NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1116

LARRY M. COOPER

VERSUS

CASINO CRUISES, INC., D/B/A HOLLYWOOD CASINO

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 565,489, Division "D"
Honorable Janice Clark, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

Judgment rendered December 22, 2010

PARRO, J.

The plaintiff, Larry M. Cooper, appeals the judgment of the trial court granting a motion for summary judgment in favor of the defendant, Louisiana Casino Cruises, Inc., d/b/a Hollywood Casino (Hollywood Casino), and dismissing Mr. Cooper's claim against Hollywood Casino in its entirety. For the reasons that follow, we reverse the judgment and remand the matter to the trial court for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On April 2, 2007, at approximately 2:30 a.m., Mr. Cooper was leaving Hollywood Casino, when he tripped and fell on an uneven portion of the casino's exterior walkway. According to his petition, Mr. Cooper sustained injuries to his left knee, right elbow, and back as a result of the accident. Mr. Cooper sought to recover damages for these injuries, as well as his lost wages, loss of earning capacity, and medical expenses.

Hollywood Casino answered the petition, generally denying the plaintiff's allegations and asserting certain affirmative defenses. Thereafter, Hollywood Casino filed a motion for summary judgment, in which it contended that there remained no genuine issues of material fact. Specifically, Hollywood Casino asserted that Mr. Cooper could not meet a necessary component of his claim because he could not demonstrate that his trip and fall was caused by a condition in the walkway presenting an unreasonable risk of harm.

In support of its motion for summary judgment, Hollywood Casino relied solely on Mr. Cooper's petition and excerpts from his deposition, in which he testified that he tripped on a raised area of the walkway where the concrete slab floor met the tile floor immediately outside the casino's exit door. Mr. Cooper further acknowledged in his deposition that this raised area in the tile floor was "maybe a half – not even half an inch" high and that it was the only thing that caused or contributed to his fall.

After the hearing on the motion for summary judgment, the trial judge held the matter open so that she could visit the scene of the accident. After viewing the scene and after consideration of the evidence in the record, which included a videotape of the

scene of the accident introduced by Mr. Cooper,[1] the trial court found that the area was "relatively free of any differentiation in height and as such did not create an unreasonable risk of harm." Accordingly, the trial court granted the motion for summary judgment in favor of Hollywood Casino. Mr. Cooper has appealed.

APPLICABLE LAW

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. Duncan v. U.S.A.A. Insurance Co., 06-363 (La. 11/29/06), 950 So.2d 544, 546; see LSA-C.C.P. art. 966. A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate, *i.e.*, whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. Samaha v. Rau, 07-1726 (La. 2/26/08), 977 So.2d 880, 882-83. The summary judgment procedure is favored and is designed to secure the just, speedy, and inexpensive determination of every action. LSA-C.C.P. art. 966(A)(2).

A motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). The burden of proof on summary judgment remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant'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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-

[1] Although the videotape shows the scene of the accident, it does not show the accident itself because the camera does not continually record. In addition, the videotape appears to show a wide-angle view of the area in which the accident occurred; therefore, it does not provide any close-up view of the raised area upon which Mr. Cooper tripped and fell.

C.C.P. art. 966(C)(2).

A genuine issue is a triable issue. More precisely, an 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. Summary judgment is the means for disposing of such specious disputes. Smith v. Our Lady of the Lake Hospital, Inc., 93-2512 (La. 7/5/94), 639 So.2d 730, 751. In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. Formal allegations without substance should be closely scrutinized to determine if they truly do reveal genuine issues of material fact. Id.

A fact is material when its existence or nonexistence may be essential to plaintiff's cause of action under the applicable theory of recovery. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. Simply put, a material fact is one that would matter on the trial of the merits. Id. Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of trial on the merits. Suire v. Lafayette City-Parish Consolidated Government, 04-1459 (La. 4/12/05), 907 So.2d 37, 48.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to this matter. Davis v. Specialty Diving, Inc., 98-0458, 98-0459 (La. App. 1st Cir. 4/1/99), 740 So.2d 666, 669, writ denied, 99-1852 (La. 10/8/99), 750 So.2d 972. Accordingly, we now address the relevant substantive law.

The general rule is that the owner or custodian of property has a duty to keep the property 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. Smith v. The Runnels Schools, Inc., 04-1329 (La. App. 1st Cir. 3/24/05), 907 So.2d 109, 112. This duty is the same under theories

of negligence or strict liability. Under either theory, the plaintiff has the burden of proving that: (1) the property that caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and (4) defendant had actual or constructive knowledge of the risk. Id.; see also LSA-C.C. arts. 2315 and 2317.1.

Whether a condition of a thing is unreasonably dangerous requires consideration of: (1) the utility of the thing; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the complained-of condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activity in terms of the activity's social utility or whether the activity is dangerous by nature. Smith v. The Runnels Schools, Inc., 907 So.2d at 112.

DISCUSSION

Prior to rendering judgment in this matter, the trial judge held the matter open after the hearing on Hollywood Casino's motion for summary judgment so that she could visit the site of the accident herself. In deciding to make such a visit, the trial judge stated that she was going to visit the scene "so I can see whether a half inch makes a difference or not." After completing this visit, the trial judge granted the motion for summary judgment, providing the following oral reasons:

> The court having inspected the premises which formed the subject of this lawsuit together with the court reporter Achee, the parties hereto and all counsel of record. The inspection preceded viewing of the video tape, rereading of the deposition testimony, together with the other exhibits and memorandum in support and in opposition. The court finds that the subject area is relatively free of any differentiation in height and as such did not create an unreasonable risk of harm. Therefore, the court grants the motion for summary judgment, there being no genuine issues of material fact. Mover is entitled to judgment; it's a matter of law. Judgment to be signed accordingly. Notify counsel.

On appeal, Mr. Cooper contends that the trial judge erred in continuing the hearing on the motion for summary judgment until she could view the accident site in person. Mr. Cooper further asserts that the trial judge erred in conducting a mini-trial

at the site, extracting unsworn testimony from him,[2] and making certain credibility determinations in granting Hollywood Casino's motion for summary judgment.

As noted above, a motion for summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B). Nothing in this provision grants a trial court the authority to visit the scene of an accident and make determinations based on what it viewed at the scene, rather than basing its ruling simply on the evidence presented by the parties in conjunction with the motion for summary judgment and in opposition thereto. Indeed, in determining whether an issue is genuine for purposes of a motion for summary judgment, courts cannot consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. Smith v. Our Lady of the Lake Hospital, Inc., 639 So.2d at 751. Accordingly, we find that the trial court lacked authority to hold this matter open in order to conduct a visit to the site of the accident. Nevertheless, appellate courts review summary judgments *de novo*, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. See Samaha, 977 So.2d at 882. Therefore, this court will conduct a *de novo* review of the evidence in the record.

At least for the purposes of the motion for summary judgment, neither party has contested the basic facts underlying this matter. It is undisputed that Mr. Cooper tripped and fell on a raised portion of tile in Hollywood Casino's exterior walkway. The sole issue is whether this raised portion of tile, which Mr. Cooper testified was "not even half an inch," presented an unreasonable risk of harm to Mr. Cooper under the particular circumstances of this case.

In its brief to this court, Hollywood Casino's argument appears to be that a difference in height of one-half inch or less in the exterior walkway cannot, as a matter

[2] There is no transcript of the trial judge's visit to the scene of the accident, and the plaintiff's brief to this court does not provide any further details as to what is meant by the allegation that the trial judge conducted a mini-trial and extracted unsworn testimony from the plaintiff.

of law, be unreasonably dangerous. In support of this argument, Hollywood Casino relies on Boyle v. Board of Supervisors, Louisiana State University, 96-1158 (La. 1/14/97), 685 So.2d 1080, 1082, in which the Louisiana Supreme Court found that a defect in a sidewalk ranging anywhere from one-half inch to two inches, based on the estimates of the experts that testified at trial, did not constitute an unreasonably dangerous condition. However, a review of Boyle makes it clear that this finding is based on the facts and circumstances of that case, rather than a fixed rule that any defect of that size is automatically too small to be considered an unreasonably dangerous condition.

In Boyle, the supreme court quoted from White v. City of Alexandria, 216 La. 308, 43 So.2d 618 (1949), in which that court stated:

> For determining what is a dangerous defect in [a] sidewalk ... there is no fixed rule; the facts and surrounding circumstances of each particular case control. The test usually applied, however, requires an answer to the question of whether or not the walk was maintained in a reasonabl[y] safe condition for persons exercising ordinary care and prudence.

Boyle, 685 So.2d at 1082. The court then performed the risk-utility balancing test, in which it weighed factors such as the gravity and risk of harm, individual and societal rights, and the social utility involved, before ultimately determining that *under the facts of the case*, the defect did not constitute an unreasonable risk of harm. Id. at 1083-84.

Hollywood Casino also relies on Reed v. Wal-Mart Stores, Inc., 97-1174 (La. 3/4/98), 708 So.2d 362, in which the supreme court was presented with the question of whether a height variance between one-quarter and one-half inch in a Wal-Mart parking lot constituted an unreasonable risk of harm. While the court ultimately found that this height variance did not constitute an unreasonable risk of harm, the court specifically noted that the question of whether a defect presents an unreasonable risk of harm is a disputed issue of mixed fact and law or policy that is peculiarly a question for the jury or trier of the facts. The court further noted that the unreasonable risk of harm concept, which requires a balancing of the risk and utility of the condition, is not a simple rule of law that can be applied mechanically to the facts of the case. Because of the plethora of factual questions and other considerations involved, the issue

necessarily must be resolved on a case-by-case basis. Reed, 708 So.2d at 364.

In this matter, the only evidence before the court on the motion for summary judgment involved the height of the raised area in the tile floor. Hollywood Casino relied only on the statements of Mr. Cooper in his deposition that the raised area in the floor was not even half an inch and that nothing else caused him to trip; however, there is no evidence whatsoever concerning the remaining factors that are to be addressed by the court in considering the risk-utility balancing test necessary to determine whether a condition in a thing constitutes an unreasonable risk of harm. While Boyle and Reed did ultimately determine that height variances of one-half inch or more were not unreasonably dangerous, both cases applied the risk-utility balancing test to the specific facts, after a trial on the merits, in coming to that conclusion. Furthermore, both cases acknowledge that the test is not a simple rule of law to be applied mechanically to the facts of the case. In this case, there is simply no evidence in the record that could be applied to any of the remaining factors in this balancing test. Therefore, genuine issues of material fact remain as to whether the raised area constituted an unreasonable risk of harm or an unreasonably dangerous condition.[3]

DECREE

Accordingly, the judgment of the trial court granting summary judgment in favor of Louisiana Casino Cruises, Inc., d/b/a Hollywood Casino, is reversed, and this matter is remanded to the trial court for further proceedings. All costs of this appeal are assessed to Louisiana Casino Cruises, Inc., d/b/a Hollywood Casino.

REVERSED AND REMANDED.

[3] Moreover, we note that the movant, Hollywood Casino, had the initial burden of proof for purposes of seeking summary judgment pursuant to LSA-C.C.P. art. 966(C)(2). However, as the defendant in this matter, Hollywood Casino would not bear the burden of proof on the issue of whether the raised area constituted an unreasonable risk of harm or an unreasonably dangerous condition at trial; therefore, it was only required to point out to the court that there was an absence of factual support for one or more elements essential to Mr. Cooper's action. Hollywood Casino attempted to point out to the court that there was an absence of factual support for an essential element of the plaintiff's cause of action by providing evidence that the raised area was less than half an inch high. Nevertheless, that alone was not enough to defeat the plaintiff's claim, nor was it enough to shift the burden to the plaintiff to show support for his claim in order to defeat the motion for summary judgment. See LSA-C.C.P. art. 966(C)(2).