CAROL BASTIAN AND FRANK BASTIAN	*	**NO. 2017-CA-0284**
	*	
VERSUS		**COURT OF APPEAL**
	*	
ANDREW ROSENTHAL AND OLIVIA ROSENTHAL AND ABC INSURANCE CORPORATION	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2014-00083, DIVISION "L-6"
Honorable Kern A. Reese, Judge
* * * * * *
Judge Joy Cossich Lobrano
* * * * * *
(Court composed of Chief Judge James F. McKay, III, Judge Edwin A. Lombard, Judge Joy Cossich Lobrano)

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REVERSED AND REMANDED

DECEMBER 20, 2017

In this premises liability case, plaintiffs/appellants, Frank and Carol Bastian (collectively the "Bastians"), appeal the district court's November 10, 2016 judgment granting the motion for summary judgment filed by defendants/appellees, Andrew and Olivia Rosenthal and their homeowners' insurance carrier Access Home Insurance Company (collectively the "Rosenthals"), which dismissed all of the Bastians' claims against the Rosenthals. For the reasons that follow, we reverse the judgment and remand this matter to the district court for further proceedings.

The Bastians and the Rosenthals are next door neighbors. Carol Bastian ("Mrs. Bastian") alleges that she sustained injuries when she fell on broken concrete where the Rosenthals' driveway meets the sidewalk. The alleged incident occurred when Mrs. Bastian, who is in her seventies, was walking her dog at 10:15 p.m. while accompanied by Francis Pollachek ("Pollachek"), a security guard employed by Metro Security, Inc. ("Metro"), the private security company for the parties' neighborhood association.

On January 3, 2014, the Bastians filed a petition for damages naming the Rosenthals as defendants. On March 31, 2014, the Rosenthals filed a third party demand against the City of New Orleans (the "City"), alleging that the City owned the sidewalk and failed to repair that sidewalk. On April 8, 2014, the Bastians filed a supplemental and amending petition naming Metro as defendant, alleging that Pollachek failed to safely escort Mrs. Bastian around the broken concrete on

the night of the accident. The Bastians' claims against Metro were dismissed via summary judgment on March 22, 2016 and are not a part of this appeal.

On August 8, 2016, the Rosenthals filed a motion for summary judgment, arguing they had no duty to warn the Bastians of any risk posed by the sidewalk or driveway or to prevent Mrs. Bastian's injuries because the broken concrete was an open and obvious condition. On October 6, 2016, the Bastians filed an opposition to summary judgment, arguing that the broken concrete was not obvious because of the "darkened conditions" at the time of the accident.

The facts most pertinent to this appeal were set forth in Mrs. Bastian's deposition and the affidavit of Andrew Rosenthal ("Mr. Rosenthal"), both of which were introduced in support of the Rosenthals' motion for summary judgment.

Mrs. Bastian testified in her deposition to the following account of the accident. Mrs. Bastian left her house with her dog at 10:15 p.m. and saw Pollachek down the street at the wrong building. It was Pollachek's first day working for Metro. Mrs. Bastian was attempting to alert Pollachek that she was going back inside her house, so she walked toward him on the sidewalk past the Rosenthals' house. Mrs. Bastian and Pollachek then turned around to walk back toward the Bastians' house. Pollachek was a large man who took up most of the sidewalk. Mrs. Bastian walked alongside him on the driveway side of the sidewalk. There was a large vehicle in the Rosenthals' driveway, which cast a shadow on the broken concrete. Mrs. Bastian fell on the broken concrete. When asked why she fell, Mrs. Bastian testified that it was dark and she tripped on a "piece of cement."

Mrs. Bastian had walked across the sidewalk approximately twenty to thirty times in the five years she lived next door to the Rosenthals, but she generally avoided the area because it was "difficult to cross" and because of prior altercations with Olivia Rosenthal. Mrs. Bastian did not ordinarily walk her dog at night, but did so on the night of accident because her husband was out of town. The Rosenthals' driveway is on the opposite side of the Rosenthals' house from the Bastians' house, and Mrs. Bastian was able to see the driveway from her yard or her porch. She had seen pedestrians walk into the street to avoid the broken concrete. Mrs. Bastian testified that the condition of the driveway had changed during the time she had lived next door to the Rosenthals. She stated that there was an area that collapsed and the "pieces in the driveway had been readjusted and changed out from time to time."

Mr. Rosenthal attested in an affidavit that he had contacted the City three times before Mrs. Bastian's accident to request repairs to the sidewalk. He also attested that the sidewalk and driveway remained in nearly identical condition from the time he moved into the house in 2009 until the accident. No one complained to Mr. Rosenthal about the sidewalk or driveway, and, to his knowledge, there were no prior accidents involving the broken concrete.

On November 10, 2016, the district court rendered judgment, granting summary judgment and dismissing all of the Bastians' claims against the Rosenthals.

The Bastians set forth a single assignment of error on appeal, arguing that the district court erred as a matter of law in granting summary judgment, when, to the extent Mrs. Bastian was aware of the condition of the sidewalk and driveway, such evidence should instead be considered by the fact finder in determining comparative fault at trial.

Appellate courts review a grant of a motion for summary judgment *de novo* using the same criteria district courts consider when determining if summary judgment is proper. *Kennedy v. Sheriff of E. Baton Rouge*, 2005-1418, p. 25 (La. 7/10/06), 935 So.2d 669, 686 (citations omitted). The summary judgment procedure is favored in Louisiana. La. C.C.P. art. 966(A)(2).

"After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents 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(A)(3). Regarding the burden of proof on summary judgment, La. C.C.P. art. 966(D)(1) states:

> The burden of proof rests with 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 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.

The Bastians argue on appeal that the district court applied the incorrect standard in granting summary judgment. According to the Bastians, the district

court improperly found that the Rosenthals owed the Bastians no duty; instead, the district court should have found that genuine issues of material fact remain as to breach of duty. Specifically, the Bastians contend that the broken concrete presented an unreasonable risk of harm (a breach of duty issue) and was not an open and obvious condition (alleviating the homeowner of any duty to warn of or protect against the condition). The Bastians contend that Mrs. Bastian's awareness of the broken concrete should be considered by the fact finder in determining comparative fault at trial.

"The threshold issue in any negligence action is whether the defendant owed the plaintiff a duty, and whether a duty is owed is a question of law." *Bufkin v. Felipe's Louisiana, LLC*, 2014-0288, p. 5 (La. 10/15/14), 171 So.3d 851, 855 (citing *Milbert v. Answering Bureau, Inc.*, 2013-0022, p. 15 (La. 6/28/13), 120 So.3d 678, 687-88). La. C.C. art. 2317 and 2317.1 are relevant to this analysis, and provide:

> **Art. 2317. Acts of others and of things in custody**
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> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.
>
> **Art. 2317.1. Damage caused by ruin, vice, or defect in things**
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> 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.

We note that in the matter before us, the record is not developed as to precisely where Mrs. Bastian fell, and the Rosenthals do not demonstrate, with undisputed facts, whether Mrs. Bastian fell on the public sidewalk or the private driveway or whether the Rosenthals owned or assumed custody over the area where Mrs. Bastian fell. The Rosenthals, as defendants, will not bear the burden of proof at trial and are not required on a motion for summary judgment to negate all essential elements of the Bastians' claims. *See* La. C.C.P. art. 966(D)(1). In seeking summary judgment, the Rosenthals essentially asked the district court to find, even if the Bastians can meet their burden to prove at trial that the Rosenthals assumed custody over the area in which Mrs. Bastian fell, that the Rosenthals are relieved of liability by operation of the open and obvious doctrine. For the purposes of this appeal, we are not required to determine whether the Rosenthals exercised custody over the area in which the incident allegedly occurred. Rather, we must determine whether the district court properly granted summary judgment on the basis that the condition of the concrete open and obvious.

The Louisiana Supreme Court stated in *Bufkin*, 2014-0288 at pp. 5-6, 171 So.3d at 855-56:

> The burden for tort liability arising from a defect in a public sidewalk is generally with the municipality, not the adjoining landowner, unless the abutting property owner negligently caused a defect in the sidewalk. *See Randall v. Feducia*, 507 So.2d 1237, 1239 (La. 1987); *Arata v. Orleans Capitol Stores*, 219 La. 1045, 1058-60, 55 So.2d 239, 244 (La.1951); *Stern v. Davies*, 128 La. 182, 54 So. 712 (La. 1911). Notwithstanding, a pedestrian has a duty to see that which should be seen and is bound to observe his course to see if his pathway is clear. *Hutchinson v. Knights of Columbus, Council No. 5747*, 03–1533 (La. 2/20/04), 866 So.2d 228, 234; *Williams v. Leonard Chabert Medical Center*, 98-1029 (La. App. 1 Cir. 9/26/99),

> 744 So.2d 206, 211, *writ denied*, 00-0011 (La.2/18/00), 754 So.2d 974.
>
> When evaluating the duty owed relative to a sidewalk condition, the facts and surrounding circumstances of each case control and the test applied requires the consideration of whether the sidewalk was maintained in a reasonably safe condition for persons exercising ordinary care and prudence. Courts have adopted a risk-utility balancing test to determine whether such 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. *See Chambers v. Village of Moreauville*, 11-0898 (La. 1/24/12), 85 So.3d 593, 597-98.

Specifically, "[i]n determining whether a condition is unreasonably dangerous, courts have adopted a four-part test. This test requires consideration of: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, which includes 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. *Dauzat v. Curnest Guillot Logging Inc.*, 2008-0528, p. 5 (La. 12/2/08), 995 So.2d 1184, 1186-87.

In *Broussard v. State ex rel. Office of State Bldgs.*, 2012-1238, p. 11 (La. 4/5/13), 113 So.3d 175, 184, the Louisiana Supreme Court noted that the "second prong of this risk-utility inquiry focuses on whether the dangerous or defective condition is obvious and apparent." *Broussard* held that whether a condition is unreasonably dangerous is a question of fact, and the fact-finder utilizes the risk-utility balancing test to determine which risks are unreasonable and whether those risks pose an open and obvious hazard. *Id.*, 2012-1238 at p. 12, 113 So.3d at 184. The *Broussard* court further explained:

> In order to avoid further overlap between the jury's role as fact-finder and the judge's role as lawgiver, we find the analytic framework for

> evaluating an unreasonable risk of harm is properly classified as a determination of whether a defendant breached a duty owed, rather than a determination of whether a duty is owed *ab initio*. It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. *E.g., Brewer v. J.B. Hunt Transp., Inc.*, 09-1408, p. 14 (La. 3/16/10), 35 So.3d 230, 240 (citing *Mundy v. Dep't of Health and Human Res.*, 620 So.2d 811, 813 (La. 1993)). The judge decides the former, and the fact-finder—judge or jury—decides the latter. "In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of 'no liability' or 'no breach of duty.' " *Pitre*, 95-1466 at p. 22, 673 So.2d at 596 (Lemmon, J., concurring). Because the determination of whether a defect is unreasonably dangerous necessarily involves a myriad of factual considerations, varying from case to case, *Reed*, 97-1174 at p. 4, 708 So.2d at 364, the cost-benefit analysis employed by the fact-finder in making this determination is more properly associated with the breach, rather than the duty, element of our duty-risk analysis.[footnote omitted] *See* Maraist, et. al., *Answering a Fool*, 70 LA. L.REV. at 1120 ("[O]ne might persuasively argue that the cost-benefit analysis used to determine whether a risk is reasonable or unreasonable is the heart of the breach decision and is one that should be conducted by the fact-finder, rather than by the court...."). 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., 2012-1238 at pp. 11-13, 113 So.3d at 185.

In *Broussard*, the Louisiana Supreme Court considered, on review of a judgment following a jury trial, whether an elevator stopped between floors was an "unreasonably dangerous" condition. 2012-1238 at pp. 1-2, 113 So.3d at 179. The Supreme Court explained that a condition is not unreasonably dangerous if it is an open and obvious hazard. *Id.*, 2012-1238 at p. 11, 113 So.3d at 184. "In order for a hazard to be considered open and obvious, this Court has consistently stated the

hazard should be one that is open and obvious to all, i.e., everyone who may potentially encounter it." *Id.*, 2012-1238 at p. 10, 113 So.3d at 184.

"The open and obvious inquiry thus focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge." *Id.*, 2012-1238 at p. 18, 113 So.3d at 188. The global knowledge requirement distinguishes risks that are "open and obvious to all" from "assumption of risk" by a particular plaintiff. *Id.*, 2012-1238 at p. 18, 113 So.3d at 188-89.

On appeal, the Bastians contend that Mrs. Bastian's age, the lighting conditions, Pollachek's path taking up most of the sidewalk, and Mrs. Bastian's lack of familiarity with the area at night all raise genuine issues of material fact as to whether the broken concrete was an open and obvious condition. The Rosenthals argue that the broken concrete was obvious during the day and did not lose its obviousness by night; they also contend that Mrs. Bastian was particularly aware of the broken concrete, which was in front of her next door neighbor's home.

We find, as a matter of law, that in order for a condition to be open and obvious, it must be visible. We further find that genuine issues of material fact remain as to whether the broken concrete was visible.

The deposition and affidavit testimony demonstrated that both Mrs. Bastian and Mr. Rosenthal were aware of the broken concrete; that members of the public walked into the street to avoid the broken concrete; that there had been no prior accidents on the broken concrete; that it was night time and dark outside at the time

of the accident; that the area in which Mrs. Bastian fell was dark and a shadow was cast by a large vehicle parked in the Rosenthals' driveway.

There was no testimony, however, stating whether the broken concrete was visible in the dark. While Mrs. Bastian testified that it was dark and she tripped, she did not specifically state whether she could see the broken concrete in the dark. Furthermore, there was no evidence as to length, width, or depth of the broken concrete.

Citing to *Rodriguez v. Dolgencorp, LLC*, 2014-1725 (La. 11/14/14), 152 So.3d 871, the Rosenthals encourage this Court to uphold summary judgment on the basis of Mrs. Bastian's actual knowledge of the cracked concrete. Under the facts before us, we disagree.

We acknowledge that, in *Rodriguez*, the Supreme Court cited to the plaintiff's testimony admitting that she saw the shopping cart which caused her to fall. However, in *Broussard*, the Supreme Court drew an explicit distinction between a condition that is "obvious to all who encounter it" and "assumption of risk" by a specific plaintiff faced with that condition. 2012-1238 at p. 18, 113 So.3d at 188-89. While we recognize that Mrs. Bastian's knowledge of the broken concrete is relevant evidence that the condition was observable, we cannot find her particular knowledge dispositive of whether that the condition was globally visible to all in the dark. *See id.* Considering Mrs. Bastian's testimony that she fell because it was dark and because there is no testimony that the broken concrete was visible in the dark, finding that the concrete remained open and obvious would

require this Court to weigh evidence and make factual findings, which is not appropriate on summary judgment. *See Grant v. Am. Sugar Ref., Inc.*, 2006-1180, p. 4 (La. App. 4 Cir. 1/31/07), 952 So.2d 746, 748.

The Rosenthals also cite to *Williams v. Orleans Par. Sch. Bd.*, 541 So.2d 228 (La. App. 4th Cir. 1989) in arguing that "an otherwise open and obvious condition does not become unreasonably dangerous simply because night has fallen." However, the *Williams* court did not examine whether the defect at issue was open and obvious. Rather, *Williams* merely stated that a plaintiff in darkness or who detects a shadow should proceed with more care than during the day. *Id.* at 230. In making these statements, *Williams* examined whether the defect in a sidewalk was unreasonably dangerous, which is a breach of duty issue and a question of fact. *Id. See also Broussard*, 2012-1238 at pp. 11-12, 113 So.3d at 185.

Accordingly, we do not find that the Rosenthals have established, with undisputed facts, that the condition posed by the broken concrete was open and obvious to all comers. We, therefore, find that the district court erred in granting summary judgment and dismissing the Bastians' claims against the Rosenthals.

For the reasons stated above, we reverse the November 10, 2016 judgment, and remand this matter to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED