NOT DESIGNATED FOR PUBLICATION

JOHN EDWARD LUDLOW, JR., ET AL.	*	**NO. 2014-C-1359**
	*	
VERSUS		**COURT OF APPEAL**
	*	
CRESCENT CITY CONNECTION MARINE DIVISION, ET AL.	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA

* * * * * * *

ON APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2010-08956, DIVISION "L-6"
Honorable Kern A. Reese, Judge

* * * * * *

Judge Dennis R. Bagneris, Sr.

* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Terri F. Love
Judge Paul A. Bonin)

BONIN, J., DISSENTS WITH REASONS

ON REMAND FROM THE LOUISIANA SUPREME COURT

James D. "Buddy" Caldwell
Attorney General
Dennis J. Phayer
Sue Busser
Andre C. Gaudin
Special Assistant Attorneys General
BURGLASS & TANKERSLEY, LLC
5213 Airline Drive
Metairie, Louisiana 70001

COUNSEL FOR RELATOR, STATE OF LOUISIANA, DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, CRESCENT CITY CONNECTION DIVISION, ET AL

Randall A. Smith
Stephen M. Gelle
SMITH & FAWER
201 St. Charles Avenue, Suite 3702
New Orleans, Louisiana 70170

COUNSEL FOR RESPONDENT, JOHN EDWARD LUDLOW, JR., INDIVIDUALLY, AND AS NATURAL TUTOR OF HIS MINOR CHILD, JEREMIAH LEE LUDLOW

WRIT GRANTED; RELIEF DENIED

SEPTEMBER 23, 2015

Defendant/relator, State Of Louisiana, Department of Transportation and Development, Crescent City Connection Division, seeks review of the trial court's judgment of October 14, 2014, that denied its re-urged motion for summary judgment. For the reasons that follow, we grant the writ and deny relief.

STATEMENT OF THE CASE/FACTS

This matter derives from a petition filed by plaintiff/respondent, John E. Ludlow, Jr., against defendant/relator, State of Louisiana, Department of Transportation and Development, Crescent City Connection Division (hereinafter, "the State"), in connection with injuries Mr. Ludlow sustained when he fell from a concrete barrier on the Canal Street Ferry Terminal. Mr. Ludlow, who contends he was a bicyclist, sat on a concrete barrier near the passenger terminal to wait for the ferry. He claimed he sat on the barrier because the State provided no other seating for bicyclists. Upon sitting, Mr. Ludlow fell backwards off the barrier onto the rocks below. The fall caused injuries that rendered him paralyzed from the waist down.

Mr. Ludlow's resulting lawsuit sought damages for the State's alleged failure to properly manage, operate and control the ferry; failure to keep and maintain the ferry in a safe, proper, reasonable and lawful condition; failure to warn invitees of dangerous conditions not known or obvious to a reasonably prudent person; failure to provide a warning sign to notify ferry users of the existence of a dangerous condition; failure to properly design the ferry; failure to curb the ruin, vice or defect of the concrete barrier; failure to properly instruct, guide, control, supervise and/or train the agents and/or employees of the ferry; failure to install fencing, netting or other protective barriers; and failure to provide adequate and safe seating.

In response, the State filed two motions for summary judgment. In the first summary judgment motion, the State argued that it breached no duty owed to Mr. Ludlow because any dangers imposed by the concrete barriers- which line the vehicle ramps- were open and obvious. The State also contended that the risk-utility test weighed in its favor. It argued that the barriers were placed to prevent vehicles and pedestrians from falling into the Mississippi River bed and that the barriers served their intended purpose as the State had received no prior notice of any reported falls or problems associated with the barriers. Hence, the potential risks and substantial costs to replace the barriers did not outweigh the utility of the barriers. In support of its motion, the State offered affidavits and deposition excerpts of the Crescent City Connection's former general counsel, Kenneth Pickering, its former assistant executive director, Randall Paisant, and its current executive director, David Tippett.

Mr. Pickering attested that his firm had represented the CCC for over thirty years. He testified that the concrete barriers were designed to prevent people and vehicles from falling off the ramp onto the riverbed and were not intended for sitting, although he had observed bicyclists sitting on the concrete barriers while waiting for the ferry. Mr. Pickering was unaware of any falls from the concrete barriers and unaware of any signage instructing persons not to sit. Mr. Pickering advised that there was no seating arrangement for bicyclists.

Mr. Paisant, who had been executive director for the CCC for thirty-six years, testified that he did not know of anyone who had fallen from a concrete barrier, although he could not testify concerning the record retention policies of the CCC police. He stated that he knew that some people sat on the concrete barriers, although they were not designed for that purpose. Mr. Paisant instructed bicyclists not to sit on the concrete barriers when he saw the barriers used for sitting and he also instructed CCC deckhands to do the same.

Mr. Tippett's affidavit stated that in over thirty years of operating the ferry, the CCC had no record of anyone falling from the concrete barriers until Mr. Ludlow's accident. He admitted that he had seen bicyclists sit on the concrete barriers; and that he had personally told bicyclists not to sit on the barriers. Mr. Tippett testified that there are no signs to warn people from sitting on the barriers.

In opposition, Mr. Ludlow also relied on the depositions and affidavits of Pickering, Paisant, and Tippett. Mr. Ludlow maintained that their collective testimonies demonstrated that genuine issues of material fact exist as to whether the concrete barriers, as the only seating available, created an unreasonably

dangerous condition and whether the State had actual or constructive knowledge of the alleged defective condition of the barriers.

After a hearing, the trial court denied the first summary judgment motion. The State sought review before this court.[1] This Court denied the State's writ. The decision stated there were genuine issues of material fact as to whether the State had constructive notice that the concrete barriers posed a dangerous condition and as to whether the State could have taken some remedial steps to guard bicyclists, such as Mr. Ludlow, from harm.[2]

Thereafter, the State re-urged its motion for summary judgment. The trial court heard argument on September 26, 2014.

The State's re-urged summary judgment motion incorporated the same arguments raised in the first summary judgment motion. The State supplemented the re-urged motion with Mr. Ludlow's deposition, along with the deposition testimony of Christopher Welch, the friend who was with Mr. Ludlow at the time of his fall. The State also cited the deposition testimonies of Bertrand W. Donnes, Jr., a risk management officer and marine engineering supervisor with DOTD and Jo Ann Fernandez, the DOTD's loss prevention clerk, who took over Mr. Donne's risk management responsibilities; and the report of Charles E. Prewitt, its forensic engineering expert. The State reiterated that this evidence showed it breached no duty owed to Mr. Ludlow because if there was any dangerous defect, it was open and obvious; that Mr. Ludlow failed to use ordinary care; and that the State had no prior notice of any problems associated with the concrete barriers.

---

[1] *Ludlow v. Crescent City Connection Marine Division*, 2013-0162 (La. App. 4 Cir. 4/9/13), unpub.
[2] *Id*.

In support of its argument that any danger was open and obvious and that Mr. Ludlow did not use due diligence, the State referenced Mr. Ludlow's acknowledgement that he had sat on the concrete barriers on "hundreds" of previous occasions without falling; his admission that he had a blood alcohol level of .178; and that he had smoked marijuana on the night of the fall. The State also buttressed this position with Mr. Welch's testimony wherein Welch relayed that Mr. Ludlow and he had had sat on the concrete barriers "hundreds" of times without falling; that they drank alcohol prior to the accident; and Mr. Welch's admission that Welch knew that sitting on the barriers was dangerous.

The State cited the deposition testimonies of Mr. Donnes and Ms. Fernandez, to reinforce its claim that the State was not on notice that the concrete barriers posed a danger. The State maintained that as with other DOTD representatives, that neither Donnes nor Fernandez had a record of a reported fall from the concrete barriers.

The State also relied on the findings of Charles Prewitt, DOTD's engineering expert, to claim entitlement to summary judgment relief. Mr. Prewitt's findings concluded that Mr. Ludwig's fall resulted from his "carelessness and total disregard for his own safety." Specifically, Prewitt's report included that 1) Mr. Ludwig was aware of the danger and simply ignored it; 2) that the barrier was not defective in that it protected vehicles and pedestrians from falling in the river; 3) that sitting on top of the barrier was an open and obvious hazard, which required no notification; 4) that DOTD representatives warned people not to sit on the barriers; and 5) that Prewitt was unaware of any standards that required that benches be placed in the area of a vehicle ramp for use by cyclists .

Mr. Ludlow opposed the State's re-urged summary judgment motion with the testimony of his expert, Dr. Fereydoun Aghazadeh, a certified professional ergonomist and a professional industrial engineer. Dr. Aghazadeh concluded that the barrier created an unreasonably dangerous condition that was foreseeable. He noted the following: 1) bicyclists were not allowed to use the passenger terminal; 2) the barrier was three feet high and a foot wide at the top, making it easy for a six foot person, such as Mr. Ludlow, to sit on the barrier; 3) there was no fencing or protective walls behind the barrier to prevent a fall; and 4) no mitigating measures were employed and no signs warning of the hazard were placed.

Mr. Ludlow's counsel re-urged his prior arguments that genuine issues of material fact remained as to whether or not the barrier was unreasonably dangerous for persons to sit and the State's knowledge of this dangerous condition. He challenged the accuracy of the State's claim that no prior accidents had happened by noting that the State had not logged Mr. Ludlow's current accident into its record books. He re-emphasized that evidence of Mr. Ludlow's alleged intoxication or marijuana use created an issue of comparative fault which would not prohibit his right to recovery.

After considering argument, the trial court again denied the motion for summary judgment. In denying the motion, the trial court indicated that if it were foreseeable that somebody could potentially fall off the barricade, a "no sitting" sign might have been appropriate.

The State then timely filed for supervisory writ review before this Court to review the denial of its re-urged motion for summary judgment. The majority

opinion denied the writ.[3] Thereafter, the State sought review before the Louisiana Supreme Court. The Supreme Court granted the State's writ application and remanded the matter to this Court for briefing, oral argument, and opinion.[4]

After submission of supplemental briefs, counsel for both parties argued before this Court on August 4, 2015. This opinion follows.

STANDARD OF REVIEW

In *Gailey v. Barnett*, this Court outlined the standard of review for an appellate court to review a trial court's decision to grant summary judgment:

> Appellate courts review summary judgment *de novo,* using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *In re Bester,* 00–2208, p. 3 (La.App. 4 Cir. 9/18/02), 828 So.2d 644, 646. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions. The procedure is favored and shall be construed to accomplish these ends. La. C.C.P. art. 966(A)(2). A summary judgment shall 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 the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). The burden of proof remains with the movant. An adverse party to a supported motion for summary judgment may not rest on the mere allegations or denial of his pleading, but his response, by affidavits or as otherwise provided by law, must set forth specific facts showing that there is a genuine issue of material fact for trial. La. C.C.P. art. 967; *Longo v. Bell South Telecommunications, Inc.,* 03–1887, pp. 4–5 (La. App. 4 Cir. 10/7/04), 885 So.2d 1270, 1273–1274. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but is to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. 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. *Smith v. Our Lady of the Lake Hosp., Inc.,* 93–2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for a trial on that issue and summary judgment is appropriate. *Id.*

12-0830, pp. 3-4 (La. App. 4 Cir. 12/5/12), 106 So.3d 625, 627-628.

---

[3] *John Edward Ludlow, Jr., et al. v. Crescent City Connection Marine Division, et al.*, 2014-C-1359 (La. App. 4 Cir. 3/10/15).

LAW/ANALYSIS

Our jurisprudence provides that a public entity is responsible under La. C.C. art. 2317[5] for damages caused by buildings within its custody. La. R.S. 9:2800(A). However, this responsibility is limited to those vices and defects of which the public entity has actual or constructive knowledge. La. R.S. 9:2800(C). Accordingly, Louisiana jurisprudence establishes that in order to prevail in a claim against a public entity based upon negligence or strict liability, a plaintiff must show: 1) that the entity has custody or ownership of the defective thing; 2) the defect has created an unreasonable risk of harm; 3) the entity possessed actual or constructive knowledge notice of the defect and failed to take corrective action within a reasonable time; and 4) causation. *Joseph v. City of New Orleans*, 02-1996, p. 3 (La. App. 4 Cir. 3/5/03), 842 So.2d 420, 423 (*citing Oster v. Dep't of Trans. & Dev., State of La.*, 582 So.2d 1285, 1288 (La. 1991); La. R.S. 9:2800)).

The framework for evaluating an unreasonable risk of harm is properly classified as a determination of whether a defendant breached a duty owed. *Broussard v. State*, 12-1238, p. 11 (La. 4/5/13), 113 So.3d 175, 185. The question of whether a duty exists is a question of law, and the question of whether it has been breached is a question of fact. *Id.*, 12-1238, p. 13, 113 So.3d at 185. Thus, whether a condition presents an unreasonable risk of harm is an issue of fact.

---

[4] *John Edward, Ludlow, Jr., et al. v. Crescent City Connection Marine Division, et al.*, 2015-CC-0650 (La. 5/22/15).

[5] La. C.C. art. 2317 provides:

> 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.

Louisiana courts apply a risk-utility test in determining whether a defect presents an unreasonable risk of harm. *Pryor v. Iberia Parish School Bd.*, 10-1683, p. 4 (La. 3/15/11), 60 So.3d 594, 597. This test includes the following four factors:

> 1) the utility of the thing; 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 social utility, or whether it is dangerous by nature.

Id.

Generally, defendants do not have a duty to protect against obvious and apparent defective conditions. *Bufkin v. Felipe's Louisiana, LLC*, 14-0288, p. 7 (La. 10/15/14), --- So.3d---, 2014 WL 5394087. For a defective condition to be obvious and apparent, it should be open and obvious to everyone who may potentially encounter it. *Id*. Whether a dangerous condition is obvious and apparent is a factual issue. *Graupmann v. Nunamaker Family Ltd. Partnership*, 13-0580 (La. App. 1 Cir. 12/16/13), 136 So.3d 863.

In the present matter, the State contends that it is entitled to summary judgment relief because Mr. Ludlow offered no evidence as to the cause of his fall or evidence that any action by the State was the cause-in-fact of his fall. The State disputes that it breached any duty owed to Mr. Ludlow because the concrete barriers were safely constructed for their intended purpose, namely, to prevent vehicles from falling off the vehicular ramp onto the river bed. It adds that any danger in sitting on the barriers was obvious and apparent to all- including Mr. Ludlow- and stresses that it had not received notice of a similar fall in decades of prior use.

In support, the State relies on Mr. Ludlow's testimony that he had safely sat on the concrete barriers on multiple occasions without a fall. It cites Mr. Ludlow's admission that he had been drinking and had used marijuana to show he failed to

exercise ordinary care and prudence. As such, the State argues that it had no duty to warn and the trial court's denial of its re-urged motion for summary judgment based upon foreseeability was in error.

The State maintains that the judgment disregards the legal factors used to determine whether the State breached a duty owed; improperly makes the State the guarantor of the public's safety when any danger was open and apparent to all; requires the State to see potential harm where none has previously occurred; and ignores that pursuant to La. R.S. 9:2798.1, the State is entitled to discretionary immunity based on the design and construction of the ramp. The State suggests that the facts of the present claim fall squarely under the recent holdings of the Louisiana Supreme Court in *Allen v. Lockwood*, 14-1724 (La. 2/13/15), 156 So.3d 650, 2015 WL 590917, and *Bufkin v. Felipe's Louisiana, LLC*, *infra*, holdings the State contends entitles it to summary judgment relief.

In *Bufkin*, a pedestrian who was struck by a bicyclist filed suit against a construction company, alleging that his vision was impaired by the construction company's placement of its dumpster across on-street parking spaces. The Court determined that the defendant was entitled to summary judgment because any vision obstruction caused by the dumpster was obvious and apparent, and reasonably safe for persons exercising ordinary care; hence, the defendant did not have a duty to warn.[6]

Similarly, in *Allen*, the Court determined that the defendant/church was entitled to summary judgment relief where the plaintiff was unable to present any facts to support that that any alleged defect in the church's parking area caused plaintiff's accident. The decision reiterated that "our jurisprudence does not preclude the granting of a motion for summary judgment in cases where the

[6] 14-0288, p. 10 (La. 10/15/14), ---So.3d---, WL 590917.

plaintiff is unable to produce factual support for his or her claim that a complained –of condition or things is unreasonably dangerous."[7]

When we review *Allen* and *Bufkin* and apply their precepts to the present matter, what this Court must decide to determine if the trial court properly denied summary judgment relief is whether Mr. Ludlow submitted any evidence to support that a genuine issue of material fact existed to show that the concrete barriers created an unreasonable risk of harm. Based upon our review of the record, we conclude that he did.

The record establishes that the State did not erect the concrete barriers as a place to sit; the State was aware that passengers frequently sat on the barriers; the State admonished passengers not to sit on the barriers; the State had no warning signs to prohibit sitting on the barriers; and the State had no designated sitting places for bicyclists, such as Mr. Ludlow. The record also is unclear as to whether sitting on the barriers was an open and obvious danger. Mr. Ludlow testified that that he did not think that sitting on the barrier was a "bad idea" because bicyclists had done so for years. We find the totality of this evidence creates genuine issues of material fact and law as to whether the State's allowance of passengers to sit on the concrete barriers created an unreasonably dangerous condition; whether the condition was open and obvious; and whether the State had constructive notice.

Moreover, we find that the interpretation of these facts by the respective experts create genuine issues of material fact. Mr. Ludlow's expert, Dr. Aghazadeh, opined that the barrier presented an unreasonably dangerous condition for sitters that was foreseeable and maintained that the State failed in its duty to provide a place for cyclists to sit and in its duty to warn. On the other hand, the

[7] 14-1724, p. 653 (La. 2/13/15), quoting *Bufkin*, ---So.3d at ---, 2014 WL 5394087, at pp. 7-8 (Guidry, J., concurring).

State's expert stated that the barrier was not defective and placed fault for the accident with Mr. Ludlow.

As discussed herein, the Louisiana Supreme Court has espoused that the question of whether a defect presents an unreasonable risk of harm as "a disputed issue of mixed fact and law or policy that is peculiarly a question for the jury or trier of the facts." *Broussard*, 12-1248, pp. 11-13, 113 So.3d at 183 citing *Reed v. Wal-mart Stores, Inc.*, 97-1174 (La. 3/4/98), 708 So.2d 362, 364. As 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. Thus, whether a defect presents an unreasonable risk of harm is "a matter wed to the facts" and must be determined in light of facts and circumstances of each particular case. *Id.*

Our review of the record shows that the particular facts and circumstances in this case present disputed issues of fact and law as to whether the barrier presented an unreasonably dangerous condition. These disputed issues are sufficient to preclude summary judgment relief. [8]

Accordingly, we grant consideration of the State's writ application; however, based on the foregoing reasons, we deny the relief requested.

WRIT GRANTED; RELIEF DENIED

[8] We determine that the plaintiff's liability complaint against the State is based on negligence and thus reviewable under the duty-risk analysis. As such, having determined that genuine issues of material fact remain that preclude summary judgment relief, we need not consider the State's claim that it is entitled to discretionary immunity.