**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0190

SANDRA WOODARD, ET. AL.

VERSUS

THE HARTFORD INSURANCE COMPANY AND BATON ROUGE MARINE INSTITUTE, INC.

***DATE OF JUDGMENT:*** SEP 14 2011

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 548,012, DIV. E, SEC. 23, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE WILLIAM A. MORVANT, JUDGE

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| Martin E. Golden<br>Baton Rouge, Louisiana | Counsel for Defendants-Appellees<br>Baton Rouge Marine Institute, Inc. and<br>Hartford Insurance Company |
| David T. Butler, Jr.<br>Baton Rouge, Louisiana | Counsel for Intervenor-Appellant<br>Lemic Insurance Company |

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Guidry, J. concurs in the result and assigns reasons.

**Disposition: REVERSED.**

KUHN, J.

Plaintiffs-appellants, Sandra Mouton Woodard, Keith Mouton, and Michael Chad Mouton, and their mother, Virlee Mouton, individually and as executrix of the estate of her deceased husband, John Mouton, appeal the trial court's judgment, dismissing via summary judgment their claims for damages as a result of the fatal injuries John sustained when he was struck by a bus driven by defendant, Albert Champion, while Mr. Champion was in the course and scope of his employment with defendant-appellee, Baton Rouge Marine Institute (BRMI). Finding outstanding issues of material fact remain, which preclude the grant of summary judgment, we reverse.

## FACTUAL AND PROCEDURAL BACKGROUND

The following facts, established through deposition testimony, are undisputed. On October 10, 2005, Mr. John Mouton was finishing cement work in the parking lot of his business, PBC Industrial Supplies, Inc. (PBC Industrial), along the curb adjacent to the north side of South Choctaw Drive in Baton Rouge. The cement had been busted around a utility pole, which was situated two feet from the edge of the roadway, to repair a water leak underneath the concrete. PBC Industrial employee, Stephen Bradley St. Romaine, assisted Mr. Mouton with the project. With but about a yard of ground finished to repair, Mr. St. Romaine took a flatbed truck to pick up the final load of cement from Waskey Bridges, a business located down the street. While he was gone, sometime around the noon hour, Mr. Champion was driving a "short" bus in a westerly direction in the northern-most travel lane of South Choctaw Drive immediately adjacent to the curb where Mr. Mouton was working. On the bus, one passenger, a BRMI student, was sleeping.

Mr. Mouton was struck in the face by the right-hand rearview mirror, which extended outward from the bus. There were no eyewitnesses to the accident. Mr. Champion stated that he did not see Mr. Mouton until after he heard a thump and, looking in his right rearview mirror, he saw a man falling toward the sidewalk. He stopped the bus and returned to the accident site. Mr. Mouton was pronounced dead shortly after impact.

The surviving wife and children of Mr. Mouton (collectively the Moutons) filed this lawsuit, averring entitlement to damages as a result of Mr. Champion's alleged negligence, naming as defendants Mr. Champion's employer, BRMI, and its liability insurer, Hartford Insurance Company (Hartford). Lemic Insurance Company, the workers' compensation insurer for PBC Industrial, intervened in the lawsuit seeking reimbursement for payments it made on behalf of Mr. Mouton. After answering the lawsuit, BRMI and Hartford moved for summary judgment. The trial court granted the motion and dismissed both the Moutons' and Lemic Insurance Company's claims for relief. This appeal followed.[1]

## DISCUSSION

Summary judgment is subject to *de novo* review on appeal, using the same standards applicable to the trial court's determination of the issues. ***Peak Performance Physical Therapy & Fitness, LLC v. Hibernia Corp.***, 2007–2206, p. 5 (La. App. 1st Cir. 6/6/08), 992 So.2d 527, 530, ***writ denied***, 2008–1478 (La. 10/3/08), 992 So.2d 1018. The mover has the burden of proof that it is entitled to summary judgment. If the mover will not bear the burden of proof at trial on the

[1] Lemic Insurance Company timely filed a brief with this court joining the appeal of the Moutons and relying on their assignments of error.

subject matter of the motion, it need only demonstrate the absence of factual support for one or more essential elements of its opponent's claim, action, or defense. If the moving party points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the nonmoving party must produce factual support sufficient to satisfy their evidentiary burden at trial. ***See*** La. C.C.P. art. 966C(2). If the mover has put forth supporting proof through affidavits or otherwise, the adverse party may not rest on the mere allegations or denials of their pleading, but their response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. La. C.C.P. art. 967(B).

In determining whether summary judgment is appropriate, we ask the same questions as the trial court: whether there is any genuine issue of material fact, and whether the mover is entitled to judgment as a matter of law. ***Barrow v. Brownell***, 2005-1627, p. 5 (La. App. 1st Cir. 6/9/06), 938 So.2d 118, 121.

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 disputes. 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 fact. ***Smith v. Our Lady of the Lake Hosp., Inc.***, 1993-2512, p. 27 (La. 7/5/94), 639 So.2d 730, 751.

A fact is "material" when its existence or nonexistence may be essential to plaintiffs' 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 on the merits. Any doubt as to a dispute regarding a material issue of fact must be resolved against granting the motion and in favor of a trial on the merits. ***Id.*** Because it is the applicable law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. ***Webb v. Parish of St. Tammany***, 2006-0849, p. 3 (La. App. 1st Cir. 2/9/07), 959 So.2d 921, 923, ***writ denied***, 2007-0521 (La. 4/27/07), 955 So.2d 695.

Under La. C.C. art. 2315, liability for damages is founded upon fault. Whether or not fault exists depends upon the facts and circumstances presented in each particular case. A common sense test is to be applied in determining the question of fault. The test is how would a reasonably prudent person have acted or what precautions would he have taken if faced with similar circumstances and conditions. The degree of care to be exercised must always be commensurate with the foreseeable dangers confronting the alleged wrongdoer. ***Cusimano v. Wal-Mart Stores, Inc.***, 2004-0248, p. 3 (La. App. 1st Cir. 2/11/05), 906 So.2d 484, 486.

Louisiana courts have adopted a duty/risk analysis in determining whether to impose liability under the general negligence principles of La. C.C. art. 2315. For liability to attach under a duty-risk analysis, a plaintiff must prove five separate elements: (1) whether the defendant had a duty to conform his conduct to a specific standard (the duty element); (2) whether the defendant's conduct failed to conform

to the appropriate standard (the breach element); (3) whether the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (4) whether the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of protection element); and (5) whether the plaintiff was damaged (the damages element). ***Cusimano***, 2004-0248 at pp. 3-4, 906 So.2d at 486-87. A negative answer to any of the inquiries of the duty/risk analysis results in a determination of no liability. ***Id.***, 2004-0248 at p. 4, 906 So.2d at 487.

It is axiomatic that drivers are required to exercise due care to avoid colliding with pedestrians upon the road. Motorists are charged with the duty to see what an ordinarily prudent driver should have seen and avoid striking pedestrians in the road. ***See*** La. R.S. 32:214.[2] Thus, Mr. Champion had a duty to see what an ordinary prudent driver should have seen and avoid striking Mr. Mouton.

The Moutons contend the trial court erred in dismissing their claims because outstanding issues of material fact exist as to whether Mr. Champion breached the duty he owed to pedestrian, Mr. Mouton, who was either in the roadway or close to it at the time he was struck. Specifically, the Moutons aver that they have produced factual support sufficient to establish that they will be able to satisfy their evidentiary burden on the material issue of whether Mr. Champion saw or should have seen Mr. Mouton as he proceeded westward on South Choctaw Drive. Thus, the Moutons assert, the trial court erred in granting summary judgment on this basis.

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[2] La. R.S. 32:214 provides:

> Notwithstanding the foregoing provisions of this Part, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a highway.

In support of summary judgment, relevant to disposition of this issue, defendants, BRMI and Hartford, placed into evidence the deposition testimony of Mr. Champion, Baton Rouge Police Department Corporal James Pittman, and Mr. Gene Ducote, who was on the roadway traveling in a vehicle immediately behind Mr. Champion. The testimony of several experts and excerpts of deposition testimony of people present in close temporal proximity to the accident were also admitted into evidence by these defendants.

Corporal Pittman testified that he investigated the accident. Among other things, he took a statement from Mr. Champion. Based on his investigation, Corporal Pittman opined that Mr. Mouton was standing and moving, possibly before he squatted down to work with a trowel, smoothing the cement. Mr. Mouton looked to see if any traffic was coming, instead of looking before he moved, and when he looked, he was struck in the face with the bus. Corporal Pittman testified that there was nothing to impede Mr. Champion's view of anything in front of him and indicated that Mr. Champion could have swerved as evasive action. But ultimately, Corporal Pittman concluded that Mr. Champion's bus was so close when Mr. Mouton moved, he could not have done anything to avoid the accident.

In conjunction with his investigation, Corporal Pittman took a written statement from Mr. Champion. That statement was entered into evidence by the Moutons. According to Mr. Champion:

> Victim was standing in street working on putting cement in area where a light pole. (Sic) Individual stepped into mirror area of bus. I stopped approximately 100-125 feet after hearing impact. I stopped bus and ran to check on individual. State police pulled up to scene shortly after accident.

In his deposition testimony, Mr. Champion explained that he was driving a familiar route. He routinely picked up students and drove them to BRMI. That morning after having picked up six or seven students, he was notified that one student had been overlooked. Mr. Champion returned to the student's pick-up spot on O'Neal Lane and then turned onto South Choctaw Drive. The posted speed limit was 45 MPH, but he estimated he was travelling about 35 MPH. The student on the bus had fallen asleep. The bus did not have a radio. and Mr. Champion was not otherwise distracted by talking on a cell phone, smoking, or eating. He stated that he was focusing on the road. When he turned the corner off of O'Neal Lane onto South Choctaw, he spotted Mr. Mouton along the roadway behind a utility pole, which was approximately one-third of a mile down the road according to expert testimony. Mr. Champion proceeded to drive through an s-curve. He explained that he had been "trained to look down [the road] a considerable amount to determine which traffic [was] coming." He testified that as he entered into the s-curve he saw the man, who had a shovel, which he placed on the side of the utility pole. Mr. Champion stated that the man was working on cement in the area where the pole was located. When the bus came out of the s-curve, Mr. Champion did not see the man anymore. The road straightened out for a stretch, and then he heard a thump. He proceeded down the roadway, looking in his right rearview mirror, and saw for the first time that the man had fallen backward toward the sidewalk. Mr. Champion then brought the bus to a complete stop.

According to his deposition testimony, there were no vehicles in front of Mr. Champion as he drove the bus, but there were some behind him. He was in the outside lane, where the roadway was closest to the curb on the north side of the

street, travelling west. A vehicle was located in the inside lane, to his left; it was not directly alongside him, but was close enough that Mr. Champion did not believe he could move into the left lane of travel.

When asked about his comment in his written statement, "Victim was standing in street working on putting cement in area where a light pole (sic)," Mr. Champion explained that he was referring to when he first saw Mr. Mouton as he turned into the s-curve. He also clarified his comment, "Individual stepped into mirror area of bus," was not because he saw Mr. Mouton step into the mirror, but rather he assumed that based on his survey of the accident site after he stopped the bus. He explained that he "[d]etermined that after I surveyed the scene by realizing that if I would have gone behind the pole to hit him, I would have ran over the wet cement where he was, and I would have hit the pole also."

Mr. Ducote testified that although he did not see the accident happen, he was positioned in his vehicle, directly behind the bus. When Mr. Ducote saw the bus apply its brakes, he drove around the bus, moving to his left (southward) and into the inside lane of travel. After he turned into a nearby grocery store, he looked back and saw Mr. Mouton lying in the driveway on his back. Mr. Ducote recalled that traffic was as usual, noting that South Choctaw Drive is a well-travelled roadway. He did not think that the bus was speeding, and he indicated that until the driver applied his brakes, he had maintained the bus in the center of the travel lane as he drove ahead of Mr. Ducote's vehicle.

In response to the showing made by BRMI and Hartford, the Moutons offered Mr. Champion's written statement. Additionally, experts Michael S. Gillen, Olin Dart, and Ric D. Robinette, whose depositions had been submitted by these

defendants, each testified, among other things, that there were no explanations why Mr. Champion could not have seen Mr. Mouton as he proceeded in a westerly direction down the roadway. Mr. Gillen speculated that perhaps Mr. Mouton "[got] lost in the pole itself." Mr. Gillen and Mr. Robinette both discredited Mr. Champion's comments about having seen Mr. Mouton as he entered into the s-curve, noting that as he travelled west, the section of road is essentially straight with an unlimited sight line, an observation with which Mr. Dart also agreed. Mr. Gillen suggested that parked cars and other visual clutter were the only impediments to seeing Mr. Mouton along the roadway as he worked near the utility pole.

In granting summary judgment, the trial judge stated in his oral reasons for judgment:

> [M]y initial inclination was that there were genuine issues of material fact. Probably the sole one that bothered me was what I perceived to be the inconsistency between Mr. Champion's statement at the time of the accident and his subsequent testimony at the deposition. ...
>
> And I look through [his deposition testimony], and ... Mr. Champion explains what he did when he wrote that statement. He never saw him in the road, that he deduced, because of the fact that he wasn't in the street, he heard this thump, and sort of started from where he stopped and working backwards, the only plausible explanation he could have, since my bus is still in a straight line with the mirror extended, ... if I would have hit him where I saw him, I would have had to go through the telephone pole and the cement because he was on the back side of that telephone pole, I simply come to the conclusion he must have walked into the road. And I go back and I look at that, and then I pull the actual statement ... I don't see, when I read Mr. Champion's deposition in light of what's written in the statement, that there is a contradiction. ...
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> [A]ll of the proverbial cards are on the table. ... I'm not called upon to make a credibility call. I'm not having to weigh one witness's view of the accident versus another because we don't have any witnesses other than Mr. Champion.

A trier of fact is free to believe in whole or part the testimony of any witness. ***See Scoggins v. Frederick***, 1998-1814, p. 15 (La.App. 1st Cir. 9/24/99), 744 So.2d 676, 687, ***writ denied***, 1999-3557 (La. 3/17/00), 756 So.2d 1141. Thus, the trier of fact can believe that when Mr. Champion wrote in his statement, "Victim was standing in street working on putting cement in area where a light pole. (sic) Individual stepped into mirror area of bus," he did indeed see Mr. Mouton and failed to take evasive action or otherwise attempt to avoid the accident. All of the experts agree that there was no obstruction to Mr. Champion's vision. We note without finding that the ultimate trier of fact may disregard a testimonial explanation offered by Mr. Champion at the trial and conclude that he saw or should have seen Mr. Mouton. Clearly, the trial court concluded that the explanation Mr. Champion provided in his deposition was more credible than that which he offered in his written statement. Because a court cannot make credibility determinations in ruling on a motion for summary judgment, it was error by the trial court to do so in its dismissal of the Moutons' claims.

Because reasonable persons could disagree about whether Mr. Champion saw Mr. Mouton (based on a literal reading of his written statement) or did not see him (based on his testimonial evidence adduced at trial), the issue of whether Mr. Champion breached the duty he owed Mr. Mouton to see him and avoid colliding with him is a genuine issue of fact. And the fact is material because the trier of fact's conclusion of whether Mr. Champion saw Mr. Mouton potentially permits or precludes recovery of damages by the Moutons. Mindful that any doubt as to a dispute must be resolved in favor of a trial on the merits, we conclude that there exists a genuine issue of material fact as to whether Mr. Champion breached the

duty he owed Mr. Mouton to see him and to avoid colliding with him regardless of whether Mr. Mouton was in the roadway or near the edge of it. ***See*** La. R.S. 32:214. Accordingly, the trial court erred in dismissing the Mouton's claims on this basis.

The Moutons also contend that an outstanding issue of material fact exists as to whether one or more traffic cones were placed in the roadway adjacent to South Choctaw Drive that should have alerted Mr. Champion to Mr. Mouton's presence, which also precludes summary judgment on the breach element of their claims.

The unanimous expert testimony was that if a cone had been in the north lane of travel near Mr. Mouton's work site at the time Mr. Champion was proceeding in a westward direction on South Choctaw Drive, it would have served as an additional alerting device and provided additional notice to Mr. Champion to be aware of what was around the cone. The testimony of both Mr. Gillen and Mr. Robinette suggested that the cones found after the accident were not in conformity with industry standards insofar as appropriately advising drivers that there was work being performed on or near the roadway.

Mr. Chris Scherer, who was an employee of CW Custom Cabinets and Millwork located in premises across from the accident site south of South Choctaw Drive, testified in his deposition that he recalled the presence of at least one cone in the roadway in the northern most lane of travel close to the work site. Mr. Scherer explained that he had sat outside his work premises eating his lunch and had seen Mr. Mouton across the street, working on the concrete project until about two minutes before the accident. He went inside his building and clocked back into work. He did not see the accident happen because he was clocking in at the time,

but he heard "what sounded like a ... mild boom, and then the screeching of tires." He went outside and was the first person to reach Mr. Mouton after the impact.

Based on Mr. Scherer's testimony, as well as that of Mr. St. Romaine and PBC Industrial co-owner, Mr. Karl Weber, both of whose entire depositions were introduced into evidence by the Moutons in response to the showing made by the defendants, a trier of fact could infer that at least one cone was present at the time of the accident. Mr. St. Romaine testified that, earlier that morning, either he or his assistant had placed two cones, taken from PBC Industrial's inventory, in the center of the northern-most lane of travel near the work site in a location intended to alert drivers to Mr. Mouton's presence. Mr. Weber confirmed having seen the cones in the roadway earlier that day as well. He testified that he had left the PBC Industrial premises shortly before the accident, and upon his return five to ten minutes later, he saw one of the cones on the other side of the road smashed up. Mr. St. Romaine described that when he returned after obtaining the last of the concrete from Waskey Bridges, an ambulance was already present. Mr. St. Romaine claimed that he had picked up both cones after the police had left the scene. One cone, located in the PBC Industrial parking lot, was 20-25 feet beyond the place where Mr. Mouton's body landed after impact. That cone had black marks on it, leading Mr. St. Romaine to believe that it had been involved in the accident. He eventually turned that cone over to counsel and returned the other one to PBC Industrial's inventory because he did not believe it had any evidentiary value.

While Mr. Champion testified at his deposition that he did not see any cones in the roadway, and Mr. Ducote also stated that he did not see any cones or traffic diverting to avoid anything that may have been in the roadway, a trier of fact could

credit the testimony of Mr. Scherer, Mr. St. Romaine, and Mr. Weber, and arrive at a factual predicate from which to infer that Mr. Champion saw or should have seen a cone in the roadway. ***See*** La. C.E. art. 302(4).[3] In light of the expert testimony that the presence of a cone in the roadway should have further alerted Mr. Champion to be aware of what was around him as he drove his bus westward on South Choctaw Drive, another genuine issue of material fact exists as to whether Mr. Champion breached his duty to see Mr. Mouton and avoid colliding with him.

We expressly note that we are not holding that the trier of fact must assess 100% of the fault on either Mr. Champion or Mr. Mouton. A pedestrian must exercise reasonable care to avoid leaving a curb and walking into the path of a vehicle. ***See*** La. R.S. 32:212(B).[4] Thus, just as Mr. Champion owed Mr. Mouton a duty, Mr. Mouton had the duty to act with reasonable care in performing his roadside work duties. It is for the trier of fact to allocate the appropriate fault to each party. ***See*** La. C.C. art. 2323 (permitting allocation of fault); ***see also Watson v. State Farm Fire and Cas. Ins. Co.***, 469 So.2d 967, 972-73 (La. 1985) (providing that proper review of a trier of fact's allocation of fault is manifest error/clearly wrong standard).

The evidence adduced at the summary judgment hearing supports findings from which a trier of fact could reasonably conclude that Mr. Champion (whose liability it is disputed in this appeal is borne by his employer, BRMI): (1) had a duty to see Mr. Mouton and avoid colliding with him; and (2) breached that duty by

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[3] La. C.E. art. 302(4) states, "An 'inference' is a conclusion that an evidentiary fact exists based on the establishment of a predicate fact."

[4] At the time of the accident, La. R.S. 32:212(B) provided: "No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield."

failing to see what he should have seen or not avoiding a collision despite having seen Mr. Mouton; and that: (3) any breach of the duty Mr. Champion had to see Mr. Mouton was a cause-in-fact of Mr. Mouton's death; (4) such failure would be sufficient to constitute a legal cause of Mr. Mouton's death; and (5) the Moutons suffered damages as a result. Accordingly, this record contains sufficient evidence for a trier of fact to conclude that defendants BRMI and Hartford could be liable to the Moutons for the actions of Mr. Champion so as to preclude dismissal of their claims by summary judgment.

**DECREE**

For these reasons, the judgment in which the trial court by way of summary judgment dismissed the claims of plaintiffs, Sandra Mouton Woodard, Keith Mouton, and Michael Chad Mouton, and their mother, Virlee Mouton, individually and as executrix of the estate of her deceased husband, John Mouton; as well as the claims of intervenor, Lemic Insurance Company, is reversed. Appeal costs are assessed against defendants, Baton Rouge Marine Institute, and its insurer, Hartford Insurance Company.

**REVERSED.**

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0190

SANDRA WOODARD, ET. AL.

VERSUS

THE HARTFORD INSURANCE COMPANY AND BATON ROUGE MARINE INSTITUTE, INC.

**GUIDRY, J., concurs in the result and assigns reasons.**

**GUIDRY, J., concurring.**

I respectfully disagree with the majority's finding that the conflicting statements made by Mr. Champion in his written statement and his deposition testimony create a genuine issue of material fact. However, from my review of the record, there is conflicting evidence as to whether safety cones were present in the roadway at the time of the accident, and whether Mr. Champion disregarded the safety cones. The trial court, in my opinion, made an impermissible credibility determination in dismissing the plaintiffs' witnesses' testimony regarding the location and/or placement of the safety cones. Because such evidence goes to the reasonableness of Mr. Champion's actions, and whether he breached a duty to Mr. Mouton, it is sufficient to create a genuine issue of material fact so as to preclude the granting of summary judgment. Accordingly, I concur in the result of the majority opinion, reversing summary judgment in favor of Baton Rouge Marine Institute and its insurer, Hartford Insurance Company.