REGINALD DAVIS	*	**NO. 2006-CA-1367**
VERSUS	*	**COURT OF APPEAL**
PONTCHARTRAIN PLUMBING INC., GIBBS CONSTRUCTION, L.L.C., ABC INSURANCE COMPANY AND XYZ INSURANCE COMPANY	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-11739, DIVISION "A"
Honorable Carolyn Gill-Jefferson, Judge
* * * * * *
Judge Terri F. Love
* * * * * *

(Court composed of Judge Terri F. Love, Judge David S. Gorbaty, Judge Edwin A. Lombard)

Sidney L. Shushan
Jonathan M. Shushan
GUSTE, BARNETT & SHUSHAN, L.L.P.
639 Loyola Avenue
Suite 2500
New Orleans, LA 70113-7103

COUNSEL FOR PLAINTIFF/APPELLANT

Gregory W. Roniger
LAW OFFICES OF SHERYL STORY
One Galleria Boulevard
Suite 1610
Metairie, LA 70001-7508

COUNSEL FOR DEFENDANT/APPELLEE

AFFIRMED

This appeal arises from the trial court's granting of a motion for summary judgment in favor of Pontchartrain Plumbing, Incorporated. Mr. Reginald Davis failed to sufficiently show that he could prove that Pontchartrain Plumbing, Incorporated created an unreasonably dangerous condition, and through the exercise of reasonable care, Mr. Davis could have averted the accident. We find that no genuine issues of material fact exist and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. Reginald Davis ("Mr. Davis"), was employed by Seles Concrete Construction, a subcontractor of Gibbs Construction Company ("Gibbs"), the main contractor on a project at the American Can Company. During construction, Pontchartrain Plumbing, Incorporated ("Pontchartrain"), another subcontractor on the project, drove stakes into the ground to delineate where the plumbing would be placed.

Mr. Davis walked across the construction site, carrying a piece of plywood, and tripped over a stake in the ground. Mr. Davis sustained physical injuries, which included contusions to the left shoulder, cervical and thoracic sprains, and cervical spondylosis.

Mr. Davis filed a petition for damages. Following a motion for summary judgment, defendant Gibbs was dismissed from the case. Defendants, Pontchartrain and Transportation Insurance Company ("Transportation"), later brought a motion for summary judgment. The trial court granted the motion for summary judgment. Mr. Davis timely filed a motion for devolutive appeal.

STANDARD OF REVIEW

Appellate courts review summary judgments *de novo* and apply the same criteria as the trial courts. *Richard v. Hall*, 03-1488 (La. 4/23/04), 874 So. 2d 131. A motion for summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B). Summary judgment is favored and shall be construed "to secure the just, speedy, and inexpensive determination of every action." La. C.C.P. art. 966(A)(2). However, summary judgment may not be used to dispense with a case that is difficult to prove. *Holmes v. Pottharst*, 557 So. 2d 1024, 1026 (La. App. 4th Cir.1990).

"A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of a legal

dispute." *Hines v. Garrett*, 04-0806, p. 1 (La. 6/25/04), 876 So. 2d 764, 765. The mover bears the initial burden of proof to show that no genuine issue of material fact exists. *Id*. Once the mover has met his initial burden of proof, the burden shifts to the nonmoving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. *Id*.

SUMMARY JUDGMENT

Pontchartrain and Transportation prevailed on a motion for summary judgment, which asserted that they left the site several weeks prior to Mr. Davis' injury. Mr. Davis assigns error to the trial court's holding that no genuine issue of material fact existed, which would preclude summary judgment.

In determining whether the trial court erred in granting Pontchartrain's motion for summary judgment, we must discern whether genuine issues of material fact exist. *King v. Dialysis Clinic Inc.*, 04-2116, p. 5 (La. App. 4 Cir. 1/4/06), 923 So. 2d 177, 180. Pontchartrain does not bear the burden of proof at trial. Therefore, Pontchartrain need not negate all essential elements of Mr. Davis' claim, but Pontchartrain must establish that there is an absence of factual support for one or more elements essential to the claim. La. C.C.P. art. 966(C)(2). Further, Mr. Davis, the opposing party

to the supported motion for summary judgment, may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts establishing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967 (B).

Unreasonable Risk of Harm

In its motion for summary judgment, Pontchartrain asserted that the condition was "open and obvious" and therefore did not create an unreasonably dangerous condition. After Pontchartrain installed underground cleanout drains on the project site, it marked the drains with PVC piping pieces. Prior to departing the site, as directed by the safety personnel of Gibbs, Pontchartrain staked off the pipes and wrapped the stakes with caution tape. Pontchartrain avers that it left the site with all staking and flagging in proper condition.

Mr. Davis claims the proximate cause of the accident was Gibbs' failure as main contractor to supervise subcontractor Pontchartrain's allegedly negligent creation of a hazard and alleged failure to properly mark the stakes. Mr. Davis avers the stakes, flagged or unflagged, created an unreasonable risk of harm. Mr. Davis asserts that unflagged stakes would create an unreasonable risk of harm and flagged stakes would create an unreasonable risk of harm if Pontchartrain knew or should have know that

there were workers carrying loads in the area who would be unable to see warning flags. At the hearing on the motion for summary judgment, Mr. Davis suggested that Pontchartrain could have established a barrier to prevent workmen from walking onto the stakes. Pontchartrain maintains caution tape was placed around the stakes and that Mr. Davis had a duty to ascertain a safe path of travel before walking through the staked area.

In *Scroggins v. Sewerage & Water Bd. of New Orleans*, this Court restated that to recover under a negligence theory, the plaintiff has to show that the condition presented an unreasonable risk of harm. 533 So. 2d 132, 135 (La. App. 4th Cir. 1988). Where a risk of harm is obvious, universally known, and easily avoidable, the risk is not unreasonable. *Henshaw v. Audubon Park Com'n*, 605 So. 2d 640, 642 (La. App. 4th Cir. 1992).

Regardless of the type of barrier, it is unlikely that Mr. Davis would have seen it due to the board placed in front of him, which obstructed his own view. Mr. Davis stated in his deposition that he was aware that there were stakes on site to connote where Pontchartrain placed the piping. We find that because Mr. Davis knew that stakes on the construction site marked where piping was sticking out of the ground and he acknowledged carrying plywood in obstruction of his own view, the risk of harm was obvious and easily avoidable. Therefore, Pontchartrain did not create an unreasonable

risk of harm.

Duty to Prevent Harm

Mr. Davis argues that the trial court erred by not applying the balancing test as required by Louisiana law. Mr. Davis states that the facts demonstrate that it was easier for Pontchartrain to prevent the accident. Therefore, he claims that obvious issues of fact exist under the balancing test.

Determining what presents an unreasonable risk of harm involves the balancing of probability and gravity of harm presented by risk against the social utility of defendant's conduct or the thing involved. *Scroggins*, 533 So. 2d at 135.

Mr. Davis argues that his deposition raises a factual question as to whether his superiors knew he was carrying plywood with a blocked line of sight, which would be substantially certain to harm him. Mr. Davis states that Pontchartrain, who created the "condition" of staking the ground, knew that people carrying pieces of plywood would be walking past daily, as a routine part of the job. Mr. Davis further maintains that Pontchartrain knew that workmen with obstructed views walked by the location of the stakes all day, every day. He avers that that should have been considered in determining what Pontchartrain's duty was in terms of how well it should

mark the stakes and whether or not it was an unreasonably dangerous condition.

Pontchartrain argues that there was an open and obvious hazard that Mr. Davis should have seen, as he had been working on the project site for several weeks. In *Norman v. Sorrel*, the court noted that some hazards will necessarily exist on a construction site and it was the owner's ultimate responsibility to protect third parties from such hazards. 391 So. 2d 496, 498 (La. App. 3rd Cir. 1980). Construction workers must expect such hazards to exist and should be aware of and avoid them. *Id*.

Mr. Davis acknowledged carrying plywood in a manner that obstructed his own view. Given that, we find that Mr. Davis was in a better position to prevent the harm by keeping his line of sight clear.

Exercise of Ordinary Care

In his deposition, Mr. Davis stated that he knew the pipes were laid for a while, that the PVC had been installed, and that stakes were sticking out of the ground. Mr. Davis asserts that notwithstanding the presence of the stakes, at the time when he stepped on the stake and injured himself, it was his first day carrying a piece of plywood on the jobsite and that the ground was uneven. Mr. Davis maintains that his deposition testimony creates a genuine issue of material fact as to liability because of the interpretation of

him stating that he knew the stakes were present.

Mr. Davis has failed to provide factual support to carry his burden that the condition presented an unreasonable risk of harm to a reasonable and prudent person exercising ordinary care. A defendant can be found liable only if the condition presented an unreasonable risk of harm to a reasonable and prudent person exercising ordinary care. *Scroggins*, 533 So. 2d at 135.

When questioned as to why he did not see the pipes sticking out of the ground, Mr. Davis stated in his deposition that he was just not thinking about the pipes sticking up and the PVC coming out of the ground. Mr. Davis failed to sufficiently show that he could prove that Pontchartrain knew or should have known of an unreasonably dangerous condition. We believe that Mr. Davis could have averted the accident through the exercise of reasonable care. Thus, Pontchartrain is entitled to summary judgment as a matter of law.

APPORTIONMENT OF FAULT

Mr. Davis argues that the trial court committed error in holding that no reasonable fact finder could assign him 100% of the fault. In *Duncan v. Kansas City S. Ry. Co.*, the Louisiana Supreme Court summarized the standard for reviewing allocation of fault determinations as follows:

> This Court has previously addressed the allocation of fault and the standard of review to be applied by appellate courts reviewing such

> determinations. Finding the same considerations applicable to the fault allocation process as are applied in quantum assessments, the Court concluded that "the trier of fact is owed some deference in allocating fault" since the finding of percentages of fault is also a factual determination. *Clement v. Frey*, 95-1119 (La. 1/16/96); 666 So.2d 607, 609, 610. As with other factual determinations, the trier of fact is vested with much discretion in its allocation of fault. *Id*. Therefore, an appellate court should only disturb the trier of fact's allocation of fault when it is clearly wrong or manifestly erroneous. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the award, and then only to the extent of lowering it or raising it to the highest or lowest point respectively which is reasonably within the trial court's discretion. *Clement*, 666 So.2d at 611; *Coco v. Winston Industries, Inc.*, 341 So.2d 332, 335 (La.1977).

00-0066, pp. 10-11 (La. 10/30/00), 773 So. 2d 670, 680-81.

We find no clear error in the trial court's apportionment of fault. Pontchartrain departed the worksite prior to the injury after having completed its work according to the specifications of Gibbs. Also, Pontchartrain provided evidence that it staked off the areas where piping was sticking out of the ground as a safety precaution. Mr. Davis failed to negate this evidence and admitted to blocking his own line of sight. We find that it was reasonable for the trial court to allocate 100% of the fault to Mr. Davis.

DECREE

Accordingly, we affirm the trial court's granting of summary judgment in favor of Pontchartrain.

AFFIRMED