, established nothing more than that the crack constituted a defect, since virtually all defects in the surface of a crosswalk, whether they consist of cracks, surface deviations or holes, potentially create a tripping hazard to pedestrians. Even a street curb could potentially constitute a tripping hazard to an inattentive pedestrian. As previously noted, public entities are not liable for every defect in a street or sidewalk. See ***Boyle***, 685 So.2d at 1082. The crucial issue in this case is not whether the crack constituted a defect, but whether the crack created an unreasonable risk of harm to a prudent pedestrian. Moreover, Mr. Brumfield's testimony concerning a hypothetical hazard in a crosswalk was of limited value, since the instant accident did not occur in a crosswalk.

The City/Parish is responsible for maintaining numerous, perhaps hundreds of, miles of streets within the City/Parish, including Third Street, which have great

societal utility and are vital to the public. The cost of constantly repairing every minor crack in these streets would be prohibitively high. See ***Orleans Parish School Board v. City of New Orleans***, 585 So.2d 643, 647 (La. App. 4th Cir.), writ denied, 589 So.2d 1069 (La. 1991); see also ***Boyle***, 685 So.2d at 1083 (finding costs of repairing defects in entire network of university sidewalks was relevant to the risk-utility balancing test). While the gravity of harm resulting from a pedestrian tripping on the crack in question was potentially great, the probability of harm posed to a prudent pedestrian exercising ordinary care was slight. In the instant case, plaintiffs failed to present sufficient factual support to show they will be able to meet their burden of proving at trial that the crack in Third Street created an unreasonable risk of harm. Further, plaintiffs failed to establish the City/Parish owed Mrs. Davis any duty to warn her about the crack since there is no duty to warn of a hazardous condition unless the condition is unreasonably dangerous. ***Deumite v. State***, 94-1210 (La. App. 1st Cir. 2/14/97), 692 So.2d 1127, 1141, writ denied, 97-1409 (La. 9/26/97), 701 So.2d 984. Under these circumstances, summary judgment dismissing plaintiffs' claims was proper.

Additionally, plaintiffs also failed to present factual support to establish the City/Parish had either actual or constructive knowledge of the crack's existence, which is an essential element of plaintiffs' claim. La. R.S. 9:2800(C); ***Chambers***, 85 So.3d at 597. Actual knowledge has been defined as "knowledge of dangerous defects or conditions by a corporate officer or employee of the public entity having a duty either to keep the property involved in good repair or to report defects and dangerous conditions to the proper authorities." ***Jones v. Hawkins***, 98-1259 (La. 3/19/99), 731 So. 2d 216, 220. Constructive notice is defined by La. R.S. 9:2800(D) as "the existence of facts which infer actual knowledge." See ***Jones***, 731 So.2d at 220.

Absolutely no evidence was presented to show how long the crack had existed in Third Street prior to Mrs. Davis' accident. When asked in his deposition had long it would take a crack to develop spalling, Mr. Brumfield was unable to give a definitive response, explaining that it depended on the average daily traffic. Further, in his affidavit, Mr. Brumfield attested that his review of the City/Parish Street Maintenance Division call log revealed no calls prior to Mrs. Davis' accident concerning the condition of the section of Third Street at issue. Plaintiffs also admitted that they could point to no prior "incidents" occurring at that location.

To defeat summary judgment after the City/Parish presented its evidence regarding lack of notice, plaintiffs were required to produce factual support establishing they would be able to satisfy their burden of proving at trial that the City/Parish had actual or constructive notice of the crack and failed to remedy the defect with reasonable diligence. Plaintiffs failed to present any such evidence. On appeal, plaintiffs do not assert the City/Parish had actual notice. Instead, they argue constructive notice of the crack should be imputed to the City/Parish since it knew pedestrians crossed the section of Third Street where the accident occurred outside of the designated crosswalks. In particular, they argue that because the City/Parish invited visitors to come to the area to visit, it was foreseeable that persons such as Mrs. Davis would walk throughout the roadway, especially since Third Street was a one-way street to vehicular traffic.

Even accepting *agruendo* that the City/Parish knew pedestrians crossed Third Street outside of the designated crosswalks, that fact alone would not have imputed constructive knowledge to the City/Parish of the crack's existence in the absence of prior accidents or complaints made to the City/Parish. No evidence of any such complaints or accidents was presented. Plaintiffs' contentions do not in themselves constitute factual support to establish the required element of either

actual or constructive knowledge. In the absence of any such factual support for the essential element of notice, the district court properly granted summary judgment dismissing plaintiffs' claims.

CONCLUSION

For these reasons, the summary judgment granted by the district court in favor of the defendants, the City of Baton Rouge, the Parish of East Baton Rouge, and the Department of Public Works, dismissing the claims of the plaintiffs, Talisha J. and John Davis, Jr., with prejudice is hereby affirmed. Plaintiffs are to pay all costs of this appeal.

AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2017 CA 1473

TALISHA J. DAVIS AND JOHN DAVIS JR.

VERSUS

THE CITY OF BATON ROUGE, EAST BATON ROUGE PARISH
AND DEPARTMENT OF PUBLIC WORKS

McDONALD, J., agrees and assigns additional reasons.

I respectfully agree with the majority opinion, which states, "We believe a pedestrian has at least the same duty of care for her own safety when walking in a street as she does when walking on a sidewalk." Under the facts of this case, however, I think Mrs. Davis had a *greater* duty of care for her own safety when walking across Third Street than she would have had had she been walking on a sidewalk because: (1) streets are not generally meant for pedestrian traffic; (2) she was crossing the street outside of a designated crosswalk; (3) the City/Parish's duty to maintain that portion of the street not intended for pedestrian traffic is less than its duty to maintain a designated crosswalk specifically intended for pedestrian traffic; and, (4) Mrs. Davis was wearing stiletto heels and carrying an infant, a purse, and a diaper bag, which should have caused her to take additional care.