STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2018 CA 1197

WHW
JEW
TMH

STEVEN MINIX

VERSUS

PILOT TRAVEL CENTERS, LLC AND
ABC INSURANCE COMPANY

Judgment Rendered: MAY 31 2019

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Docket Number C609540

Honorable R. Michael Caldwell, Judge Presiding

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

WHIPPLE, C.J.

This is an appeal from a judgment of the Nineteenth Judicial District Court in East Baton Rouge Parish, granting the defendant's motion for summary judgment and dismissing the plaintiffs' suit with prejudice. For the following reasons, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Steven Minix, a commercial truck driver, was injured on March 30, 2011, at the Pilot Travel Center in Rayville, Louisiana, when he fell after encountering a pothole in a paved area of the Pilot facility adjacent to the fueling island where he had parked his rig. Upon pulling into a fueling island at the Pilot facility, Minix exited his truck and began walking around the tractor and trailer, engaging the fuel pumps to fill both the driver's side and passenger side fuel tanks of his rig. After engaging both pumps, Minix proceeded around the front of the rig from the passenger side, and as he approached the driver's side of the truck in front of the rig, his right leg "slipped" in a pothole, located about eighteen to twenty-four inches off the front bumper. According to Minix, the toe of his shoe "hung up on the edge of the hole," and he stumbled, landing on both knees and hurting his back.

Thereafter, Minix filed suit against Pilot Travel Centers, LLC ("Pilot") for the injuries he sustained, averring that the hole had been present for an extended period of time as evidenced by its eroded edges and that the area surrounding the hole was coated with a slippery substance, which appeared to be fuel or a similar substance.[1] Thus, Minix contended that the hole was a defect that created an unreasonable risk of harm and that Pilot knew or should have known of the

[1]Liberty Mutual Insurance Company, the workers' compensation insurer of Minix's employer, intervened in the suit, seeking reimbursement, out of the proceeds of any judgment or settlement in favor of Minix, for compensation benefits and medical expenses it paid to or on behalf of Minix.

defect. Accordingly, he sought damages for his personal injuries. Minix later died, and Connie Minix, Christopher Minix, and James Minix (hereinafter collectively referred to as "plaintiffs") were apparently substituted as parties plaintiff.[2]

After answering the petition, Pilot filed a motion for summary judgment, averring that the alleged defect was "obvious to all" and that plaintiffs would be unable to meet their burden of proof at trial to demonstrate the existence of an unreasonably dangerous condition on the Pilot premises. Pilot further asserted that plaintiffs lacked the ability to demonstrate that Pilot had knowledge of the defective condition. Thus, Pilot contended that it was entitled to judgment in its favor as a matter of law, dismissing plaintiffs' claims against it.[3]

Following a hearing on the motion, the trial court granted the motion and dismissed plaintiff's claims against Pilot with prejudice. From this judgment, plaintiffs appeal.

LEGAL PRECEPTS

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. Jones v. Anderson, 2016-1361 (La. App. 1st Cir. 6/29/17), 224 So. 3d 413, 417. After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(A)(3). The only documents that may be filed in support of or in opposition to the motion are pleadings, memoranda, affidavits, depositions,

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[2]The record on appeal contains only those pleadings and evidence as designated by plaintiffs for purposes of this appeal, and it does not contain a motion and order of substitution.

[3]Pilot also filed a separate motion for partial summary judgment, seeking to exclude certain evidence. However, that motion is not at issue in this appeal.

answers to interrogatories, certified medical records, written stipulations, and admissions.[4] LSA–C.C.P. art. 966(A)(4).

The burden of proof rests on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover'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 the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. The burden is then on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. LSA-C.C.P. art. 966(D)(1).

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Crosstex Energy Services, LP v. Texas Brine Company, LLC, 2017-0895 (La. App. 1st Cir. 12/21/17), 240 So. 3d 932, 936, writ denied, 2018-0145 (La. 3/23/18), 238 So. 2d 963. Thus, appellate courts ask the same questions: whether there is any genuine issue of material fact and whether the mover is entitled to judgment as a matter of law. Crosstex Energy Services, LP, 240 So. 3d at 936. Because it is the applicable substantive law that determines materiality, whether a particular issue in dispute is material can be seen only in light of the substantive law applicable to the case. Jones, 224 So. 3d at 417.

The owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. LSA-C.C. arts. 2317, 2317.1, and 2322. The owner of a building is not responsible for all injuries resulting from any risk posed by his building, but, rather, only for those injuries caused by an

[4]Nevertheless, the court shall consider any documents filed in support of or in opposition to the motion for summary judgment to which no objection is made. LSA-C.C.P. art. 966(D)(2).

unreasonable risk of harm to others. Broussard v. State, Office of State Buildings, 2012-1238 (La. 4/5/13), 113 So. 3d 175, 183.

Courts have developed a risk-utility balancing test to determine whether a condition is unreasonably dangerous, wherein the trier of fact balances the gravity and the risk of harm against the individual and societal utility and the cost and feasibility of repair. Bufkin v. Felipe's Louisiana, LLC, 2014-0288 (La. 10/15/14), 171 So. 3d 851, 856. The four pertinent factors to be considered in the risk-utility balancing test are: (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 social utility or whether the activities are dangerous by nature. Bufkin, 171 So. 3d at 856.

Regarding the second prong of the risk-utility inquiry, a defendant generally does not have a duty to protect against that which is obvious and apparent. An alleged hazard is considered obvious and apparent if it is open and obvious to everyone who may potentially encounter it. Bufkin, 171 So. 3d at 856. The open and obvious inquiry thus focuses on the global knowledge of everyone who encounters the defective thing, not the victim's actual or potentially ascertainable knowledge. Temple v. Morgan, 2015-1159 (La. App. 1st Cir. 6/3/16), 196 So. 3d 71, 77, writ denied, 2016-1255 (La. 10/28/16), 208 So. 3d 889.

The granting of summary judgment is not precluded in cases where no legal duty is owed because the condition encountered is obvious and apparent to all and, thus, not unreasonably dangerous. Allen v. Lockwood, 2014-1724 (La. 2/13/15), 156 So. 3d 650, 653 (*per curiam*). Rather, summary judgment is appropriate where a defendant points out a lack of factual support for a plaintiff's claim that a condition is unreasonably dangerous, and, upon the burden shifting to the plaintiff, the plaintiff is unable to produce factual support for his claim or to establish the

existence of a genuine issue of material fact. LSA-C.C.P. art. 966(D). Thus, in the absence of any material issues of fact, a court may determine by summary judgment that a defect is open and obvious and, therefore, does not present an unreasonable risk of harm. Temple, 196 So. 3d at 78.

DISCUSSION

The evidence presented by Pilot in support of its motion for summary judgment established that after engaging both fuel pumps to fill his tanks on the night of March 30, 2011, Minix continued walking around his rig, looking it over and checking the lights across the top of the cab. He walked across the front of his rig, which was approximately nine and one-half feet wide, carrying a "squeegee" and continuing to inspect his rig. Not seeing the pothole, which he estimated was eighteen to twenty-four inches off the bumper, he stumbled and fell forward on his hands and knees. He described the pothole as a "chunk of asphalt" that was gone.

Pilot also offered photocopies of photographs of the pothole in support of its motion. However, the quality of these photocopies is so poor as to offer no real value in analyzing the size, depth or obviousness of the pothole. Nonetheless, Pilot also pointed out that Minix did not claim that there was any obstruction to his view of the pothole as he walked the width of his rig, instead testifying that he was looking up at his truck as he crossed in front on it. Thus, Pilot argued that Minix's actions resulted in him not observing that "which was otherwise fully visible."

Additionally, Pilot offered the affidavit of one of its risk management employees, who attested that there had been no complaints or other incidents involving the area of the fuel island where Minix had fallen in the year prior to the incident in question.

On the other hand, in opposition to the motion, plaintiffs offered, among other evidence, the surveillance video of the fuel island where Minix was fueling his truck. While not capturing surveillance of Minix's actual fall, the video depicts

Minix's tractor-trailer rig and the pothole located in front of the rig. The footage demonstrates that the pothole was located in an area of asphalt, rather than the concrete portion of the bay, making it difficult to observe at that time of night.[5] Moreover, a review of the surveillance video further reveals that Minix's rig appears to be casting a shadow over at least a portion of the area of the pothole, and as Minix approaches the pothole from the front of his rig, his body also casts a shadow over the area of the pothole.[6]

As stated above, the open and obvious inquiry focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, thus distinguishing those risks that are open and obvious to all from risk to a particular plaintiff. Bastian v. Rosenthal, 2017-0284 (La. App. 4th Cir. 12/20/17), 234 So. 3d 1022, 1028. In the instant case, given the proximity of the pothole to the fueling bay, where drivers are undoubtedly tasked with activities such as fueling and inspecting their rigs, its location in a darker area of asphalt rather than concrete, and the overall condition of the fueling bay, where the pothole may or may not be apparent depending on the time of day, the location where a particular rig is parked within the bay, or other objects in the area that may cast shadows on the area, we must conclude that genuine issues of material fact remain as to whether the pothole created an unreasonable risk of harm which renders this case inappropriate for disposition by summary judgment. See Lincoln v. Acadian

[5]Plaintiffs apparently were unable to measure the size and depth of the pothole due to resurfacing work performed by Pilot at the facility approximately seven weeks after Minix's accident.

[6]This particular footage seems to be after Minix's fall, as he can be seen limping in the video and gingerly stepping over the pothole.

Plumbing & Drain, LLC, 2017-684 (La. App. 5th Cir. 5/16/18), 247 So. 3d205, 210-212, writ denied, 2018-1074 (La. 10/15/18), 253 So. 3d 1302 (despite whether a hole was open and obvious, genuine issues of material fact existed as to whether the manner in which the hole was barricaded or the area was secured created an unreasonable risk of harm, thus precluding summary judgment); Bastian, 234 So. 3d at 1027-1028 (genuine issues of material fact remained as to whether broken concrete was visible where the area was dark and a shadow was cast by a large vehicle); and Cox v. Baker Distributing Company, L.L.C., 51,587 (La. App. 2nd Cir. 9/27/17), 244 So. 3d 681, 685-686, writ denied, 2017-1834 (La. 1/9/18), 231 So. 3d 649 (relationship between a nonexistent dock plate and the other conditions of a loading dock gave rise to fact-specific issues as to whether the condition of the loading dock was open and obvious).

The facts of this case are clearly distinguishable from cases where a condition was blatantly open and obvious to all, such as a concrete barrier on a vehicle ramp, Ludlow v. Crescent City Connection Marine Division, 2015-1808 (La. 11/16/15), 184 So. 3d 21 (*per curiam*), a large construction dumpster the size of a pickup truck placed on a sidewalk, Bufkin, 171 So. 3d at 858, or a shopping cart in a parking lot, Rodriguez v. Dolgencorp, LLC, 2014-1725 (La. 11/14/14), 152 So. 3d 871, 872 (*per curiam*). Indeed, the facts presented herein are also distinguishable from those in Temple, where an entire area of sidewalk contained numerous cracks and crevices in an area plainly visible on a sunny day. See Temple, 196 So. 3d at 72, 78-79.

Based on our *de novo* review of the evidence presented, we conclude that, even if we were to find that Pilot had pointed out the absence of factual support for an element of plaintiffs' claim, thus shifting the burden to plaintiffs, plaintiffs produced factual support sufficient to establish the existence of genuine issues of material fact. Accordingly, Pilot was not entitled to judgment as a matter of law

dismissing plaintiffs' claims against it on the basis that the pothole was "obvious to all."

CONCLUSION

For the above and foregoing reasons, the March 8, 2018 judgment of the trial court, granting Pilot Travel Centers, LLC's motion for summary judgment and dismissing plaintiffs' claims against it, is hereby reversed. This matter is remanded for further proceedings consistent with the views expressed herein. Costs of this appeal are assessed against Pilot Travel Centers, LLC.

REVERSED AND REMANDED.