Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **17th day of March, 2023** are as follows:

BY Genovese, J.:

2022-CC-00849 SUZANNE FARRELL AND JOSEPH FARRELL VS. CIRCLE K STORES, INC. AND THE CITY OF PINEVILLE (Parish of Rapides)

REVERSED AND RENDERED. SEE OPINION.

Weimer, C.J., concurs in the result and assigns reasons.
Hughes, J., dissents and assigns reasons.
Griffin, J., dissents and assigns reasons.

SUPREME COURT OF LOUISIANA

No. 2022-CC-00849

SUZANNE FARRELL AND JOSEPH FARRELL

VS.

CIRCLE K STORES, INC. AND THE CITY OF PINEVILLE

On Supervisory Writ to the 9th Judicial District Court, Parish of Rapides

GENOVESE, J.

This Court granted certiorari in this personal injury matter in order to consider whether the lower courts erred in denying Defendants' motion for summary judgment. For the reasons that follow, we reverse and render.

FACTS AND PROCEDURAL HISTORY

On July 10, 2019, Plaintiffs, Suzanne Farrell and her husband, Joseph Farrell, were traveling to Galveston, Texas, when they stopped to refuel at a Circle K Store ("Circle K") located in Pineville, Louisiana. While Mr. Farrell pumped gas, Mrs. Farrell decided to take their dog for a walk. Mrs. Farrell exited the vehicle and looked around for a suitable area to take the dog. She ultimately chose a grassy area located at the edge of the Circle K parking lot. In order to reach this area of grass, Mrs. Farrell had to traverse a pool of water. The water extended approximately the length of a tractor-trailer and was draining to the low spot of the parking lot. Mrs. Farrell walked to the narrowest part of the water—approximately one foot across—and attempted to step over the water. She was unsuccessful, and she fell and sustained personal injury.

Mr. and Mrs. Farrell subsequently filed this personal injury lawsuit against Circle K and the City of Pineville (collectively referred to as "Defendants").

Defendants jointly moved for summary judgment,[1] arguing that they were not liable on the ground that the alleged hazardous condition was open and obvious. Plaintiffs opposed the motion,[2] arguing that the hazard was not the pool of water, but the slippery substance hidden in the water. Therefore, they argued the hazard was not open and obvious, and Defendants were not entitled to summary judgment.

The trial court denied Defendants' motion for summary judgment, finding "that there exist issues of material fact regarding whether a reasonable person should have seen the mold/mildew/algae/slime present in the water puddle at issue." The trial court explained "that there are genuine issues of material fact, specifically that relate to whether or not the condition was open and obvious."

The court of appeal denied Defendants' writ application, with one judge dissenting.[3] The majority denied the writ application stating: "We find no error in the trial court's ruling." The dissenting judge did not assign reasons. Defendants then sought writs in this Court, which were granted. *Farrell v. Circle K Stores, Inc*., 22-849 (La. 11/8/22), 349 So.3d 570.

LAW AND ANALYSIS

This Court applies a *de novo* standard of review when considering lower court rulings on summary judgment motions. *Bolden v. Tisdale*, 21-224, p. 10 (La. 1/28/22), 347 So.3d 697, 706 (quoting *Bufkin v. Felipe's Louisiana, LLC*, 14-288, p. 3 (La. 10/15/14), 171 So.3d 851, 854; *Catahoula Par. Sch. Bd. v. Louisiana Mach. Rentals, LLC*, 12-2504, p. 8 (La. 10/15/13), 124 So.3d 1065, 1071). Thus, we use the same criteria that govern the trial court's consideration of whether summary

[1] Attached to Defendants' motion for summary judgment were the following exhibits: (1) Petition for Damages; (2) Answer to Petition for Damages by the City of Pineville; (3) Answer and Affirmative Defenses to Petition for Damages by Circle K; (4) the deposition of Mrs. Farrell; (5) the deposition of Mr. Farrell; and, (6) the deposition of Denise Hendrix, the manager of Circle K.

[2] In addition to the exhibits attached by Defendants, Plaintiffs relied on the deposition of Kent Magee, the maintenance manager of Circle K; however, Mr. Magee's deposition was not attached to their memorandum in opposition, and it is not in the record.

[3] *Farrell v. Circle K Stores, Inc.*, 22-45 (La.App. 3 Cir. 4/28/22) (unpublished).

judgment is appropriate. *Id*. at 706-707. A trial court must grant a motion for summary judgment if the pleadings, memoranda, affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions 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.Code Civ.P. art. 966(A)(3)(4). The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by La.Code Civ.P. art. 969. La.Code Civ.P. art. 966(A)(2). The procedure is favored and shall be construed to accomplish these ends. *Id.*

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. La.Code Civ.P. art. 966(D)(1). 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. *Id*. When a motion for summary judgment is made and supported as provided in La.Code Civ.P. art. 967(A), an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in La.Code Civ.P. art. 967(A), must set forth specific facts showing that there is a genuine issue for trial. La.Code Civ.P. art. 967(B). If he does not so respond, summary judgment, if appropriate, shall be rendered against him. *Id.*

In this case, Defendants argue that the trial court erred in finding the allegedly hazardous condition was not open and obvious, even though Mrs. Farrell admitted that she fell when she misjudged her ability to step over a "murky," "brownish gray"

pool of water at the edge of the parking lot. Defendants assert the trial court's analysis is flawed because it ignores the fact that the pool of water was itself an open and obvious hazard. They contend that Mrs. Farrell had a duty to consider the strong possibility of algae being present in a stagnant pool of water on a hot summer day in Louisiana. It is their contention that the trial court erred in focusing on what Mrs. Farrell said she saw and did not see, rather than whether the condition was open and obvious to all and, thus, would not be dangerous to pedestrians exercising ordinary care and prudence.

By contrast, Plaintiffs argue that a pool of water is not itself a dangerous condition; however, algae, mold, and slime constitute hidden dangers. They assert that a reasonable person, who had never been to the Circle K store before, would not know that the water had pooled for 12 days and contained algae. Plaintiffs contend that a reasonable person would not presume that a pool of water hides a layer of algae. Thus, contrary to Defendants' contention, Plaintiffs conclude that the defect was not open and obvious and that the trial court did not err in denying Defendants' motion for summary judgment.

Plaintiffs assert liability predicated on La.Civ. Code arts. 2315, 2316, 2317, and 2317.1. Louisiana Civil Code Article 2315(A) provides: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Louisiana Civil Code Article 2316 states: "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill." Louisiana Civil Code Article 2317 states: "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by . . . things we have in our custody." Finally, Louisiana Civil Code Article 2317.1 provides, in part:

> 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.

Whether a claim arises in negligence under La.Civ.Code art. 2315 or in premises liability under La.Civ.Code art. 2317.1, the traditional duty/risk analysis is the same. And now, with La.Civ.Code art. 2317.1's requirement of actual or constructive knowledge of a defect, the result under either should be the same. In any event, a claim under La.Civ.Code art. 2315 typically focuses on whether the defendant's conduct of allowing an unreasonably dangerous condition to exist on its premises is negligent, while a La.Civ.Code art. 2317.1 claim focuses on whether the thing itself is defective; *i.e.*, unreasonably dangerous. But, when the legislature eliminated strict liability for defective things in one's custody by adding La.Civ.Code art. 2317.1, a negligence standard replaced it. The requirements of actual or constructive knowledge of the defect and proof that the defendant could have prevented damage from the defect by exercising reasonable care evidences this shift. We will utilize a duty/risk analysis to determine whether liability exists. *Malta v. Herbert S. Hiller Corp*, 21-209, p. 11 (La. 10/10/21) 333 So.3d 384, 395 (citing *Posecai v. Wal-Mart Stores, Inc.*, 99-1222, p. 4 (La. 11/30/99), 752 So.2d 762, 765).

Under the duty/risk analysis, the plaintiff must prove five separate elements: (1) the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of duty element); and, (5) proof of actual damages (the damages element). *Id.* (citing *Boykin v. Louisiana Transit Co., Inc.*, 96-1932, pp. 8-9 (La. 3/4/98), 707 So.2d 1225, 1230). If the

plaintiff fails to prove any one element by a preponderance of the evidence, the defendant is not liable. *Id.* (citing *Mathieu v. Imperial Toy Corp.*, 94-952, p. 4 (La. 11/30/94), 646 So.2d 318, 322).

At trial, Plaintiffs would bear the burden of proving the elements of their claims against Defendants. Thus, for Defendants to prevail on summary judgment, they were required to show an absence of factual support for any of the elements of Plaintiffs' cause of action.

DUTY/RISK ANALYSIS

THE DUTY ELEMENT

The existence of a duty is a question of law. *Id.* (citing *Posecai*, 752 So.2d at 766). The inquiry is whether the plaintiff has any law (statutory, jurisprudential, or arising from general principles of fault) to support the claim that the defendant owed him a duty. *Id.* (citing *Faucheaux v. Terrebonne Consol. Gov't*, 615 So.2d 289, 292 (La.1993)).

In this case, La.Civ. Code arts. 2315, 2316, 2317, and 2317.1, are the sources of the duty owed. The general rule is that the owner or custodian of property has a duty to keep the premises in a reasonably safe condition. The owner or custodian must discover any unreasonably dangerous condition on the premises, and either correct the condition or warn potential victims of its existence. Consequently, we find Defendants owed such a duty to Plaintiffs.

THE BREACH OF DUTY ELEMENT

Whether there was a breach of the duty owed is a question of fact or a mixed question of law and fact. *Boykin*, 707 So.2d at 1231. Louisiana courts apply the risk/utility balancing test to make this determination. *Bufkin*, 171 So.3d at 856 (citing *Chambers v. Village of Moreauville,* 11-898, p. 5 (La. 1/24/12), 85 So.3d 593, 597-98). This Court has synthesized the risk/utility balancing test to a consideration of four pertinent factors: (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 were dangerous by nature. *Id.* (citing *Broussard*, 113 So.3d at 184; *Dauzat v. Curnest Guillot Logging, Inc.*, 08-528, p. 5 (La. 12/2/08), 995 So.2d 1184, 1186-87 (per curiam); *Hutchinson v. Knights of Columbus, Council No. 5747*, 03-1533, pp. 9-10 (La. 2/20/04), 866 So.2d 228, 235; *Pitre v. Louisiana Tech Univ.*, 95-1466, pp. 11-15 (La. 5/10/96), 673 So.2d 585, 591-93. We, therefore, consider these four factors herein.

Risk Utility Balancing Test

Utility of the complained of condition

The alleged defect was not intended nor present by design. If it was meant to be there, it often will have social utility, and in the balancing test, weigh against a finding that the premises was unsafe. Here, there is no evidence the pool of water was intended, nor do we otherwise find any utility to its presence in the parking lot of a commercial store.

Likelihood and magnitude of the harm, including the obviousness and apparentness of the condition

The likelihood of the harm factor asks the degree to which the condition will likely cause harm. If it is likely to cause harm, that weighs in favor of finding it unreasonably dangerous. If it is unlikely to cause harm, that weighs in favor of it not being unreasonably dangerous. The magnitude of the harm factor asks whether the condition presents a risk of great or small injury and the likelihood of each. The likelihood and magnitude of the harm, includes a consideration of the open and obviousness of the condition. Relative to the instant matter, undisputedly, there was water flowing into part of the parking lot and standing water in the area where Mrs. Farrell fell. The pool of water was located at the edge of the parking lot, and it was of a significant size. Mrs. Farrell described it as bigger in length than a car and

approximately a foot wide at its narrowest portion. According to Mrs. Farrell, it was also dirty, "[b]rownish-gray" in color, and "the water was very noticeable because it was flowing freely." There was debris in the water. Ms. Hendrix, the manager of Circle K, testified it was approximately the size of a fuel truck.

We note that the size of the allegedly unreasonably dangerous condition is relevant. The more obvious the risk, the less likely it is to cause injury because it will be avoided. Thus, it is conceivable that an allegedly hazardous condition, as alleged in this case, located at the entrance to the store, may ultimately be determined to be unreasonably dangerous; whereas, the same condition, located in the corner of a parking lot, may not be unreasonably dangerous because the likelihood and magnitude of harm is vastly different. It is also relevant that the pool of water was not located in a customarily traversed area, such as the entrance to the store, where patrons would likely encounter it or be forced to encounter it to go into the location. It also was not located near the gas pumps, where, again, it would necessarily or likely be encountered by customers.

We are cognizant that the analysis of whether a condition is open and obvious has been applied differently and inconsistently in the jurisprudence. At this juncture, we find it prudent to note that the phrase "open and obvious" is, frankly, a figment of judicial imagination. "The phrase 'open and obvious' is also notably absent from any of the premises liability statutes. These concepts—embodied in our risk-utility analysis—are thus strictly jurisprudential doctrines[.]" *Broussard*, 113 So.3d at 189, n.8. Moreover, in some instances, whether a condition is open and obvious has been considered as part of the **duty element** of the duty/risk analysis. In others, it has been incorporated in the **breach of the duty** element of the duty/risk analysis. As has been noted in the jurisprudence discussed below, when analyzing the existence of a duty by determining whether a condition is open and obvious and, thus, not an unreasonable risk of harm, courts erroneously conflate the duty and breach elements.

Considering their numerosity, a discussion of each decision making this error need not be addressed. However, the pertinent decisions of this Court discussed below demonstrate the conflation that occurs and the inaccuracy of prior statements by this Court, which we now rectify.

In *Broussard*,[4] this Court recognized the problematic analysis, stating:

> We have stated that if the facts and circumstances of a particular case show a dangerous condition should be open and obvious to all who encounter it, then the condition may not be unreasonably dangerous and the defendant may owe no duty to the plaintiff. *E.g.,Caserta,*12-0853 at p. 1, 90 So.3d at 1043; *Dauzat,* 08-0528 at p. 4, 995 So.2d at 1186; *Hutchinson,* 03-1533 at p. 9, 866 So.2d at 234; *Pitre,* 95-1466 at p. 7, 673 So.2d at 589; *Socorro v. City of New Orleans,* 579 So.2d 931, 942 (La.1991). While this statement is consistent with our "open and obvious to all" doctrine, by tethering the existence of a duty to a determination of whether a risk is unreasonable, our prior decisions have admittedly conflated the duty and breach elements of our negligence analysis. *See* Maraist, et. al., *Answering a Fool,* 70 LA. L.REV. at 1121-22, 1124. This conflation, in turn, has confused the role of judge and jury in the unreasonable risk of harm inquiry and arguably transferred "the jury's power to determine breach to the court to determine duty or no duty." *Id.* at 1124, 1132-33.
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> 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)). . . . 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. *See* Maraist, et. al., *Answering a Fool,* 70 LA. L.REV.at 1120.

[4] In *Broussard*, the complained of condition was a malfunctioning elevator. The plaintiff was a United Parcel Service delivery person who was injured while trying to maneuver a loaded dolly into the elevator that had stopped a few inches above the floor. Following trial, a jury found the elevator presented an unreasonable risk of harm. The appellate court found this determination to be manifestly erroneous and reversed. This Court granted writs and reinstated the trial court's judgment, finding the appellate court erred in reversing the jury's determination that the elevator presented an unreasonable risk of harm because a reasonable jury could have determined that the danger posed by the elevator was not open and obvious to all who encountered it. *Broussard*, 113 So.3d 175.

Broussard, 113 So.3d at 184-85 (footnote omitted).

Broussard, therefore, acknowledged the differing analysis and reasoned that the proper analysis for evaluating an unreasonable risk of harm was in the context of whether there was a **breach of a duty owed**. However, *Broussard's* language that, "[a]s a mixed question of law and fact, it is the fact-finder's role—either the jury or the court in a bench trial—to determine whether a defect is unreasonably dangerous[,]" was later misinterpreted. *Id.* at 183. Some courts interpreted this language as standing for the proposition that the question of whether a defect is unreasonably dangerous must always be presented to the trier of fact and cannot be resolved as a matter of law on summary judgment. Following *Broussard*, this Court made it clear that, absent any material factual issue, the summary judgment procedure can be used to determine whether a defect constitutes an unreasonably dangerous condition, and thus, does not present an unreasonable risk of harm. However, admittedly, the language of these decisions failed to eliminate the conflation of duty and breach as had been addressed in *Broussard*. Despite *Broussard*, courts continued to speak in terms of no duty when there existed open and obvious conditions on premises. See *Bufkin*, 171 So.3d 851; *Allen v. Lockwood*, 14-1724 (La. 2/13/15), 156 So.3d 650.

In *Bufkin*, 171 So.3d at 859 n.3,[5] this Court clarified its holding in *Broussard*, to make clear that *Broussard* "should not be construed as precluding summary judgment[.]" Regrettably, *Bufkin* also removed some of the analytical clarity provided by *Broussard*. Notably, *Bufkin* begins with the statement that the writ presented "the issue of whether a building contractor breached any legal duty owed

[5] *Bufkin* involved a dumpster that had been placed on several parking spaces in the French Quarter of New Orleans. The dumpster was being used in connection with renovations of a building. As a pedestrian, plaintiff encountered the dumpster and a construction barrier blocking his path. The barrier contained signage indicating that the sidewalk was closed, as well as a large arrow directing pedestrians to the sidewalk on the opposite side of the street. As plaintiff attempted to cross the street, a bicyclist, riding in the wrong direction, struck and injured him. *Bufkin*, 171 So.3d 851.

to a pedestrian. . . ." *Id.* at 851. However, that statement was followed by "we conclude that the dumpster was obvious and apparent, and not unreasonably dangerous; thus, there was no duty to warn of the clearly visible obstruction[.]" *Id.* In the context of summary judgment, the no duty holding was repeated, as we opined that summary judgment is not precluded "when no legal duty is owed because the condition encountered is obvious and apparent to all and not unreasonably dangerous." *Id.* at 859 n.3. Thus, following *Bufkin*, the language of *Broussard* seemingly prohibiting summary judgment was clarified; however, *Bufkin* reverted back to "no legal duty" language, thereby perpetuating the confusion in the jurisprudence conflating the duty and breach elements of a negligence analysis.

Subsequently, in *Allen*, 156 So.3d 650,[6] we were presented with the issue of whether defendants were entitled to summary judgment where the plaintiff alleged defendants' parking lot was unreasonably dangerous. The *Allen* Court granted writs:

> [T]o provide much needed guidance to both the practitioners and the Judiciary of this State on the proper interpretation and application of our holding in *Broussard v. State Ex Rel. Office of State Buildings,* 12-1238 (La.4/5/13), 113 So.3d 175, when addressing motions for summary judgment on the issue of whether an alleged defect presents an unreasonable risk of harm.

Id. at 651.

This Court, in *Allen*, stated that the court of appeal "misinterpreted our holding in *Broussard* by concluding '[t]he supreme court has held that the question of whether a [condition] presents an unreasonable risk of harm is a mixed question of law and fact and, accordingly, should be determined by the fact-finder,' which would preclude summary judgment on these issues." *Id.* at 652. This Court noted that,

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[6] In *Allen*, the complained-of condition was an unpaved, grassy parking area owned by the defendants. A church member struck the plaintiff with her vehicle when the church member was backing out of the parking area. The trial court denied the defendants' motion for summary judgment. The court of appeal denied the defendants' writ application, citing *Broussard*. *Id.* at 652.

procedurally, *Broussard* involved a jury trial, not a motion for summary judgment.[7] We then made it clear that: "Any reading of *Broussard* interpreting it as a limit on summary judgment practice involving issues of unreasonable risk of harm is a misrepresentation of the *Broussard* case." *Id.* at 652-53. Although we expressly referred to "issues of unreasonable risk of harm[,]" inconsistently, we quoted *Bufkin's* language that there is no duty owed when risk is open and obvious to all who encounter it and not unreasonably dangerous. Thus, despite referring to the absence of a duty, *Allen* compounded the conflation of the duty and breach elements by opining that, when considering a motion for summary judgment, "the court's obligation is to decide 'if there [is] a genuine issue of material fact as to whether the [complained-of condition or thing] created an unreasonable risk of harm. . . .'" citing *Broussard*, which would be a question of breach. *Id.* at 653.

Ultimately, the *Allen* Court found "as there is no genuine issue as to whether the parking area was unreasonably dangerous, the church defendants are entitled [to] summary judgment in their favor as a matter of law." *Id.* However, given the language of *Allen*, arguably, it was unclear whether the Court determined that defendants were entitled to judgment as a matter of law based upon the lack of a duty or the lack of a breach. Therefore, *Allen* left the appropriate analysis unclear.

Acknowledging the confusion which has arisen and the legitimate criticism thereof, we specifically clarify herein that whether a condition is open and obvious is embraced within the breach of the duty element of the duty/risk analysis and is not a jurisprudential doctrine barring recovery, but only a factor of the risk/utility balancing test. Specifically, it falls within the ambit of the second factor of the

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[7] The *Allen* Court explained that, in *Broussard*: "Our comments under this discussion clearly pertained to cases that were tried either by judge or jury. *Broussard* did not involve summary judgment practice nor did our discussion infer that issues of this nature must be determined by a trial." *Id.* *Allen*'s recognition of the procedural posture of the case is one that courts must remain mindful of. A fact-intensive determination after a trial on the merits as to whether a defect is unreasonably dangerous differs from such a determination at the summary judgment stage.

risk/utility balancing test, which considers the likelihood and magnitude of the harm, and it is not a consideration for determining the legal question of the existence of a duty. Thus, although this Court has so stated before, it is inaccurate to profess that a defendant generally does not have a duty to protect against an open an obvious condition. There is, with limited exception, the duty to exercise reasonable care and to keep that which is within our custody free from an unreasonable risk of harm. If the application of the risk/utility balancing test results in a determination that the complained of hazard is not an unreasonably dangerous condition, a defendant is not liable because there was no duty breached. Although the breach of the duty element involves a mixed question of law and fact, summary judgment is not necessarily precluded. Summary judgment, based on the absence of liability, may be granted upon a finding that reasonable minds could only agree that the condition was not unreasonably dangerous; therefore, the defendant did not breach the duty owed. In such instance, the plaintiff would be unable to prove the breach element at trial.

Defendants point out certain facts relative to Mrs. Farrell's subjective awareness. While we provide instruction on the proper analysis, our conclusion herein does not change the basic premise of open and obvious. For a hazard to be considered open and obvious, it must be one that is open and obvious to all who may encounter it. The open and obvious concept asks whether the complained of condition would be apparent to any reasonable person who might encounter it. If so, that reasonable person would avoid it, and the factor will weigh in favor of finding the condition not unreasonably dangerous. Whether the plaintiff has knowledge of the condition is irrelevant in determining whether the thing is defective. Otherwise, the analysis resurrects the long ago abolished doctrines of assumption of the risk and contributory negligence, both of which focus on the knowledge and acts of the plaintiff. The plaintiff's knowledge is appropriately considered in assessing fault, but is not appropriate for summary judgment

proceedings. Therefore, as applied to this case, Mrs. Farrell's knowledge and appreciation of the allegedly hazardous condition is not determinative.[8] Although it would be relevant in a trial on the merits, for purposes of potential comparative fault, Mrs. Farrell's awareness is irrelevant to Defendants' entitlement to summary judgment.

With regard to the magnitude of the harm, anyone who would encounter the pool of water would not look at it and conclude it presents a likelihood of great harm. Considering the facts of this case, including the location of the pool of water, the size and condition thereof, and the fact that the condition was apparent to all who may encounter it, we find the likelihood and magnitude of the harm, to be minimal.

Cost of preventing the harm

Turning back to the risk/utility balancing test's third factor, the cost of prevention, we find the record is void of any such evidence. Therefore, this Court is unable to consider this factor in applying the risk/utility balancing test.

Nature of plaintiff's activities in terms of social utility or whether the activities were dangerous by nature

Finally, the fourth factor of the risk/utility balancing test involves a consideration of the nature of the plaintiff's activity in terms of social utility or whether the activities were dangerous by nature. In this case, Mrs. Farrell was taking their dog for a walk while Mr. Farrell pumped gas. While the social utility of walking a dog may be important and it is not dangerous in nature, it does not weigh heavily as a consideration in determining an unreasonably dangerous condition.

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[8] Defendants assert: there were other grassy areas around the parking lot Mrs. Farrell could have utilized; she made a conscious assessment as to where she was going to walk the dog; she looked a full 360 degrees; she assessed the area and chose this area; she saw the pool of water before heading in that direction; she knew she would have to step over it; she found the narrowest point of the water; she walked toward it; she decided to try and step over the water despite its appearance; and, she "made as wide of a step as [she] was capable," but, in her words, she "may have inadvertently stepped into it partially, because [she has] short legs."

For the reasons set forth above, after applying the risk/utility balancing test, we find that the allegedly hazardous condition, be it the pool of water at the edge of the parking lot or the slippery substance contained within the water, was not an unreasonably dangerous condition. Therefore, Defendants met their initial burden of pointing out the absence of factual support for the breach element of Plaintiffs' claims. Thereafter, the burden shifted to Plaintiffs to produce factual support sufficient to establish the existence of a genuine issue of material fact or that Defendants are not entitled to judgment as a matter of law. Plaintiffs have failed to do so as no reasonable juror could find that Defendants breached the duty owed to Plaintiffs. Consequently, summary judgment in favor of Defendants is mandated.

Further, on the issue of breach, Plaintiffs also advance the argument that the water leak began on June 28, 2019, and Circle K discovered the leak and the resulting standing water, but failed to timely call the City of Pineville to repair the leak or to take any action to warn customers of the danger presented. This argument fails because the standing water did not create an unreasonably dangerous condition. Whether they failed to eliminate or warn against it is irrelevant since we find it is not unsafe.

THE CAUSE-IN-FACT ELEMENT, THE SCOPE OF THE DUTY ELEMENT, AND THE DAMAGES ELEMENT

Given our ruling that Defendants did not breach a duty, we pretermit any further discussion of the cause-in-fact element, the scope of the duty element, and damages elements herein.

CONCLUSION

Liability is determined utilizing a duty/risk analysis. Generally, there exists a duty to maintain one's property in a reasonably safe condition and to correct an unreasonably dangerous condition or to warn of its existence. The question of whether a condition is open and obvious and, thus, not unreasonably dangerous, is

an issue of breach, not duty. To determine if there has been a breach of a duty owed, courts are to apply the risk/utility balancing test. The second factor of the risk/utility balancing test includes the likelihood and magnitude of harm, which includes the open and obvious nature of the condition. Summary judgment on the issue of an unreasonably dangerous condition is warranted upon a finding that no reasonable juror could have found that the defendant was in breach of the duty. If the defendant meets that burden of proof, and the plaintiff fails to establish that he or she will be able to establish the breach element at trial, summary judgment in favor of the defendant is mandated.

For the reasons set forth above, this Court finds that the trial court erred in denying Defendants' joint motion for summary judgment, as did the court of appeal in finding no error in the trial court's ruling . Defendants met their burden of proving their duty was not breached. Thereafter, Plaintiffs failed to come forward with specific facts showing that there remains a genuine issue of material fact. Because Plaintiffs failed to establish that they would be able to meet their burden of proof at trial to show a breach of duty on the part of Defendants and/or demonstrate that Defendants' conduct was a cause-in-fact of their injuries, summary judgment in favor of Defendants is mandated.

DECREE

The judgments of the lower courts are reversed, and summary judgment is hereby entered in favor of Circle K Stores, Inc. and the City of Pineville, dismissing the claims of Susan Farrell and Joseph Farrell.

REVERSED AND RENDERED.

SUPREME COURT OF LOUISIANA

No. 2022-CC-00849

SUZANNE FARRELL AND JOSEPH FARRELL

VS.

CIRCLE K STORES, INC. AND THE CITY OF PINEVILLE

On Supervisory Writ to the 9th Judicial District Court,
Parish of Rapides

WEIMER, C.J., concurring in the result.

This court granted writs in this matter to address, and to clarify once and for all, a confusion-laden area of negligence law: the so-called "open and obvious" defense in the context of a motion for summary judgment.

With its analysis, the majority has outlined and appropriately corrected the confusion that arose in the jurisprudence subsequent to our decision in **Broussard v. State ex rel. Office of State Buildings**, 12-1238 (La. 4/5/13), 113 So.3d 175, which itself corrected earlier jurisprudence that had tended to conflate the duty and breach questions insofar as the "open and obvious" defense is concerned.[1] **Broussard** explained that the "open and obvious" defense is a question of breach, not duty, and part of the risk/utility analysis. ***Id.***, 12-1238 at 11-12; 113 So.3d at 185.

With the majority decision, the statement that "no legal duty is owed because the condition encountered is obvious and apparent to all and not unreasonably dangerous,"[2] should disappear from the jurisprudence, joining other discarded phrases

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[1] For a thorough and scholarly analysis of this court's "open and obvious" jurisprudence, see Professor Galligan's timely article, Thomas C. Galligan, Jr., *Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach*, 97 Tul.L.Rev. (forthcoming March 2023). See also Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr., & William R. Corbett, *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On*, 70 La. L. Rev., 1105 (2010).

[2] **Bufkin v. Felipe's Louisiana, LLC**, 14-288, p. 12 (La. 10/15/14), 171 So.3d 851, 859 n.3

of negligence law such as "assumption of the risk."[3] Also, it should be abundantly clear going forward that the relegation of the "open and obvious" defense to its proper role in assessing the likelihood of the harm element of the risk/utility analysis will not preclude summary judgment in the appropriate case.

I write separately primarily to elaborate more fully on what considerations will be relevant in determining whether summary judgment, which "is designed to secure the just, speedy, and inexpensive determination of every action" and is now "favored,"[4] is warranted in cases such as this one where issues (such as breach), which are typically reserved for the trier of fact are presented.

Pursuant to La. C.C.P. art. 966(A)(3), "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." This court has recognized that a "genuine issue" is a "triable issue." **Jones v. Estate of Santiago**, 03-1424, p. 6 (La. 4/14/04), 870 So.2d 1002, 1006. As the court has explained, "[a]n issue is genuine if reasonable persons could disagree. 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.***, (quoting **Smith v. Our Lady of the Lake Hospital, Inc.**, 93-2512 (La. 7/5/94), 639 So.2d 730, 750). A fact is "material," moreover, "when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery." ***Id.***

Based on these definitions, the task of the court presented with a properly supported motion for summary judgment on the issue of breach (such as presented in this case) will be to assess whether or not there is a "genuine issue" for trial; *i.e.*,

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[3] **Murray v. Ramada Inns, Inc.**, 521 So.2d 1123 (La. 1988).

[4] La. C.C.P. art. 966(A)(2).

whether, on the undisputed facts presented, no reasonable juror could have found that the defendant failed to act reasonably. An affirmative answer to this inquiry should result in the grant of summary judgment on grounds that the plaintiff will be unable to prove the breach element of his or her claim at trial.[5]

Thus, as the majority notes, and as I write to emphasize, re-affirming **Broussard**'s conclusion that the open and obvious defense is not a "doctrine" but properly a part of the risk/utility analysis applied in fault-based cases to determine whether the condition encountered created an unreasonable risk of harm does not preclude summary judgment in the appropriate case.

Turning to the facts of the present case, I must respectfully disagree with one aspect of the majority's duty/risk analysis: its conclusion that no reasonable juror could find that Circle K failed to act reasonably and that summary judgment is appropriate on this basis. To be clear, I agree with the majority's broad, Civil Code based, articulation of the duty that is owed here: under La. C.C. arts. 2317 and 2317.1, the owner or custodian of property owes a duty to discover any unreasonably dangerous condition on the premises, and either correct the condition or warn potential victims of its existence. I also agree that in determining whether a condition is unreasonably dangerous, the court has adopted a risk/utility balancing test "wherein the fact-finder must balance the gravity and risk of harm against individual societal rights and obligations, the social utility of the thing, and the cost and feasibility of repair." **Broussard,** 12-1238 at 9-10; 113 So.3d at 184. Where I depart from my colleagues is in the determination that reasonable minds could not reach different conclusions with respect to whether Circle K acted reasonably in failing to take

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[5] Likewise, a court could also grant summary judgment in a plaintiff's favor on the issue of breach upon a finding that no reasonable juror would fail to find a breach of the appropriate standard of care under the uncontested facts.

measures to remediate the pooling water in its parking lot for a period of 12 days, allowing algae, mold and slime to accumulate under and around its murky surface. Obviously, my departure from the majority stems largely from the manner in which the majority has characterized the condition that existed on Circle K's premises.

The facts developed below disclose that the water that had accumulated on the surface of Circle K's parking was not simply a "pool of water,"[6] such as that which might accumulate after a heavy rainstorm and be expected to dissipate shortly. Rather, the substantial pool of water (roughly the size of a fuel truck) was the result of a leaking pipe, the existence of which Circle K employees had discovered 12 days prior to Mrs. Farrell's accident, but which they took no action to remedy or warn about. At the time of the accident, in July in the south, Mrs. Farrell alleged that the murky water disguised the presence of slime/mold/mildew that had been allowed to grow on the parking lot surface, and that this was the unreasonably dangerous condition – not the presence of the water in and of itself.

Using this appreciation of the condition Mrs. Farrell encountered, my application of the factors involved in the risk/utility balancing test results in a different conclusion from that reached by the majority as to whether the condition on the Circle K premises created an unreasonable risk of harm. First, as to the utility of the condition, I agree with the majority that there is no social utility to the existence of a pool of water, resulting from a continuous leak that has existed for days, in the parking lot of a commercial establishment.

The second factor in the risk/utility balancing test is the likelihood and magnitude of the harm posed by the condition of the premises, including whether that condition was open and obvious. The majority relies on the "location of the pool of

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[6] **Farrell v. Circle K Stores, Inc. and the City of Pineville,** 22-00849, slip op. at 8

water, the size and condition thereof, and the fact that the condition was apparent to all who may encounter it" to conclude that likelihood and magnitude of harm in this case was "minimal." **Farrell v. Circle K Stores, Inc. and the City of Pineville,** 22-00849, slip op. at 14. While I agree that the size and location of the condition may be factors in determining the likelihood and magnitude of the harm, here, while the standing water was significant in size, it had accumulated on the paved parking surface of a commercial establishment, in an area where customers were invited to park their vehicles. Moreover, as to the openness and obviousness of the condition, the undisputed evidence establishes that the surface of the water was murky, disguising the slime/mold/mildew that had proliferated below it over time. The condition complained of – the slime/mold/mildew – was not open and obvious to all. Indeed, as the majority finds, "anyone who would encounter the pool of water would not look at it and conclude it presents a likelihood of great harm." ***Id.*** At any rate, at a minimum, there exists a factual issue as to whether the presence of slime/mold/mildew under standing water *should be* obvious to all who might encounter it. Thus, I find that the likelihood and magnitude of harm created by the condition of the premises was not insignificant.

With respect to the third and fourth factors of the risk/utility balancing test, I agree with the majority that nature of Mrs. Farrell's activities – walking her dog while stopping to refill her vehicle's gas tank – was, while arguably socially useful, not an activity that is dangerous by its nature. As to the cost of preventing/repairing the leak, I also agree that there is no direct evidence in the record on this point; however, as the leak was the responsibility of the City, one can assume there is minimal cost to Circle K in assuming the responsibility to report the continuing existence of the leak, or warning customers of the dangerous condition.

Considering the foregoing factors, therefore, I find that reasonable persons could conclude that Circle K failed to act reasonably, and that the condition of its premises created an unreasonable risk of harm. Thus, I do not find summary judgment appropriate on this basis. However, I do find that summary judgment is appropriate on other grounds; specifically, the Farrells' failure to produce factual support sufficient to establish the existence of a genuine issue of material fact as to a different, but equally essential, element of their claim: cause-in-fact.

The cause-in-fact element of the duty/risk analysis is usually a "but for" inquiry, which tests whether the accident would have happened but for the defendant's substandard conduct. **Malta v. Herbert S. Hiller Corporation,** 21-00209, p. 16 (La. 12/10/21), 333 So.3d 384, 398. While the cause-in-fact question is a factual one, ***Id.***, here the facts are not in dispute. As the facts recited by the majority reveal, although there were other grassy areas in which Mrs. Farrell could have chosen to walk her dog, she purposefully chose the location that required her to traverse the murky water, water she stated she would not have allowed her dog to drink. She approached the water, evaluated the situation and, because she did not want to get her feet wet, chose to cross at a point (approximately a foot in width) that she believed she was capable of stepping over without incident. She misjudged her ability, mis-stepped, and fell. On these facts, no reasonable juror could find that Mrs. Farrell's fall would not have occurred "but for" defendants' conduct. The accident did not occur because of the presence of the water or the hidden danger thereunder, but because Mrs. Farrell misjudged her ability to step over the water. In deposition, Mrs. Farrell acknowledged that her accident probably would not have happened had she chosen a different area to walk and/or had she not decided to step over the water. Thus, defendants met their burden of proving an absence of factual support for the

cause-in-fact element of the duty/risk analysis, and plaintiffs failed to produce factual support sufficient to establish the existence of a genuine issue of material fact or that defendants are not entitled to judgment as a matter of law on this element of plaintiffs' claim. Therefore, I respectfully concur in the ultimate conclusion of the majority that summary judgment in favor of the defendants is correct.

SUPREME COURT OF LOUISIANA

No. 2022-CC-00849

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On Supervisory Writ to the 9th Judicial District Court, Parish of Rapides

Hughes, J., dissenting.

I respectfully dissent. The water pool at issue had been standing for 12 days and contained debris (obvious) and slime (not so much). These facts should be presented to a trier of fact for comparison of fault.

SUPREME COURT OF LOUISIANA

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GRIFFIN, J., dissents and assigns reasons.

Finding genuine issues of material fact exist to preclude summary judgment, I respectfully dissent. I further question the continued application of the open and obvious doctrine in the risk/utility balancing test regardless of whether it is posed as a question of duty or breach. Aptly described by the majority as a "figment of the judicial imagination," scholars have observed that courts merely created a replacement for the recovery-barring defenses of contributory negligence and assumption of risk. *See* Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr., and William R. Corbett, *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On*, 70 La. L. Rev. 1105, 1134 (2010).

The distinction between the hypothetical reasonable person and the individual plaintiff is little more than sophistry. Instead, consideration of whether a hazard is open and obvious appears premised on the "notion that there are plaintiffs who do such foolish things or create such risks that it is not fair for them to recover." *Id.* This effectively creates a modified comparative fault system in derogation of Louisiana's statutorily established pure comparative fault system. "Under the pure comparative fault system … [a] plaintiff's negligence will only diminish, not defeat, recovery as long as plaintiff's negligence is less than 100%." *Watson v. State Farm*

Fire and Cas. Ins. Co., 469 So.2d 967, 971 n. 9 (citing R. Pearson, *Apportionment of Losses*, 40 La. L. Rev.343, 344 (1980)).