NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2192

TIHOMIR JANCAN and MILANA JANCAN

VERSUS

EAST BATON ROUGE PARISH SCHOOL BOARD

Judgment Rendered: AUG 17 2011

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. C509163

Honorable Kay Bates, Judge Presiding

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Gregory J. Miller Baton Rouge, Louisiana	Counsel for Plaintiff/1st Appellant Tihomir Jancan
Stephen W. Glusman Baton Rouge, Louisiana	Counsel for Intervenor/2nd Appellant Louisiana Home Builders Association Self Insurance Fund (LHBA)
Karen D. Murphy Carla S. Courtney Harold J. Adkins Baton Rouge, Louisiana	Counsel for Defendant/Appellee East Baton Rouge Parish School Board
John Swanner Baton Rouge, Louisiana	Counsel for Defendant/Appellee Culotta Construction, Inc.
Thomas W. Darling Baton Rouge, Louisiana A. Mark Flake Gretna, Louisiana	Counsel for Defendant/Appellee Allstate Maintenance, Inc.

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

Whipple, J. dissents, finding the matter is not appropriate for summary judgment.

McCLENDON, J.

Plaintiffs appeal a judgment of the trial court, granting a motion for summary judgment in favor of the defendant and dismissing plaintiffs' action for damages. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On June 26, 2002, Tihomir Jancan was on a job as a commercial door installer in connection with renovations to Capitol High School in Baton Rouge. Mr. Jancan entered the back of the school's dark auditorium and, while looking for a light switch, proceeded across the stage where he fell off into the orchestra pit, which was approximately five to six feet deep, sustaining serious injuries. Thereafter, on June 30, 2003, Mr. Jancan and his wife, Milana, filed a petition for damages against the East Baton Rouge Parish School Board (School Board), asserting that the School Board owned, operated, or had at all relevant times the care, custody, and control of Capitol High School and that it was negligent in failing to give proper instructions regarding its property to the workers on campus and in failing to maintain its property in such a manner as to be reasonably safe for its use or to be free from defects rendering it an unreasonable risk of harm. The plaintiffs also asserted that the School Board was negligent in failing to have adequate lighting around the orchestra pit and in failing to have a light switch at the rear of the stage where Mr. Jancan entered. Additionally, the plaintiffs alleged that the orchestra pit presented a hidden trap and was an unreasonable risk of harm. The Louisiana Home Builders Association Self Insurance Fund (LHBA) filed a petition for intervention on August 18, 2003, asserting that as the workers' compensation insurer for Mr. Jancan's employer it paid disability and medical benefits to or on behalf of Mr. Jancan and its statutory lien for benefits paid should be recognized and maintained.

After answers were filed, the School Board, on March 7, 2005, filed a third-party demand against Frank Culotta Contractors, Inc. (Culotta) and

Employers Mutual Casualty Company (EMC),[1] seeking indemnification for any award the plaintiffs might obtain, asserting that on the date of the accident Culotta had a contract with the School Board for certain renovations at the high school and that Culotta had subcontracted with Allstate Maintenance, Inc. (Allstate). The School Board claimed indemnification pursuant to the contract between it and Culotta. Thereafter, Culotta and EMC filed a third-party demand against Allstate, asserting indemnification pursuant to Culotta's subcontract with Allstate.[2]

On May 26, 2010, the School Board filed a motion for summary judgment, asserting that there were no genuine issues of material fact and that it was entitled to summary judgment as a matter of law. Following a hearing on July 12, 2010, the trial court granted the summary judgment, without oral reasons, and on July 22, 2010, judgment was signed dismissing all of plaintiffs' claims against the School Board, with prejudice. Plaintiffs appealed. The intervenor, LHBA, also filed an appeal, adopting as its argument that of plaintiffs.

APPLICABLE LAW

A motion for summary judgment is properly 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. 966B. The summary judgment procedure is expressly favored in the law and is designed to secure the just, speedy, and inexpensive determination of non-domestic civil actions. LSA–C.C.P. art. 966A(2).

The mover bears the burden of proving that he is entitled to summary judgment. LSA–C.C.P. art. 966C(2). However, if the mover will not bear the burden of proof at trial on the subject matter of the motion, he need only

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[1] The original third-party demand mistakenly named Clarendon National Insurance Company as the commercial general liability insurer of Culotta. EMC was replaced as the proper insurer in the School Board's First Supplemental and Amending Third-Party Demand.

[2] Culotta actually subcontracted with Baton Rouge Door & Supply, on January 24, 2002, to furnish doors and hardware for the renovation project. Allstate, however, installed the doors. Both companies were owned by Dan Miller. Mr. Jancan worked for either Allstate or Baton Rouge Door on the Capitol High School project.

demonstrate the absence of factual support for one or more essential elements of his opponent's claim, action, or defense. LSA–C.C.P. art. 966C(2). 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 establish that he will be able to satisfy his evidentiary burden at trial. LSA–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 his pleading, but his response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue for trial. LSA–C.C.P. art. 967B. Thus, once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. **Babin v. Winn-Dixie Louisiana, Inc.**, 00-0078, p. 4 (La. 6/30/00), 764 So.2d 37, 40.

In ruling on a motion for summary judgment, the trial court's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. **Hines v. Garrett**, 04–0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765 (per curiam). A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the 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 trial on that issue and summary judgment is appropriate. **Id.**

Further, in determining whether summary judgment is appropriate, appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. See **Barnett v. Watkins**, 06–2442, p. 8 (La.App. 1 Cir. 9/19/07), 970 So.2d 1028, 1033, writ denied, 07–2066 (La. 12/14/07), 970 So.2d 537. Because it is the applicable substantive law that determines materiality, whether or not a

particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Bezet v. Original Library Joe's, Inc.**, 01–1586, p. 8 (La.App. 1 Cir. 11/08/02), 838 So.2d 796, 800. Accordingly, we now address the relevant substantive law.

Plaintiffs filed their petition alleging negligence under LSA-C.C. art. 2317.[3] Pursuant to Article 2317, 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 modification:

> 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.

LSA-C.C. art. 2317.1.

Thus, to establish liability based on ownership or custody of a thing, the plaintiff must show that (1) the defendant was the owner or custodian of a thing which caused the damage, (2) the thing had a ruin, vice, or defect that created an unreasonable risk of harm, (3) the ruin, vice, or defect of the thing caused the damage, (4) the defendant knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect, (5) the damage could have been prevented by the exercise of reasonable care, and (6) the defendant failed to exercise such reasonable care. LSA-C.C. art. 2317.1. **Granda v. State Farm Mut. Ins. Co.**, 04-2012, p. 5 (La.App. 1 Cir. 2/10/06), 935 So.2d 698, 702.

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[3] Plaintiffs also assert negligence under LSA-C.C. art. 660, which provides:

> The owner is bound to keep his buildings in repair so that neither their fall nor that of any part of their materials may cause damage to a neighbor or to a passerby. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the 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.

With the addition of the requirement to show actual or constructive knowledge in order to impose liability under LSA–C.C. art. 2317.1, the legislature has effectively turned strict liability into negligence claims. **Jackson v. Brumfield**, 09-2142, p. 3 (La.App. 1 Cir. 6/11/10), 40 So.3d 1242, 1243. Additionally, LSA-R.S. 9:2800 further circumscribes the liability of public entities with respect to LSA-C.C. arts. 2317 and 2317.1.[4]

A defendant has a duty to conform to the standard of conduct of a reasonable person under the circumstances. See **Moory v. Allstate Ins. Co.**, 04-0319, p. 4 (La.App. 1 Cir. 2/11/05), 906 So.2d 474, 478, writ denied, 05–0668 (La. 4/29/05), 901 So.2d 1076. The risk that occurs must be within the scope of the defendant's duty to exercise reasonable care. Thus, the court must decide if the risk which caused the damage is within the ambit of protection of the duty. **Granda**, 04-2012 at p. 5, 935 So.2d at 702.

However, failure to take every precaution against all foreseeable injury to another does not necessarily constitute negligence. Negligence requires the risk be both foreseeable and unreasonable. Failure to take a particular precaution to

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[4] Louisiana Revised Statute 9:2800 provides, in pertinent part:

> A. A public entity is responsible under Civil Code Article 2317 for damages caused by the condition of buildings within its care and custody.
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> * * *
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> C. Except as provided for in Subsections A and B of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.
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> D. Constructive notice shall mean the existence of facts which infer actual knowledge.
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> G. (1) "Public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions. Public entity also includes housing authorities, as defined in R.S. 40:384(15), and their commissioners and other officers and employees and sewerage and water boards and their employees, servants, agents, or subcontractors.

guard against injury to another in connection with a risk constitutes negligence only when it appears such a precaution would have been undertaken under the circumstances by a reasonably prudent individual. Finally, where a risk is obvious, there is no duty to warn or protect against it. **Moory**, 04-0319 at pp. 4-5, 906 So.2d at 478.

DISCUSSION

Plaintiffs assign as error the trial court's determination that there were no disputed material issues of fact regarding the School Board's negligence in failing to protect Mr. Jancan from the fall hazard. Plaintiffs also maintain that the trial court erred in finding that the School Board breached no duty to Mr. Jancan to protect him from injury by proper inspection and maintenance of its premises. The School Board contends, however, that plaintiffs failed to submit any evidence showing a genuine issue of material fact and, therefore, the trial court correctly granted summary judgment.

In support of its motion for summary judgment, the School Board submitted, *inter alia*, a copy of its contract with Culotta, the subcontract between Culotta and Baton Rouge Door & Supply, and excerpts of the specifications for the renovation project regarding communications. It also presented excerpts of testimony from various depositions, including those of Mr. Jancan, Mr. Jancan's supervisor, the project superintendent, and the head custodian at Capitol High School. Further, the School Board also submitted the affidavit of a safety expert. In response to the summary judgment motion, plaintiffs filed a memorandum in opposition and attached thereto excerpts from the same depositions submitted by the School Board in support of its motion for summary judgment.

Michael Dunn, the superintendent assigned by Culotta to oversee the project, testified that Culotta was not doing work in the auditorium itself at that time in the renovation project, but was replacing doors in a classroom area behind the auditorium, as well as in the vestibule area. He stated that he did not know why Mr. Jancan was in the area of the auditorium on the day of the accident.

Claude Tibbetts, Mr. Jancan's supervisor, also testified that on the day of the accident, they were changing doors at the back of the auditorium building, in the vestibule and bathrooms. He testified that their tools and equipment were stored in the vestibule in the front of the auditorium and that every morning someone from his crew went through the back door of the auditorium, which was usually unlocked, and unlocked the front doors. Mr. Tibbets stated that the lighting was supposed to be on when they were in the auditorium, and every time he had gone through the auditorium himself to open the front doors, the lights in the auditorium had been on. He testified that he therefore had no concern that the lights would be off on the day he asked Mr. Jancan to open the front doors. Mr. Tibbetts further stated that he thought that either the contractor or the school custodian was responsible for turning on the auditorium lights.

Excerpts from the deposition testimony of Eddie Davis, the head custodian at Capitol High School, were also presented. Mr. Davis stated that on the morning of the accident either he or his assistant opened the door to the back of the auditorium, because a class was coming in at eight o'clock to the choir room. He also stated that this was the first time he knew of any injury of any kind in the auditorium since his employment in 1989.

The School Board also submitted the affidavit of Michael J. Frenzel, a certified safety professional, who had previously been qualified as an expert in safety, offering expert testimony in state and federal courts in Louisiana, Texas, Mississippi, Ohio, and Pennsylvania. He attested to reviewing the various pleadings and depositions in this matter, as well as a partial set of the original drawings for the auditorium from 1958. Mr. Frenzel further attested that following a general review of safety literature and various life safety, building and electrical codes:

> [N]o requirement [was] found that would have required, then or now, there be a light switch at each door entering a room, or at the door at the rear of the stage. Typically, and as is the case a[t] Capital High School, stage lights, to include those back stage, are controlled from a central panel in the stage wings so as to preclude

> unwanted and/or unintended lighting changes during a performance.

Mr. Frenzel opined:

> That there was no light switch located at or near the doorway entrance to the rear of the stage was not the cause of this accident. The absence of a light switch at or near the doorway did not cause the auditorium to be classified as unsafe or defective.[5]

On our *de novo* review review of the evidence, we find that the School Board had no duty to warn Mr. Jancan of, or protect him from, the lack of a light switch at the back door to the auditorium. Although it is unfortunate that Mr. Jancan was injured, under the facts and circumstances of this case, his actions did not create a duty on the part of the School Board, as the School Board would not have anticipated that a reasonably prudent individual would proceed forward in the dark into an unknown area. As movant, the School Board pointed out an absence of factual support for plaintiffs' claims. Plaintiffs failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden at trial. Plaintiffs offered no evidence regarding its argument that the School Board failed to properly inspect or maintain its premises. Nor was there any evidence offered that failure to have lighting at the back door of the auditorium was a defect. Furthermore, the School Board presented evidence, through Mr. Frenzel, that the auditorium was not defective based on a lack of lighting or inadequate light switches. Plaintiffs failed to respond with specific facts showing that there was a genuine issue for trial. Additionally, while plaintiffs suggest that the orchestra pit, in and of itself, presented a hidden trap

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[5] Additionally, the School Board maintained that, as per the specifications for the Capitol High School renovations, communications with subcontractors were to be performed by the contractor, Culotta. Specifically, Section 4.2.4 of the specifications provided, in pertinent part: "Communications by and with Subcontractors and material suppliers shall be through the Contractor." Further, in Section 3.9.1, it was provided that the contractor was to employ a competent superintendent for the project, that the superintendent would represent the contractor, and that communications given to the superintendent would be as binding as if given to the contractor.

Mr. Dunn testified that as superintendent he would meet with his boss, Frankie Culotta, and the representative from the School Board about once a week to discuss the progress of the project and further discuss what needed to be done. Mr. Dunn stated that he had safety meetings with the Culotta employees at least once a week and stated that he specifically warned all of the subcontractors about the auditorium, about two to three weeks before the accident. Mr. Dunn stated that he remembered that Mr. Tibbetts and his crew, including Mr. Jancan, were at that meeting. Mr. Jancan and Mr. Tibbetts both testified that they never attended any safety meetings and that they were never told to stay out of or anything about the auditorium.

Thus, although there was a dispute as to whether Mr. Jancan was informed at a safety meeting of the auditorium hazard, it was not material to the outcome of this legal dispute.

and was an unreasonable risk of harm, they have offered no evidence to support that suggestion. Mr. Davis testified that there had been no prior accident or injury in the auditorium since his employment in 1989. Plaintiffs failed to respond with any evidence showing prior knowledge by the School Board of a defect.

Accordingly, finding no merit to plaintiffs' assignments of error, we find on review that the trial court correctly granted the School Board's motion for summary judgment.

CONCLUSION

For the above and foregoing reasons, the July 22, 2010 judgment of the trial court is affirmed. All costs of these proceedings are assessed to the plaintiffs, Tihomir and Milana Jancan.

AFFIRMED.