NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1708

ELOUISE SPENCER

VERSUS

BENNY'S CAR WASH, LLC AND CENTRAL CLAIMS SERVICE, INC.

Judgment Rendered: MAY 04 2012

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On Appeal from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
Trial Court Number 516,558

The Honorable Todd W. Hernandez, Judge

* * * * * * *

Elouise Spencer Baton Rouge, Louisiana	Plaintiff/Appellant Pro Se
James A. Prather Katherine F. Ogburn Mandeville, Louisiana	Counsel for Defendants/Appellees Benny's Car Wash, LLC and Certain Underwriters at Lloyds, London, Subscribing to Certificate Number SVBPKG1123

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BEFORE: GAIDRY, McDONALD, AND HUGHES JJ.

HUGHES, J.

This is an appeal of a judgment granting the defendants' motion for involuntary dismissal by the trial court. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On or about February 1, 2003[1] Elouise Spencer took her vehicle to Benny's Car Wash, on Coursey Boulevard, in Baton Rouge, to get a car inspection sticker. While walking through the garage area, Dr. Spencer[2] fell into a mechanic's oil-change pit and allegedly suffered injury. On January 29, 2004 Dr. Spencer filed suit against Benny's Car Wash, LLC ("Benny's") and its insurer, Certain Underwriters at Lloyds, London, Subscribing to Certificate Number SVBPKG1123 ("Lloyds").[3]

On March 21, 2011 a trial was held in this case, and after the presentation of evidence by the plaintiff, who appeared without the benefit of counsel, the defendants made a motion for involuntary dismissal, which the court took under advisement. On March 23, 2011 the trial court issued a written ruling finding the plaintiff failed to prove liability on the part of Benny's and granted the defendants' motion for involuntary dismissal; a judgment dismissing the plaintiff's case, with prejudice, was signed on April 14, 2011. Notice of judgment was sent to Dr. Spencer on May 4, 2011, and she filed a devolutive appeal on June 13, 2011.

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[1] Although the plaintiff listed February 1, 2003 as the date of her accident in her petition, she testified at trial that the accident occurred on February 2, 2003. Because the medical records submitted into evidence showed that Dr. Spencer was treated following the accident on February 1, 2003, we will refer to this date as the date of accident.

[2] Dr. Spencer testified that she was a Ph.D. professor in and chair of the Department of Sociology at Southern University.

[3] In the plaintiff's petition, Central Claims Service, Inc. ("Central") was named as Benny's insurer; however, Central filed a peremptory exception pleading the objection of no cause of action, asserting that it was not an insurer, but rather a corporation that provides "independent adjustment services to the insurance industry." The petition was later amended to add as a defendant Lloyds, and Central was dismissed.

On appeal, Dr. Spencer presents the following issues for review:[4]

A. To what extent did an unexpected change of a scheduled 3-day [j]ury trial to approximately a 3-hour [b]ench [t]rial deprive Plaintiff of her right to a jury trial as preserved by the Seventh Amendment?

B. To what extent did the proceedings of the [b]ench [t]rial deviate from the proceedings of the expected [j]ury [t]rial other than its informality?

C. To what extent did the malfunctioning of the telecommunication [i]nstruments/equipment and the [d]irector's claimed lack of knowledge to operate or correct contributed [sic] to the outcome of the bench trial?

D. To what extent did this abrupt change lead to the exclusion of pertinent and critical evidence to substantiate Plaintiff's claim of Defendant's negligent practices and dereliction of duty to protect patrons from hazardous conditions?

E. To what extent did denial of a jury trial; the exclusion of critical evidence (videos and photographs of fall into mechanical pit, injuries, [c]omplete medical records, depositions of physicians, expert photographer, interrogatories, pleadings and etc.); and the deviation from trial procedures inadvertently lead to a deprivation of due process as preserved in the Fifth [A]mendment[?]

F. To what extent did violations of a right to a jury trial and due process of the law lead to an unjust and an inequitable settlement of Plaintiff's case?

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[4] In Dr. Spencer's pro se appellate brief, she lists as "alleged errors" the following factors, which she evidently contends were erroneous conclusions of law or fact made by the trial court:

> Unnumbered Alleged Errors
>
> 1. Appearing in Proper Person, after having been represented by various counsel and after the court having given her sufficient time to obtain one, plaintiff did not do so.
> 2. Testimonial evidence of plaintiff's two siblings and a friend chiefly centered around injuries suffered and residual effects, and the testimony given by Benny's manager and plaintiff in response to a video (still) of the plaintiff.
>
> Numbered Alleged Errors
>
> In order for liability to attach under a duty risk analysis, the plaintiff must prove:
> 1. The defendant had a duty to conform his or her conduct to a specific standard of care;
> 2. The defendant failed to conform his or her conduct to a specific . . . standard;
> [3.] The defendant's conduct was a cause in fact of the plaintiff's injuries;
> [4.] The [d]efendant's substandard conduct was the legal cause of the plaintiff's injuries[;] and
> [5.] Damages[.]

However, we also quote Dr. Spencer's "Issues for Review," which more closely reflect the arguments contained in her brief.

G. To what extent did Plaintiff's status as a pro se litigant prejudiced [sic] the proceedings and lead to a denial of her right to a jury trial and ensuing due process violation?

H. To what extent did Plaintiff's counsels' actions and inactions contribute to client['s] deprivation of a right to a jury trial and ensuing due process violation?

I. To what extent did defense counsel avoidance of cooperation during the discovery phase, disregard for Plaintiff's desire to have a jury trial, even when they themselves had so requested and later withdraw jury bond, and incorrect accusations lead to Seventh and Fifth Amendments violations?

J. To what extent did Plaintiff's actions as client, as plaintiff and pro se litigant who demanded and never wavered [sic] her right to a jury trial as the best forum contributed [sic] to the outcome of her case?

K. To what extent did incomplete, incorrect and missing case records contributed [sic] to the denial of a jury trial and the ensuing denial of due process of law?

LAW AND ANALYSIS

U.S. Constitutional 7th Amendment Right to Jury Trial

On appeal Dr. Spencer makes the argument that she was deprived of her constitutional right to a jury trial, citing the 7th Amendment of the United States Constitution, which provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

This Constitutional Amendment has been interpreted as meaning that the right to a jury trial in civil cases under the Seventh Amendment is ***not*** among those provisions of the Bill of Rights that have been made applicable to the states through the Fourteenth Amendment. See **R.J. Reynolds Tobacco Co. v. Bonta**, 272 F.Supp.2d 1085, 1110-11 (E.D. Cal. 2003), affirmed, 423 F.3d 906 (9th Cir. 2005), cert. denied sub nom. **R.J. Reynolds**

Tobacco Co. v. Shewry, 546 U.S. 1176, 126 S.Ct. 1344, 164 L.Ed.2d 58 (2006) (citing **Gasperini v. Center for Humanities, Inc.**, 518 U.S. 415, 418, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996) (holding that the "Seventh Amendment . . . governs proceedings in federal court, but not in state court"); **Curtis v. Loether**, 415 U.S. 189, 192 n. 6, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974) (holding that the Supreme Court "has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment"); **Walker v. Sauvinet**, 92 U.S. 90, 92, 23 L.Ed. 678 (1875) (holding that "[t]he States, so far as [the Seventh] amendment is concerned, are left to regulate trials in their own courts in their own way[; a] trial by jury . . . is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge"). Thus, under the U.S. Constitution's 7th Amendment, the right to a jury trial is provided to a litigant only in a *federal* district court; this right does not extend to a litigant is a *state* district court, where any right to a jury trial is as provided by state law. See **Arshad v. City of Kenner**, 2011-1579, 2011-1814 (La. 1/24/12), ___ So.3d ___; **Riddle v. Bickford**, 2000-2408, pp. 5-6 (La. 5/15/01), 785 So.2d 795, 799-800.

In Louisiana, this state's Constitution provides for the absolute right to a jury trial only in criminal cases, as provided in Louisiana Constitution Article I, § 17 (A), which states:

> A criminal case in which the punishment may be capital shall be tried before a jury of twelve persons, all of whom must concur to render a verdict. A case in which the punishment is necessarily confinement at hard labor shall be tried before a jury of twelve persons, ten of whom must concur to render a verdict. A case in which the punishment may be confinement at hard labor or confinement without hard labor for more than six months shall be tried before a jury of six persons, all of whom must concur to render a verdict. The accused shall have

> a right to full voir dire examination of prospective jurors and to challenge jurors peremptorily. The number of challenges shall be fixed by law. Except in capital cases, a defendant may knowingly and intelligently waive his right to a trial by jury but no later than forty-five days prior to the trial date and the waiver shall be irrevocable.

In a civil case, brought in a Louisiana district court, the right to jury trial is governed by the Louisiana Code of Civil Procedure. See LSA-C.C.P. art. 1731 et seq. The nature and amount of the principal demand determines whether any issue in the principal or incidental demand is triable by jury. LSA-C.C.P. art. 1731. In general, a trial by jury shall ***not*** be available in a civil suit ***unless*** a petitioner's cause of action exceeds fifty thousand dollars exclusive of interest and costs. See LSA-C.C.P. art. 1732.

In order to obtain a jury trial, if jury trial is not otherwise prohibited by law, the party so desiring must file "a pleading demanding a trial by jury and a bond in the amount and within the time set by the court pursuant to Article 1734." See LSA-C.C.P. art. 1733(A). The pleading demanding a trial by jury shall be filed ***not later than ten days*** after either the service of the last pleading directed to any issue triable by a jury or the granting of a motion to withdraw a demand for a trial by jury. LSA-C.C.P. art. 1733(C). Normally, the demand for a jury trial would be made by the plaintiff in his petition, or made by the defendant in his answer. If not made then, under Article 1733 it may be made in a supplemental pleading filed timely. This supplemental pleading would have to be filed not later than ten days after service of the answer, if there was no incidental demand, or not later than ten days after service of the answer to the incidental demand. However made, the pleading in which it was made would have to be served on the adverse party. LSA-C.C.P. art. 1733, 1960 Official Revision Comment (b). Paragraph C of Article 1733 further protects the rights of a party, who has

relied upon another party's demand of trial by jury, by providing a reasonable time after the demand is withdrawn for such a party to file his own demand. LSA-C.C.P. art. 1733, 1983 Official Revision Comment (b).

In the instant appeal, Dr. Spencer asserts that she made a request for a jury trial both to her attorneys and to the trial court. Dr. Spencer further states that she has "remained steadfast in desiring a jury trial." However, Dr. Spencer acknowledged in her appellate brief that her third counsel of record, Mr. Pierre, told the trial court judge that she "never wanted a jury trial;" Dr. Spencer asserts that this statement was not true. Ms Spencer also states in her appellate brief that, prior to the March 2010 court date, her trust in Mr. Pierre was "wearing thin," so she contacted Judge Hernandez's office and was told that the upcoming trial date had been converted into a "continuance hearing." Dr. Spencer states, "It was then that I was told that there was not going to be a jury trial, instead a bench trial." Dr. Spencer further indicates that the parties and counsel "met on the trial date"[5] and that she gave her attorney, Mr. Pierre, "a letter and other documentation confirming that a jury trial had always been in place until he went against [her] wishes and not only agreed to its cancellation but paid for it out of

[5] The date referenced, though not specifically stated in Dr. Spencer's appellate brief, appears to have been March 30, 2010. The trial court's prior November 17, 2009 scheduling order, which resulted following a telephone conference between the trial judge, plaintiff's counsel, and defendants' counsel, fixed a trial date of March 30, 2010, but did not specify whether the trial was to be by jury or by judge; however, the telephone scheduling conference was held subsequent to the defendants' motion to withdraw its jury trial request, which had been granted by the trial court on August 25, 2009. The trial court's minute entry for March 30, 2010 stated that the matter had been set for a bench trial on that date, but that counsel for the plaintiff had filed a motion for continuance and a motion to withdraw as counsel of record, both of which were granted by the court. The minute entry further provided that the plaintiff was ordered to obtain new counsel and have said counsel enroll as counsel of record within 45 days, failing which the matter would proceed with the plaintiff in proper person. Additionally, the minute entry stated, "The matters regarding a jury trial will be heard when counsel has enrolled for the plaintiff." The record reflects that no substitute counsel of record thereafter enrolled on the plaintiff's behalf.

monies that [she] had paid to the Clerk of Court."[6] Further, Dr. Spencer alleges that "defense counsel accused [her] of not paying [her] Jury Bond of $2,800.00." Dr. Spencer contends that she "paid all mandatory cost for [a] jury bond in both scheduled jury trials and never with[drew] funds for such." However, Dr. Spencer failed to provide this appellate court with any specific record reference that would support the inference she makes (that she had in fact filed a jury bond with the trial court), contrary to the directive of Uniform Rules of Louisiana Courts of Appeal, Rule 2-12.4, providing: "The argument on a specification or assignment of error in a brief shall include a suitable reference by volume and page to the place in the record which contains the basis for the alleged error. The court may disregard the argument on that error in the event suitable reference to the record is not made."

Our review of the record presented to this court on appeal does not reveal any request for a jury trial having been made on behalf of Dr. Spencer. In particular, neither her petition, filed on January 29, 2004, nor her first supplemental and amending petition, filed on March 26, 2004, contained a request for jury trial. Nor was any other pleading filed so requesting.

While defendants did request a jury trial and paid a $2,000 jury bond on December 23, 2005, this request was withdrawn by the defendant by means of a motion filed August 21, 2009, which was granted by the trial

[6] A claim for legal malpractice is stated when the plaintiff alleges there was an attorney-client relationship, the attorney was guilty of negligence or professional impropriety in his relationship with the client, and the attorney's misconduct caused the client some loss. **Prestage v. Clark**, 97-0524 (La. App. 1 Cir. 12/28/98), 723 So.2d 1086, 1091, writ denied, 99-0234 (La. 3/26/99), 739 So.2d 800. When an attorney's performance falls below the standard of competence and expertise usually exercised by other attorneys in handling such matters, the attorney is liable for any damage to the client caused by his substandard performance. The proper method of determining whether an attorney's malpractice is a cause in fact of damage to his client is whether the performance of that act would have prevented the damage. **Ault v. Bradley**, 564 So.2d 374, 379 (La. App. 1 Cir.), writ denied, 569 So.2d 967 (La. 1990). To the extent that Dr. Spencer raises issues related to allegedly substandard performance by her various attorneys of record, claims of this nature are beyond the scope of the instant action.

court on August 25, 2009. Notice of this ruling was served on Dr. Spencer's attorney of record at that time, John K. Pierre.[7] Dr. Spencer then had ten days after the granting of the defendants' motion to withdraw the demand for a trial by jury to file her own written jury trial request, if she so desired, as directed by LSA-C.C.P. art. 1733(C). No such request for jury trial was filed into the trial court record.

Nevertheless, the trial court seemingly accorded Dr. Spencer an additional opportunity to request a jury trial on her own behalf, following the August 17, 2010 pre-trial conference, as reflected on the pre-trial order signed that date by both Dr. Spencer, pro se, defense counsel, and the trial judge, who were in attendance.[8] In that August 17, 2010 pre-trial order, it was stated:

> Jury bond in the amount of $2,800.00 is to be filed 45 days prior to trial by requesting party; 35 days prior to trial by non-requesting party, with a true or certified copy of the bond to be delivered by the filing party to the Jury System Coordinator (Room 731) on the date filed.

A new trial date of March 21, 2011 was also set during the August 17, 2010 pre-trial conference, and handwritten at the bottom of the form was the following statement by the trial judge: "There will be no continuance of the March 2011 Trial Date and if counsel is hired then must enroll on record by Jan[uary] 1, 2011."

On August 30, 2010 the defendants filed a motion to withdraw the $2,000 jury bond previously filed on December 23, 2005, referencing their

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[7] Mr. Pierre did not file a motion to withdraw as Dr. Spencer's attorney of record until March 26, 2010. The motion was granted by the trial court on April 1, 2010, and notice of the signing of the ruling was forwarded to Dr. Spencer on April 5, 2010.

[8] In accordance with LSA-C.C.P. art. 1733, Dr. Spencer's right to request a jury trial was lost ten days after the granting of the defendants' motion to withdraw their demand for a jury trial. Since the defendants' motion to withdraw was granted on August 25, 2009, Dr. Spencer was required to file her own jury trial request by September 4, 2009. Yet, the trial court's August 17, 2010 pre-trial order allowed Dr. Spencer until 35 to 45 days prior to the March 21, 2011 trial date to file a request and jury bond to obtain a jury trial (which would have resulted in a due date of either January 27, 2011 or February 7, 2011, depending on whether the 35-day or 45-day period was applicable).

prior August 2009 withdrawal of their jury trial request.[9] The trial court granted the motion to withdraw the jury bond, and the funds were refunded to the defendants on September 17, 2010. The record does not reflect that any jury bond, in any amount, was filed on behalf of Dr. Spencer.

On February 10, 2011 the defendants filed a "Motion to Strike Jury or, Alternatively, Rule to Show Cause Why this Matter Should Not Proceed as Bench Trial," citing the fact that the plaintiff had never filed a written motion for jury trial and that the request of the defendants for a jury trial had been withdrawn. The defendants further noted in their motion that, notwithstanding the absence of any current request for jury trial in the record, the matter was designated on the trial court's docket as a jury trial.[10] The motion was set for hearing on the same day as the trial, March 21, 2011. The trial court's minute entry for March 21, 2011 states that the defendants' motion to strike the jury was granted.

We find no error in the refusal of the trial court to hold a jury trial in this case. A civil litigant must timely file a pleading demanding a trial by jury and a bond of sufficient amount. If the jury trial is not timely requested or sufficient bond is not timely filed, the litigant loses the statutory right to a trial by jury. **Riddle v. Bickford**, 2000-2408 at pp. 5-6, 785 So.2d at 799-800.

Dr. Spencer claims in her brief to this court that the trial court's conducting the trial in the matter as a bench trial, rather than a jury trial, was "unexpected" and caused her to be "disadvantaged" in representing herself at the trial, as she arrived without all of her exhibits and witnesses, expecting

[9] The certificate of service contained on the motion indicated that a copy of the motion was forwarded to "plaintiff pro se" on August 25, 2010.

[10] The certificate of service contained on the motion indicated that a copy of the motion was forwarded to "plaintiff pro se" on February 7, 2011.

the day to occupied with selecting a jury. However, by choosing to represent himself, a litigant assumes the responsibility of familiarizing himself with applicable procedural and substantive law. He assumes all responsibility for his own inadequacy and lack of knowledge of procedural and substantive law. His failure to comply with applicable procedural and substantive law does not give him any greater rights than a litigant represented by an attorney. See **Harrison v. McNeese State University**, 93-288, p. 3 (La. App. 3 Cir. 3/23/94), 635 So.2d 318, 320, writ denied, 94-1047 (La. 6/17/94), 638 So.2d 1099; **Deville v. Watch Tower Bible and Tract Society, Inc.**, 503 So.2d 705, 706 (La. App. 3 Cir. 1987); **Alexander v. Town of Jeanerette**, 371 So.2d 1245, 1247 (La. App. 3 Cir. 1979). See also **Hudson v. East Baton Rouge Parish School Board**, 2002-0987, p. 3 n.2 (La. App. 1 Cir. 3/28/03), 844 So.2d 282, 285 n.2. Cf. **Hutchinson v. Westport Insurance Corporation**, 2004-1592 (La. 11/8/04), 886 So.2d 438. Accordingly, Dr. Spencer is required to comply with the Louisiana Code of Civil Procedure rules, which dictate how a party may obtain a jury trial in a state civil court. Further, in light of the trial court's express directive to her during the August 17, 2010 pre-trial conference and resulting pre-trial conference form, which she signed (as noted hereinabove), that if she desired a jury trial she was required to pay the $2,800 jury bond within the applicable 35 or 45 day period prior to the March 21, 2011 trial, and together with the numerous pre-trial notices and motions, informing her that the defendants' request of a jury trial had been withdrawn, Dr. Spencer should have been forewarned and prepared for the eventuality that there would be a bench trial in this case. Therefore, we find no error in the procedure employed by the trial court, in conducting a bench trial and

requiring all evidence and witnesses to be presented on the designated day, March 21, 2011.[11]

Motion for Continuance and/or to Hold Trial Open for Production of Additional Evidence

Dr. Spencer called three witnesses at trial on the issue of her injuries, her brother, her sister, and a friend. She also called Benny's manager, Dzanh Vu, on the issue of the fault of Benny's. She then indicated to the court that she had other testimony of additional witnesses she wished to present, but stated: "They are not here because I told them I would call them so that they would not miss work." Dr. Spencer described these witnesses as being her son and daughter, the past chair of her department, a secretary in the department, and students in her department. Although she did not give the names of all of these individuals, she specifically named as potential witnesses: Mary Franklin and Dr. Christopher Hunt.[12] Dr. Spencer asserted that she came to trial, expecting a jury trial, and she stated that she was following jury trial procedure. Defense counsel objected to the prospective witnesses as not being listed on the pre-trial order. Dr. Spencer claimed that she had listed the witness on discovery responses. She admitted she had no

[11] We find no merit in Dr. Spencer's argument regarding the inaudibility of the in-court discussion of this issue (that "defense counsel and the judge engaged in a dialog which the plaintiff could barely hear or understand due to defense counsel's low and rapid speech patter[n], and when the court announced that there was going to be a bench trial instead of a jury trial and 'it['s going to be held today,' shocked and disappointed [she] said 'What just happened? This is a travesty of justice...[,]'") since the requirements for a civil jury trial, LSA-C.C.P. art. 1731 et seq., had not been complied with, and the designation of "jury" trial on the court's docket was obviously a clerical error. Moreover, if Dr. Spencer had a complaint about her inability to clearly hear what was being said in the courtroom concerning her case, she was required to voice an objection sufficient to bring her reasons for objecting to the attention of the trial court, so that the trial court would have an opportunity to rule on the objection and take corrective action, if necessary. See **McCann v. McCann**, 2009-1341, p. 8 (La. App. 3 Cir. 3/10/10), 33 So.3d 389, 395; **Haltom v. State Farm Mutual Automobile Insurance Company**, 588 So.2d 792, 794 (La. App. 2 Cir. 1991). In the absence of an objection, a party must be deemed to have waived his right to complain of the alleged impropriety on appeal. **Schoonmaker v. Capital Towing Company**, 512 So.2d 480, 486 (La. App. 1 Cir.), writ denied, 514 So.2d 458 (La. 1987). We likewise apply these principles to any argument asserted by Dr. Spencer relative to malfunctioning telecommunications equipment; any complaint as to courtroom equipment issues should have first been raised in the trial court. Similarly, to the extent Dr. Spencer raises issues about the lack of cooperation by defense counsel during the discovery phase of the trial proceedings, remedies were available to have those issues addressed in the trial court, as stated in the Louisiana Code of Civil Procedure provisions applicable to discovery. See LSA-C.C.P. arts. 1420 through 1475.

[12] Dr. Spencer indicated that Dr. Hunt was the past department chair of the Department of Sociology at Southern University and that Ms. Franklin was a secretary in the department; these witnesses were to testify as to her injuries. With respect to Ms. Franklin, Dr. Spencer had stated she told this witness to come at 2:00 on the afternoon of trial; however, the trial apparently concluded prior to that time.

other witnesses she could present on the day of trial, and that she had not brought her medical records, which she wished to introduce into evidence. Dr. Spencer made the following request to the trial court: "I want to ask if I could do my medicals and my other witnesses tomorrow morning, because I have all my medicals that I get [sic], and I think that -- I do not think that that is asking too much." In response, defense counsel objected to any exhibits that were not exchanged in discovery, and further objected to "cutting [the trial] short" that day and coming back the next day. Defense counsel stated that he had no objection to the submission of the depositions of Doctors Bankston and Roberts. The trial judge stated that "[i]t has got to go now," he could not continue it until the next day, and "the same thing would be true if [defense counsel] stood here and said the same thing." The court further reminded the plaintiff that he had previously said (in the August 17, 2010 pre-trial order) that he would not continue the March 2011 trial date and that "this was the date that we were going [to hold the trial] come heck or high water."

The trial court ruled that witnesses not listed on the pre-trial order would not be allowed to testify, and further that the matter would not be continued. However, the court stated he would allow Dr. Spencer to deliver her medical records to the court on the following day, if the defendants' counsel would stipulate to authenticity; defense counsel indicated he would stipulate to the authenticity of medical records that had previously been

provided to him during discovery.[13] The trial court also denied Dr. Spencer's request to accept written statements from witnesses who had not been present on March 21, 2011 to give oral testimony.

Pursuant to LSA-C.C.P. art. 1601, a continuance may be granted in any case if there is good ground therefor. A continuance shall be granted if at the time a case is to be tried, the party applying for the continuance shows that he has been unable, with the exercise of *due diligence*, to obtain evidence material to his case; or that a material witness has absented himself without the contrivance of the party applying for the continuance. LSA-C.C.P. art. 1602. A party applying for a continuance, although entitled to a reasonable delay and opportunity to procure his witnesses, *must show due diligence*. LSA-C.C.P. art. 1602, Official Revision Comment (b).

Under the circumstances presented in the instant case and considering our conclusion, stated hereinabove, that Dr. Spencer should have been prepared for a bench trial, we cannot say that she demonstrated due diligence when she failed to direct her witnesses to show up on the date set for trial, March 21, 2011. See **Brooks v. Minnieweather**, 44,624, pp. 6-7 (La. App. 2 Cir. 8/19/09), 16 So.3d 1244, 1249. See also **U. S. Machine & Equipment Company v. Kerschner Air Conditioning & Heating Company, Inc.**, 342 So.2d 1278, 1280 (La. App. 4 Cir. 1977); **Berger v. Johnson**, 141 So.2d 164, 165 (La. App. 4 Cir. 1962); **Logwood v. Grand Lodge, K.P.**, 148 So. 282, 282 (La. App. Orl. 1933). Therefore, we cannot

[13] Despite the fact that Dr. Spencer was allowed to submit her exhibits on the following day, the record does not reflect that she did so. In fact, Dr. Spencer filed an application for supervisory review on February 23, 2012, following the lodging of this appeal on September 15, 2011, seeking review of a trial court ruling on January 25, 2012, granting her motion to supplement the trial court record with exhibits, in part, as to "evidence that was submitted to the court on her trial date," and denying her motion in part, as to "exhibits that were not put into evidence." Dr. Spencer's writ application was referred to this panel for disposition and is also handed down this date. See **Spencer v. Benny's Car Wash, LLC**., 2012 CW 0323 (La. App. 1 Cir. 5/2/12) (unpublished) (declining consideration of Dr. Spencer's application for supervisory review because of our decision in this appeal and the numerous violations in her writ application of the Uniform Rules of Louisiana Courts of Appeal, governing the contents of applications for supervisory review).

say the trial court abused its discretion in refusing to allow a continuance of the trial.

Furthermore, the decision to hold open or reopen a case for the production of additional evidence also rests within the discretion of the trial judge. **deBen v. Bobby Collins Seafood, Inc.**, 2000-306 (La. App. 5 Cir. 10/31/00), 772 So.2d 266, 267-68. In this case, Ms Spencer described the witnesses that she wanted to call on the day following the trial, as follows:

> My son and daughter who are coming in tomorrow morning. I have the chair of the department, person who used to be the chair of the department, and the secretary there who needs to give vital testimony to my incapacitation at work, and I have students who can also do the same. One of the students is now a state police officer, so her schedule is, you know -- so, I did leave a message that I would try to get her in.

As stated above, we find no abuse of discretion in the trial court's refusal to continue the trial, as Dr. Spencer should have apprised her witnesses to show up on the day scheduled for trial, not on the day after the trial was scheduled to begin.

In addition, none of these witnesses were described as being eyewitnesses to the accident itself or having specific information related to Benny's alleged fault, but rather, were to give testimony as to the effects of Dr. Spencer's injuries. As we state hereinbelow, the plaintiff's presentation of evidence failed to establish fault on the part of Benny's. Since damages are only owed, in a tort suit, by one who is at "fault" in causing the damages, pursuant to LSA-C.C. art. 2315(A), even if the trial court abused its discretion in refusing to hold open the case for taking the testimony of these additional witnesses, the error was harmless. As we conclude below, the plaintiff failed to prove Benny's was at fault, so Benny's was not responsible

for her damages, and thus, further testimony as to damages was unnecessary.[14]

Involuntary Dismissal

Louisiana Code of Civil Procedure Article 1672(B) provides that in an action tried by the court without a jury, "after the plaintiff has completed the presentation of his evidence, any party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action as to him on the ground that upon the facts and law, the plaintiff has shown no right to relief." Paragraph B further provides that the court "may then determine the facts and render judgment against the plaintiff and in favor of the moving party or may decline to render any judgment until the close of all the evidence."

Because dismissal of an action under LSA-C.C.P. art. 1672, is based on the "facts and law," a review of the substantive law applicable to the plaintiff's case is necessary. In a negligence case, such as Dr. Spencer's, LSA-C.C. art. 2315(A) directs that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." Further, as provided by LSA-C.C. art. 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 modifications. 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

[14] Dr. Spencer failed to demonstrate that any of these witnesses had factual information to give that she could not have testified to herself.

by the exercise of reasonable care, and that he failed to exercise such reasonable care. LSA-C.C. art. 2317.1.

In an action to recover damages for injuries allegedly caused by another's negligence, the plaintiff has the burden of proving negligence on the part of the defendant by a preponderance of the evidence. Most negligence cases are resolved by employing the duty-risk analysis, which entails 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 liability or scope of protection element); and (5) whether the plaintiff was damaged (the damages element). All of these elements must be proven by the plaintiff, in order to prevail in a negligence case, and he may meet his burden of proof by presenting both direct and circumstantial evidence. See **Broussard v. Voorhies**, 2006-2306, pp. 5-6 (La. App. 1 Cir. 9/19/07), 970 So.2d 1038, 1042-43, writ denied, 2007-2052 (La. 12/14/07), 970 So.2d 535.

The general rule applicable to an owner or person having custody of immovable property is that he has a duty to keep such property in a reasonably safe condition. He must discover any *unreasonably dangerous condition* on his premises and either correct the condition or warn potential victims of its existence. 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 which 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. 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.**, 2004-1329, p. 4 (La. App. 1 Cir. 3/24/05), 907 So.2d 109, 112.

In the instant case, Dr. Spencer offered virtually no proof on these factors. Apparently, she would have the court assume that the fact that an accident occurred, involving the mechanic's oil-change pits at Benny's, is in and of itself proof of fault; such a presumption would be like unto the doctrine of *res ipsa loquitur*, meaning "the thing speaks for itself." See **Linnear v. CenterPoint Energy Entex/Reliant Energy**, 2006-3030 (La. 9/5/07), 966 So.2d 36.

In **Linnear**, the plaintiff/homeowner sued a gas company who had performed work on her property, laying a new gas line to her home, which involved digging a trench near her driveway. After the gas company had completed its work, refilled the trench that had been dug, and tamped down the fill dirt firmly, it rained, and the plaintiff subsequently fell and injured her back after stepping on the wet mud. The plaintiff contended that her leg sunk down into the mud to her knee cap, and that this caused her to fall. The plaintiff filed suit against the gas company, asserting it was negligent in filling the trench and failing to re-sod the area, which caused her fall and injury. The plaintiff presented testimony and evidence at trial to establish

that her fall occurred,[15] but submitted no testimony to establish the alleged defect imputed to the defendants; instead the plaintiff requested that the jury be instructed on the doctrine of *res ipsa loquitur*. The trial court refused to give the instruction, and the jury subsequently found that the plaintiff failed to prove by a preponderance of the evidence that any negligence on the part the defendant gas company caused or contributed to the plaintiff's accident. On appeal, the appellate court concluded that the trial judge's refusal to give a *res ipsa loquitur* instruction constituted legal error which "impeded" the fact-finding process of the jury; the appellate court conducted a *de novo* review, and finding the gas company at fault, awarded damages to the plaintiff. On review, the Louisiana Supreme Court concluded that the appellate court erred in the application of *res ipsa loquitur* to a case involving direct evidence, holding that *res ipsa loquitur* only applies where direct evidence of the defendant's negligence is not available to assist the plaintiff to present a *prima facie* case of negligence. **Id.**

Likewise, in Dr. Spencer's case there was ample direct evidence available as to the premises wherein she sustained her fall, but she failed to present this evidence to the trial court. For instance, LSA-C.C.P. art. 1461 allows a litigant to request, during discovery, that another party "permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Articles 1422 through 1425;" therefore, Dr. Spencer could have obtained and submitted to the court precise information concerning the layout and accoutrements, as

[15] Included in the **Linnear** plaintiff's evidence was a photograph that showed a muddy footprint in the area at issue, but did not show a "sinkhole" as alleged by the plaintiff.

well as precise measurements and specifications applicable to same, appertaining to the Benny's garage premises, which she alleged were defective. We note that Dr. Spencer did list on the pre-trial statement that an expert, Robert Sanderson, was a potential witness in her case, but she did not attempt to call or even mention this witness during the March 21, 2011 trial. To the extent that Dr. Spencer would have the court find Benny's at fault simply because an accident happened, in the manner of the doctrine of *res ipsa loquitur*, such a presumption does not apply in a case such as this, as direct evidence was readily available.

Since the instant matter was decided on a motion for involuntary dismissal, the items of requisite proof must be evaluated from that procedural perspective. In deciding whether to grant a motion for involuntary dismissal, the trial court is ***not*** required to review the evidence presented in the light most favorable to the plaintiff, as is done when the analogous motion for directed verdict is filed in a jury case. Unlike the motion for a directed verdict in a jury trial, a motion for involuntary dismissal, pursuant to LSA-C.C.P. art. 1672(B), requires a judge to evaluate the evidence and render a decision based upon a preponderance of the evidence without any special inferences in favor of the opponent to the motion. In other words, on a motion for involuntary dismissal, the trial judge is only required to weigh and evaluate all of the evidence presented up to that point and grant a dismissal, if the plaintiff has failed to establish his claim by a preponderance of the evidence. **Ross v. Premier Imports**, 96-2577 (La. App. 1 Cir. 11/7/97), 704 So.2d 17, 20, writ denied, 97-3035 (La. 2/13/98), 709 So.2d 750. Proof by a preponderance of the evidence simply means that, taking the evidence as a whole, such proof shows that the fact or cause sought to be proved is more probable than not. Although petitioners

are not entitled to any special inferences in their favor, absent circumstances in the record casting suspicion on the reliability of the testimony and sound reasons for its rejection, uncontroverted evidence should be taken as true to establish a fact for which it is offered. Great weight must be given to the factual conclusions arrived at by the trier of fact and reasonable inferences of fact should not be disturbed absent a showing of manifest error. **Id.**, 704 So.2d at 20-21. See also **Jackson v. Capitol City Family Health Center**, 2004-2671, pp. 3-4 (La. App. 1 Cir. 12/22/05), 928 So.2d 129, 131 (citing **Foster v. Tinnea**, 96-2718 (La. App. 1 Cir. 12/29/97), 705 So.2d 782, 784).

On the issue of the fault of Benny's, Dr. Spencer testified to the following alleged facts. When she arrived at Benny's on February 1, 2003, she parked her car "on the side wall," and after informing a Benny's employee that she wanted to have her car inspected, she was instructed to go "inside." As she was walking "where [she] could walk" through the work area of the facility and in the direction of the "lady in the glass window," "all of a sudden" she "found [herself] in a mechanical pit." Dr. Spencer said that she was stopped from falling completely down into the pit by a metal scaffold-like object. Dr. Spencer further testified that one or more Benny's employees came to assist her out of the pit, and that she then sat on a bench in the work area for a while before going into the customer waiting area. By the time her car inspection was completed, Dr. Spencer stated that she had chills, was hurting, and had a "burning sensation," so she proceeded to a local hospital for treatment. Dr. Spencer testified that as a result of her fall she had contusions and abrasions over her body, that she had an injury on one leg, and that she had twisted both her ankles.[16]

[16] Dr. Spencer testified at length concerning the symptoms she suffered as a result of the accident, as well as the course of her convalescence; however, we find it unnecessary to relate the substance of that testimony because of the result we reach herein.

On cross-examination, Dr. Spencer was shown video footage and/or still photographs taken from that footage, apparently photographed by Benny's security cameras,[17] which showed her actual fall. Though she said she could not be certain that she was the person in the video, she admitted she was wearing a black pants suit that day, as shown in the video, and that she did fall into the pit; however, she complained of the clarity of the film. Dr. Spencer was further asked to review still shots of her taken a few steps before she fell into the pit, and she admitted that she was holding her car registration papers in her hand at the time, but she denied looking at or reading those papers as she walked through Benny's. Dr. Spencer further denied looking where she placed her feet while walking. She stated that while walking, "I do not look down." Dr. Spencer indicated that she believed that her path through Benny's was "clear." When the defendants' counsel asserted to Dr. Spencer that her falling into a pit was indicative of the fact that her path was not clear, she responded, "Well, that hole was not supposed to be there." When shown a page from her medical records that indicated she had reported to medical personal that she had not been watching where she was going at the time the accident, Dr. Spencer denied making that statement.

Dr. Spencer's lack of recall as to the exact circumstances of her fall are reflected by her testimony, wherein she stated:

> Everything before the accident I could remember. I have what you call photographic flashback, but the accident itself, it left me without some information, and I needed to know, I needed to know where did I fall?
>
> I do not recall falling into a car. I remember it was close to a reflection of a car being in opposite direction from me, and

[17] This photographic material was not submitted into evidence during the trial, apparently due to the fact that the case was involuntarily dismissed at the close of the plaintiff's case, which obviated the need for the defendants to present the testimony and evidence prepared in defense of the action.

so, I just needed to know the physical mechanics of just what had happened. How I had gotten into that pit.

So, when I went to Benny's, they told me, you cannot -- my daughter-in-law and I went to Benny's, and I wanted to take a photograph of the area, and a guy came out and he said, no, no, you cannot. I honored that because that was -- that would have been illegal to go in and take pictures on the owner's property.

So, what I did, I so wanted to know what had happened to me, especially after I had seen three different versions of the tapes that had been presented. The first version that had been presented had no cars, and as a matter of fact, I wrote a letter to my first attorneys that I had, McGuin [sic] and Perret, and they had said to me, watch that. We watched that video. He said, but Dr. Spencer, there are no cars there. If you keep saying that, somebody is going to think something is wrong. I said, I know they will, I said, but I am telling you, I walked in front of cars.

So, having this debate that questions your, not only your integrity, but it questions your sensibilities, you know, that begins to question. So, I went to great details to find out what possibly happened at the so-called fall. So, I could not get any information that way, so I thought, I said, okay. I said -- and this was a long shot.

* * *

...During the fall, I did not know. Nothing happened to my mental capacity now. I am talking about during the fall.

* * *

...So, what I did to remedy this, this lack of information right with the fall, I called aerial photographers and just say by happenstance, and when I thought about the aerial photographers, I thought about the Columbia space crash, and they had reconnaissance planes flying over Texas and part of Louisiana, and so, I did send an email to NASA and asked if the so happened to have any planes at that time, because the crash happened around that time that morning.

* * *

...I got an aerial photographer. His named is Charles Priot (phonetic).

* * *

...[H]e gave me pictures of Benny's. Pictures had been taken of Benny's on April 22, 2002. A lot of aerial photographs had been taken of Benny's. He gave me the copyrights to these photographs. I took these photographs to ... Kadair's, and [a] Kadair's sketch artist did ... this ... picture, this is one of the pictures that was taken that came from that copyright set of aerial photographs of Benny's.

* * *

...His sketch artist was able to, with me, recapture what that parking lot looked like that morning.

* * *

> ...The aerial photograph was taken on April 22, 2002.[18]
>
> * * *
>
> ...before the accident. ...I do not know why they were taking aerial photographs of Benny's, but there was a whole lot of them.

Dr. Spencer also called as a witness Dzanh Vu, who was Benny's manager on duty that day. Mr. Vu testified that he heard screaming and turned around and saw Dr. Spencer sitting on the net over an "oil bay." Mr. Vu explained that the net was used to cover the bay for the safety of people working there, and it was pulled across the oil bay when there was no car parked there. He indicated he did not see Dr. Spencer fall and could not say how it happened.

The testimony of Dr. Spencer and Mr. Vu was the only evidence presented, ostensibly, on the issue of the fault of Benny's in this accident. The remainder of the evidence offered by Dr. Spencer sought to establish the extent of her injuries only.

In reviewing the propriety of the involuntary dismissal, the first issue to be resolved is whether Dr. Spencer proved by a preponderance of the evidence (whether it was more probable than not) that the Benny's premises contained a condition that created an *unreasonable risk of harm* to persons on the premises (i.e. an *unreasonably dangerous condition*).

As stated above, one element of the analysis of whether a condition is unreasonably dangerous requires consideration of the obviousness and apparentness of the complained-of condition. It is accurate to state that defendants generally have no duty to protect against an open and obvious hazard. If the facts of a particular case show that the complained of condition should be obvious to all, the condition may not be unreasonably

[18] Although the aerial photograph was introduced into evidence, it showed only the exterior of Benny's, as seen from the air, and did not depict the scene of the accident, which took place inside the garage.

dangerous and the defendant may owe no duty to the plaintiff. Specifically, in a trip and fall case, the duty is not solely with the landowner. A pedestrian has a duty to see that which should be seen and is bound to observe whether the pathway is clear. The degree to which a danger may be observed by a potential victim is one factor in the determination of whether the condition is unreasonably dangerous. A landowner is not liable for an injury which results from a condition that should have been observed by the individual in the exercise of reasonable care or which was as obvious to a visitor as it was to the landowner. **Hutchinson v. Knights of Columbus, Council No. 5747**, 2003-1533, p. 9 (La. 2/20/04), 866 So.2d 228, 234-35. Whether the obstruction is an obvious hazard which a pedestrian should observe and avoid, or whether the obstruction is a hazard which a pedestrian exercising due care would not see unless posted with proper warning devices, depends upon all the surrounding circumstances. Factors to consider include the time of day, the nature of the pathway, distractions to the attention, familiarity with the obstruction, and the size, situation and color of the obstruction. **Dunaway v. Rester Refrigeration Service, Inc.**, 428 So.2d 1064, 1067 (La. App. 1 Cir.), writs denied, 433 So.2d 1056- 1057 (La. 1983).

Inherent in the trial court's ruling in Dr. Spencer's case was his factual finding that the existence of an auto mechanic's oil-change pit in an automobile garage does not present an *unreasonably* dangerous condition. We agree.

Customers of Benny's should know that car care services are conducted on the premises and should be aware that such a business requires the presence of dangerous equipment on the premises for business purposes. Consequently, Benny's customers should also know that they need to be

vigilant when traversing the premises to avoid contact with dangerous equipment. The presence of large holes in the floor of Benny's garage (the oil-change pits), only slightly smaller in size than the automobiles that they are used to service, under these circumstances, presents a condition that should be obvious to all and the presence of these pits is not unreasonably dangerous; thus, Benny's owed no duty to warn its customers of the presence of the oil-change pits. Moreover, due to the large size of the oil-change pits, they should be readily visible by the exercise of reasonable care; they are observable to anyone who is looking where they are going. Therefore, we find no manifest error in the finding of the trial court that there was no *unreasonably* dangerous condition in Benny's garage, in light of the nature of the business conducted at Benny's.[19]

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[19] Accord **Dowdy v. City of Monroe**, 46,693 (La. App. 2 Cir. 11/2/11), 78 So.3d 791 (wherein a previously patched three-foot circular area in an asphalt parking lot, with deteriorating frayed borders that had cracked and broken off, creating an approximate 1-1/2 inch variation in elevation, was held to be open and obvious and did not present an unreasonable risk of harm); **McCloud v. Housing Authority of New Orleans**, 2008-0094 (La. App. 4 Cir. 6/11/08), 987 So.2d 360 (in which a muddy hole in a construction area was held to be an open and obvious hazard that was readily observable); **Gray v. State Department of Transportation and Development**, 2000-7 (La. App. 5 Cir. 5/17/00), 761 So.2d 760 , writ denied, 2000-2369 (La. 11/3/00), 773 So.2d 146 (where it was held that a 40-inch square catch basin, located in front of an opening in a curb, near a bus stop, was clearly visible and did not present an unreasonable risk of harm); **Buchert v. State Department of Recreation and Tourism, Office of Tourism**, 95-0924 (La. App. 4 Cir. 1/31/96), 669 So.2d 527, writ denied, 96-0534 (La. 4/8/96), 671 So.2d 341 (holding that a moveable handicapped ramp protruding onto the sidewalk was readily visible against the contrasting sidewalk and did not present an unreasonable risk of harm); **Bealer v. National Tea Co.**, 597 So.2d 1242 (La. App. 3 Cir. 4/16/92) (wherein an appellate court could not say the factfinder was clearly wrong in failing to find a two-and-a-half-foot wide and twelve-inch deep hole, in a construction site parking lot, created an unreasonable risk of harm to a delivery man who failed to see the hole); **Alexander v. City of Lafayette**, 584 So.2d 327 (La. App. 3 Cir. 1991) (holding that an exposed tree root, alone, does not present an unreasonable risk of harm); **Maples v. Merrimack Mutual Fire Insurance Company**, 567 So.2d 1178 (La. App. 3 Cir. 1990), writ denied, 572 So.2d 64 (La. 1991) (in which ruts in an unimproved driveway were found not to be defects that present an unreasonable risk of injury to visitors); **McDade v. Town of Oak Grove**, 545 So.2d 1276 (La. App. 2 Cir. 1989) (holding that the trial court was not clearly wrong in failing to find an unreasonable risk of harm in a one-inch-deep, triangular-shaped hole or depressed area (measuring approximately 4″ x 3″ x 3″) in a sidewalk on the town's main street); **Callender v. City of New Orleans**, 524 So.2d 136, 138 (La. App. 4 Cir.), writ denied, 526 So.2d 800 (La. 1988) (wherein a pedestrian's conduct was found substandard, when she tripped over a pothole in the street she was crossing, when inclement weather at the time of the incident was enough to put an ordinarily prudent person on notice that she would have to watch her step, and when she did not cross the street at the corner); **Wood v. Cambridge Mutual Fire Insurance Company**, 486 So.2d 1129 (La. App. 2 Cir. 1986) (holding that a trial court was not clearly wrong in finding a hole, approximately six inches deep and two feet across, located on residential property that was rented by the plaintiff, did not create an unreasonable risk of harm); **Carr v. City of Covington**, 477 So.2d 1202 (La. App. 1 Cir. 1985), writ denied, 481 So.2d 631 (La. 1986) (in which it was held that a pothole, about twelve inches in diameter and from one inch to two inches deep, in a street, did not present an unreasonable risk of injury, where plaintiff's conduct was substandard in not watching his step); and **Stone v. Trade-Mark Homes, Inc.**, 431 So.2d 61 (La. App. 1 Cir.1983) (wherein it was held that a cup-shaped hole, seven inches in diameter by three inches deep, on a vacant lot, did not create an unreasonable risk of harm).

CONCLUSION

For the reasons assigned, the judgment of the trial court, dismissing the plaintiff's action, is affirmed. All costs of these proceedings are assessed to the plaintiff/appellant, Elouise Spencer.

AFFIRMED.