NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 1608

GIANG PHAM AND KIM MAI PHAM

VERSUS

STATE FARM FIRE AND CASUALTY COMPANY, LIBERTY MUTUAL INSURANCE COMPANY, RONALD BONIN, SUSAN BONIN, GLEN TEMPORELLO, AND KIM VU

DATE OF JUDGMENT: March 26, 2008

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 540344, Div. F(22)), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE TIMOTHY E. KELLEY, JUDGE

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BEFORE: PARRO, KUHN AND DOWNING, JJ.

Disposition: AFFIRMED.

Kuhn, J.

Plaintiffs-appellants, Giang Pham and Kim Mai Pham, appeal the trial court's summary judgment that dismissed with prejudice their wrongful death suit against defendants-appellees, Ronald and Susan Bonin and Glen Tamporello,[1] and their respective insurers, State Farm Fire and Casualty Company ("State Farm") and Liberty Mutual Insurance Company ("Liberty Mutual") (collectively referred to as "movants"). The suit was filed after plaintiffs' two-year old son, Nathan Trung Hoang Pham, drowned in a lake. The lake had pieces of concrete encircling its edges that were mostly submerged under the water. Plaintiffs claimed the lake's unnatural condition presented an attractive nuisance to their son. We affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Nathan drowned in a lake near the plaintiffs' home in Breaux Bridge, Louisiana, on August 25, 2005. Plaintiffs alleged that the Bonins, Mr. Tamporello, and others co-owned the lake, which was a proximate cause of their son's death. Additionally, plaintiffs named Mr. Pham's mother, Kim Vu, as a defendant, alleging she was a proximate cause of Nathan's death because she failed to properly supervise him while he was in her care. Movants filed their motions for summary judgment, alleging that Nathan's death was caused by Ms. Vu's failure to supervise and by the Phams' failure to ensure that Nathan could not leave the house unobserved. Additionally, movants asserted that plaintiffs would not be able to meet their requisite burden of proof because there is no legal basis

[1] Although the petition refers to Glen Temporello, the motion for summary judgment was filed on behalf of Glen Tamporello.

for imposing liability on them. Specifically, they urged that they were entitled to summary judgment because: 1) the lake did not present an unreasonable risk of harm because it was open and obvious, and 2) plaintiffs cannot establish which lake owner had custody of the thing that caused the harm because plaintiffs have no information regarding where Nathan entered the lake.

The facts are undisputed and establish that about a year before the accident, the Phams purchased their home, which is located at 1182 Cormier Road.[2] Around the time they bought the house, they realized there was a lake close to their house. When they stood on the top step out of their back door, the lake was visible to them. Mr. Pham estimated the lake was approximately two hundred feet from their house. Ms. Vu lived in Texas but regularly visited the Phams and had used the back door before the day of the accident.

Mr. Pham had instructed the two eldest of his five children about the dangers of the lake and had instructed them not to go near it, but he had not discussed the lake's dangers with the three younger children. The children sometimes played in the backyard while Mr. Pham was with them. On the day of the accident, Ms. Vu was watching Nathan and his twin brother, who were two-and-a-half years old, and another sibling, who was one year old. None of the children were able to swim or had ever had swimming classes.

On the day Nathan drowned, Nathan and his twin brother, who had been in the living room, somehow left the house while Ms. Vu was in the bathroom. The Phams testified that at the time of the accident, the doors of the house did not have chains or bolts that could have prevented the children from going outside. The

[2] The movants filed the deposition testimony of Mr. and Mrs. Pham into the record.

house did not have an alarm system, and their backyard did not have a fence around it.

When Ms. Vu discovered their absence and was unable to locate them, she called Mrs. Pham at work. Ms. Vu also told Mr. Pham about the children's absence. When the Phams arrived home, Nathan's body had already been removed from the lake by emergency rescue personnel and was lying on the road close to the lake. The Phams both denied having any information about exactly where Nathan entered the lake or exactly where his body was discovered in the lake.

The Phams testified that before the accident, they had never been invited to use the lake and that their family had never in fact used it. They knew it was located on private property.

In support of their motion for summary judgment, Mr. and Mrs. Bonin filed affidavits in which they both attested that: 1) they are co-owners of the property located at 1192 Cormier Road and reside on the property; 2) they own only a portion of the property surrounding the lake in question; 3) to the best of their knowledge, there are at least ten people who own property surrounding the lake, and at least four other people who own property which is a part of the lake; 4) their lake ownership does not begin until approximately three feet into the lake water itself; 5) property owned by at least two other landowners exists in the space between their portion of the lake and the Phams' home; and 6) "No Trespassing" signs were posted around the lake on the day of the accident.

In an affidavit, Mr. Tamporello attested that: 1) he is the owner of the property located at 1198 Cormier Road, and he resides on the property; 2) he owns

only a small portion of the property surrounding the lake in question, and there are at least four other owners of the property that surrounds the lake; 3) in certain areas, his lake ownership does not begin until approximately five feet into the lake water itself; and 4) property owned by two other landowners exists in the space between his portion of the lake and the Phams' home.

The Phams opposed the motion for summary judgment by filing the affidavits of Joe Mayers, a licensed mechanical and environmental engineer, and William T. Phillips, a licensed clinical social worker. Both of their affidavits were based on their personal observation of the lake in question and their examination of pictures of the lake that were taken after the accident occurred.[3] Mr. Mayers' affidavit states in pertinent part:

> Affiant notes that the entirety of the lake has "rip-rap" along the banks of the lake which is constituted by large chunks of broken concrete which have been placed intentionally around the borders of the lake immediately adjacent to the banks of same. The purpose of this rip-rap is to prevent vegetation from growing near the banks and to prevent erosion of the banks into the lake, but affiant shows that the prevention of erosion of the banks can also be accomplished by the installation of bulkhead, or the planting of compatible vegetation, such as cypress or shrubbery. Affiant further shows that it is his professional opinion that the concrete blocks were not necessary for prevention of bank erosion, as the lake bottom does not have a steep slope into the center thereof. Affiant thus shows as his expert opinion and belief that the afore-mentioned concrete blocks which go all around the lake in question immediately adjacent to the banks of same are definitely not a naturally occurring feature of this lake, but was the result of the way the lake was intentionally constructed.

Mr. Phillips averred:

> Affiant thus shows ... that his personal examination of the lake in question ... revealed that there is a line of large chunks of concrete which go all the way around the lake and lie immediately adjacent to the banks of same.... Most of these slabs of concrete come within [a]

[3] No one claims that any changes in the condition of the pond occurred before the photographs were taken or before Mr. Mayers or Mr. Phillips examined it.

few inches of the surface of the water in the lake and are easily visible. Thus, affiant's opinion ... is that [the] presence of these slabs of concrete would cause a two-and-one-half year old such as [Nathan] to believe that he could wade into the lake by using these blocks of concrete as stepping-stones. Thus, affiant's professional opinion is that the presence of what appeared to [be] stepping-stones caused [Nathan] to venture into the shallow waters of the lake ....

Affiant further observed in the lake a variety of wild-life, (sic) including minnows and a dead turtle. ... [T]he presence of said wildlife would have been an additional attraction to a two-and-one-half year old ... to enter the lake .... Thus, affiant's professional opinion as a licensed clinical social worker ... is that the presence of the concrete slabs and the ... wildlife combined to attract [Nathan] into attempting to wade into the lake by stepping onto the slabs of concrete.

The trial court granted the motion for summary judgment, reasoning as follows in pertinent part:

[Under ***Pitre v. Louisiana Tech University***, 95-1466, 95-1487 (La. 5/10/96), 673 So.2d 585, ***cert denied***, 519 U.S. 1007, 117 S.Ct. 509, 136 L. Ed.2d 399 (1996)], [t]he duty of a landowner is not to insure against the possibility of an accident on its premises, but rather to act reasonably in view of the probability of injury to others. Thus, the landowner is not liable for injury resulting from a condition which should have been observed by an individual in the exercise of reasonable care or which was obvious to a visitor as to the landowner.

[***Kibodeaux v. Clifton***, 99-1980 (La. App. 3d Cir. 7/19/00), 771 So.2d 112, ***writ denied***, 00-2475 (La. 11/13/00), 773 So.2d 729] is almost directly on point. The ponds are not normally considered to be attractive nuisances. In that case it was not unreasonably dangerous. It was open and obvious, as it is in this case.

[***Humphries v. T.L. James & Co.***, 468 So.2d 819 (La. App. 1st Cir.), ***writ denied***, 470 So.2d 123 (La. 1985)] states ... Louisiana jurisprudence has consistently held that the attractive nuisance doctrine does not apply to a pond unless there is [an] unusual condition or artificial feature, other than the mere water and its location, rendering the place particularly dangerous to children. This doctrine also does not apply unless the danger be unknown, concealed, or hidden. ... [E]ven considering that the concrete blocks might be dangerous, they are certainly open and obvious. They are not concealed, hidden, or unknown. It's all open and obvious.

> In [***Slaughter v. Gravity Drainage Dist. No. 4***, 145 So.2d 50 (La. App. 3d Cir. 1962), the court found] there ... are inherent dangers of drowning in every body of water[.] [H]owever, the owner does not become the insurer of lives and [the] safety of all children who come near the waterway. [In ***Slaughter***, the court addressed] a canal and not a pond, but [the court] said [where] the canal is open and in full view of those who come near it[,] [t]he facility itself serves as a warning of the dangers which are apparent, especially to those who are of the age of discretion. Where those conditions exist, [a drainage district which constructs and maintains a canal] has the right to presume that [for] every child under the age of discretion, there is someone of mature judgment on whom rests the special duty and responsibility for the safety of the child. In this case, it was the grandmother who was charged with supervision.
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> Under Louisiana law, according to [***Guidry v. Hamlin***, 188 So. 662 (La. App. Orl. 1939)], parents are required to properly supervise and protect their young children.
>
> A parent's duty of supervision is measured by a standard of what a reasonable parent would do under the same or similar circumstances. [***Ryals v. Home Ins. Co.***, 410 So.2d 827 (La. App. 3d Cir.), ***writs denied***, 414 So.2d 375, 376 (La. 1982).] ....
>
> In this case, the parents knew of the danger. There's no way anyone could say that this was a hidden danger to anyone. The lack of supervision is what caused this tragic event. The attractive nuisance doctrine does not apply to open and obvious conditions such as this; and therefore, I'm going to grant [the] summary judgment to [movants].

The trial court signed a May 21, 2007 judgment in accordance with his oral reasons. The Phams have appealed, urging that movants are not clearly entitled to judgment as a matter of law.

II. ANALYSIS

A motion for summary judgment is a procedural device used when there is no genuine issue of material fact for all or part of the relief prayed for by a litigant. See La. C.C.P. art. 966. A summary judgment is reviewed on appeal *de novo*, with the appellate court using the same criteria that govern the trial court's

determination of whether summary judgment is appropriate; *i.e.*, whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. ***Samaha v. Rau***, 07-1726, p. 2 (La. 2/26/08), ___ So.2d ___.

Louisiana Code of Civil Procedure article 966C(2) establishes the burden of proof in summary judgment proceedings, providing:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

This article first places the burden of producing evidence at the hearing on the motion for summary judgment on the movant, who can ordinarily meet that burden by submitting affidavits or by pointing out the lack of factual support for an essential element in the opponent's case. At that point, the party who bears the burden of persuasion at trial must come forth with evidence (affidavits or discovery responses) which demonstrates he or she will be able to meet the burden at trial. ***Samaha***, 07-1726 at p. 5, ___ So.2d at ___. Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce factual support sufficient to establish that he or she will be able to satisfy his or her evidentiary burden of proof at trial mandates the granting of the motion. See La. C.C.P. art. 966C(2).

The general rule is that the owner or person having custody of immovable property 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 that caused the damage was in the "custody" of the defendant; 2) the property had a condition that created an unreasonable risk of harm to persons on the premises; 3) the unreasonably dangerous condition was a cause in fact of the resulting injury; and 4) defendant had actual or constructive knowledge of the risk. ***Smith v. The Runnels Schools, Inc.***, 04-1329, p. 4 (La. App. 1st Cir. 3/24/05), 907 So.2d 109, 112; See La. C.C. arts. 2315 and 2317.1.

In the instant case, movants point out that plaintiffs have no factual support to establish where Nathan entered the lake or where he drowned, such that they will not be able to establish at trial which landowner had custody of the property that allegedly caused the damage. Plaintiffs have failed to come forward with any evidence to refute movants' allegation in this regard.

Movants also claim they are not liable to plaintiffs because the risk presented by the lake was open and obvious and did not constitute an unreasonably dangerous condition. They assert they owed no duty to take precautions to either prohibit or preclude access to it. Whether a duty is owed is a question of law. ***Barrow v. Brownell***, 05-1627, p. 6 (La. App. 1st Cir. 6/09/06), 938 So.2d 118, 122.

Plaintiffs' only allegation of a defect, or an unreasonably dangerous condition, is that the lake was not entirely in a natural state because it was manmade and had pieces of concrete that formed a ring around the lake. Most of

the concrete pieces were fully submerged under water, and it is undisputed that the concrete pieces were placed in the water for the purpose of preventing vegetation from growing near the banks and to prevent erosion of the banks into the lake. We conclude the trial court properly analyzed the law and correctly concluded that the condition of the lake did not present an unreasonable risk of harm. The danger of the lake was open, obvious, and apparent to the Phams and Ms. Vu. The concrete pieces encircling the lake did not present any danger to Nathan. Rather, the lake presented a drowning risk to Nathan, as a small child who did not know how to swim, and the Phams and Ms. Vu should have exercised ordinary care in supervising Nathan against that risk. Mr. and Mrs. Bonin and Mr. Tamporello had no obligation to safeguard their premises so that it did not present any risk of harm to an unsupervised two-year-old child that might wander onto their respective properties.

III. CONCLUSION

Accordingly, we find there are no genuine issues of material fact, and movants are entitled to judgment as a matter of law. We affirm the trial court's judgment. Appeal costs are assessed against plaintiffs.

AFFIRMED.