SUSAN LAFAYE	*	**NO. 2018-C-0905**
VERSUS	*	
		COURT OF APPEAL
SES ENTERPRISES, LLC, ET AL	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

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APPLICATION FOR WRITS DIRECTED TO
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 17-6075, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge
* * * * * *
Judge Regina Bartholomew-Woods
* * * * * *

(Court composed of Judge Roland L. Belsome, Judge Joy Cossich Lobrano, Judge Regina Bartholomew-Woods, Judge Tiffany G. Chase, Judge Dale N. Atkins)

BELSOME, J., DISSENTS FOR REASONS ASSIGNED BY J. CHASE.
LOBRANO, J., CONCURS IN THE RESULT WITH REASONS.
CHASE, J., DISSENTS.

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WRIT GRANTED, JUDGMENT REVERSED
DECEMBER 26, 2018

Defendants-Relators, Clarence Grisham, Reliable Disposal Company, and United Specialty Insurance Company, seek review of the district court's September 12, 2018 judgment denying their motion for summary judgment. For the reasons that follow, we grant Relators' writ application, reverse the judgment of the district court, and grant the motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff-Respondent, Susan Lafaye, filed an action against Relators for personal injuries sustained on November 30, 2016. During her deposition, Respondent testified that she sustained her injuries while walking her dog in the daytime and attempted to step over a sanitation hose suspended over a sidewalk. The hose was connected to a sanitation truck and was servicing a portable toilet on a construction site. Respondent explained that the hose itself was about three inches in diameter, she was able to get her right foot over the lower portion of the hose, suspended at about four inches from the ground, but her left foot got caught on a portion of the hose suspended about eight inches from the ground, causing her

fall.[1] While Respondent stated she "couldn't get around [the hose,]" she also agreed she "could have" walked around the truck. She added, "I thought I could make it over, you know. It didn't seem to be that necessary. It's not like it was that high."

In filing for summary judgment, Relators argued the hose was an open and obvious hazard and accordingly owed no duty to Respondent. Respondent opposed the motion, asserting the hose created an unreasonable risk and/or defect, and that the hose obstructed the sidewalk in violation of a city ordinance. In support of her opposition, Respondent provided an expert witness' affidavit opining that Relators created an unreasonable risk of harm and should have taken precautionary measures, such as placing cones or a barrier, to prevent injuries such as those sustained by Respondent. The district court, in denying the motion, relied on the existence of a "statutory duty" to keep the sidewalk clear and held that a question of fact existed as to whether Relators' breach of that duty caused Respondent's injuries.

LAW AND ANALYSIS

We review a district court's ruling on a motion for summary judgment *de novo*. *Johnson v. Loyola Univ. of New Orleans*, 2011-1785, p. 7 (La.App. 4 Cir. 8/8/12), 98 So.3d 918, 923. This is an action based in negligence, and "[t]he 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." *Hanks v. Entergy Corp.*, 2006-477, p. 21 (La. 12/18/06), 944 So.2d 564, 579. "Under Louisiana law, a defendant generally does not have a duty to protect against that which is obvious

[1] Respondent also stated the lower and higher portions of the hose over which she stepped could have been three and six inches, respectively.

and apparent." *Bufkin v. Felipe's Louisiana, LLC*, 2014-0288, p. 7 (La. 10/15/14), 171 So.3d 851, 856. The "open and obvious" nature of a hazard is determined objectively, meaning the condition should be apparent "to everyone who may potentially encounter it." *Id.* The Louisiana Supreme Court, in *Broussard v. State ex rel. Office of State Bldgs.*, 2012-1238, p. 9 (La. 4/5/13), 113 So.3d 175, 183, noted that the issue of whether a condition presents an unreasonable risk of harm is a mixed question of law and fact reserved for the trier of fact. However, *Broussard* concerned an appeal after a full trial on the merits, whereas here, we are conducting a *de novo* review of the district court's denial of a motion for summary judgment. The Supreme Court has explicitly stated that *Broussard* is not to be read "as a limit on summary judgment practice involving issues of unreasonable risk of harm." *Allen v. Lockwood*, 2014-1724, p. 4 (La. 2/13/15), 156 So.3d 650, 652–53.

Relators have primarily relied upon three recent Louisiana Supreme Court cases. In the first, *Bufkin*, the Supreme Court reversed a denial of summary judgment, having determined that defendant building contractor had no duty to warn plaintiff of a clearly visible, large dumpster that blocked plaintiff's line of sight, causing him to be struck by a bicyclist when he attempted to cross in the middle of the street. *Bufkin*, 2014-0288, pp. 1-2, 171 So.3d at 853. The Court reasoned that because the dumpster was apparent, it posed no risk of harm to "persons exercising ordinary care and prudence" who encountered it. *Id.*, 2014-0288, p. 10, 171 So.3d at 858. In the second case, *Allen*, the Supreme Court, again, reversed the district court's denial of summary judgment in an action resulting from a pedestrian being struck in a parking lot by a vehicle moving in reverse at a high rate of speed. *Allen*, 156 So.3d at 651. Plaintiff argued that the owner of the lot was negligent because the lot had been defectively designed and lacked

appropriate safety barriers. *Id.* However, the Court found the condition of the lot was open and apparent, and that plaintiff failed to show how the condition of the lot contributed to her injuries. *Id.* at 653. The same result was handed down in the third and final case, *Rodriguez v. Dolgencorp, LLC*, 2014-1725 (La. 11/14/14), 152 So.3d 871. Plaintiff therein attempted to thread her way through a maze of shopping carts, tripping on one that she admitted she saw prior to tripping. *Id.* 2014-1725, p. 1, 152 So.3d at 872. The Court reasoned that the presence of the carts was obvious, and that any harm resulting from their presence could have been avoided through the exercise of ordinary care. *Id.*

Respondent argues Relators had not only a general negligence duty to keep the sidewalk free of obstruction, but also a statutory duty. Specifically, Respondent argues that Relators violated Orleans Municipal Code section 54-101 relative to "Obstructing public passages."

> (a) No person shall wilfully [sic] obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.
>
> (b) Whoever violates the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $500.00 or imprisoned for not more than six months, or both fined and imprisoned.
>
> (c) This section shall not be applicable to the erection or construction of any barricades or other forms of obstructions as a safety measure in connection with construction, excavation, maintenance, repair, replacement or other work, in or adjacent to any public sidewalk, street, highway, bridge, alley, road, or other passageway, nor to the placing of barricades or other forms of obstruction by governmental authorities, or any officer or agent thereof, in the proper performance of duties.

This ordinance is modeled after State criminal law prohibiting the same conduct, specifically La.R.S. 14:100.1. The former is categorized under "Offenses Against

the General Peace and Order," while the latter is categorized under "Offenses Affecting the Public Safety." "Where injury results from the violation of . . . a criminal statute, a civil jury may find that the violation constitutes negligence as a matter of law, or *per se*." 2B Sutherland Statutory Construction § 55:5, Civil liability for violation of a criminal statute (7th ed.). However, "[t]he doctrine of negligence per se has been rejected in Louisiana." *Galloway v. State Through Dep't of Transp. & Dev.*, 94-2747, p. 5 (La. 5/22/95), 654 So.2d 1345, 1347 (citing *Boyer v. Johnson*, 360 So.2d 1164 (La.1978)). "A violation of a criminal statute does not automatically create liability in a particular civil case, because the statute may have been designed to protect someone other than the plaintiff, or to protect the plaintiff from some evil other than the injury for which recovery is sought." *Boyer*, 360 So.2d at 1168–69. Thus, the violation of a statutory provision may provide only some guidance in assessing civil liability. *Galloway*, 1994-2747, p. 6, 654 So. 2d at 1347. Civil liability does not automatically flow from the violation of a statutory duty.

Based on the aforementioned jurisprudence, we find that the district court erred in denying Relators' motion for summary judgment. The condition giving rise to Respondent's injuries was indeed open and obvious, considering her deposition testimony indicating that she observed the suspended hose while walking her dog, and any harm could have been avoided through the exercise of ordinary care. Respondent made an active decision to attempt to traverse the hose despite the existence of alternative routes around or away from it, leading this Court to conclude that any sort of warning sign, construction cone, or barrier would not have had the intended effect, as Respondent herself stated "I thought I could make it over. . . . It's not like it was that high." Furthermore, we do not find

Relators' violation of any local ordinance or State statute controlling in this matter, as it was not intended to prevent the harm suffered in this case, that being an injury or injuries sustained by an individual who observes a hazard yet actively engages with it based on a perceived ability to avoid any harm.

Accordingly, Relators' writ is granted, and the trial court's judgment denying Relator's motion for summary judgment is reversed. Susan Lafaye's claims against Clarence Grisham, Reliable Disposal Company, and United Specialty Insurance Company are dismissed with prejudice.

WRIT GRANTED, JUDGMENT REVERSED