NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2009 CA 0119

MICHAEL HUDSPETH

VERSUS

ALLSTATE INSURANCE COMPANY AND CINALYN McCONNELL[1]

Judgment Rendered: JUL 17 2009

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On Appeal from the 22nd Judicial District Court
In and For the Parish of St. Tammany
Trial Court No. 2006-13513, Division "G"

Honorable Larry J. Green, Judge Presiding

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Morris Bart Vincent L. Bowers New Orleans, LA	Plaintiff/Appellant Michael Hudspeth
P.M. Donovan Metairie, LA	Defendants/Appellees Ginalyn McConnell and Allstate Insurance Company

[1] Although the pleadings in this case refer to the defendant as "Cinalyn" McConnell, in her deposition, Ms. McConnell states that her name is "Ginalyn. It's a 'G' not a 'C'."

G. Fredrick Kelly, III New Orleans, LA	Defendants/Appellees Lake Castle Private School, Inc. and Clarendon American Ins. Co.
Walter P. Reed District Attorney Bernard S. Smith Assistant District Attorney Covington, LA	Defendant/Appellee Parish of St. Tammany
Charles C. Foti, Jr. Attorney General Allen H. Danielson, Jr. Assistant Attorney General New Orleans, LA	Defendant/Appellee State of Louisiana, Through the Department of Transportation and Development

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BEFORE: PETTIGREW, McDONALD, AND HUGHES, JJ.

HUGHES, J.

This is an appeal from a trial court judgment granting summary judgment in favor of a defendant private school and its insurer and dismissing in part an action arising from a motorcycle accident. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 21, 2005 Michael Hudspeth was operating a motorcycle at approximately 3:00 p.m. southbound on La. Highway 433 in St. Tammany Parish, approaching the highway's intersection with Sylve Road. At approximately the same time, Ginalyn McConnell was driving her vehicle westbound on Sylve Road, near its intersection with Highway 433 (also known as Thompson Road). Sylve Road was controlled by a stop sign at this intersection, while Highway 433 had no traffic control device. As Mr. Hudspeth approached the intersection, Ms. McConnell entered onto Highway 433 from Sylve Road. To avoid an accident with Ms. McConnell's vehicle, Mr. Hudspeth decided to "lay down" his motorcycle, resulting in serious injury to him, including a broken neck.

Deposition testimony filed in the record further reveals that immediately prior to the accident, Ms. McConnell left the premises of the Lake Castle Private School, Inc. ("LCPS"), located on the corner of Highway 433 and Sylve Road, through the Sylve Road exit, after picking up her son. Although LCPS had advised parents to turn left onto Sylve Road (travelling on to Highway 190) upon exiting the LCPS driveway to relieve traffic congestion, Ms. McConnell turned right onto Sylve Road (toward its intersection with Highway 433). When she reached the intersection of Sylve and Highway 433, Ms. McConnell stopped at the stop sign, waiting for an opportunity to cross through the intersection and turn left (northbound) onto

Highway 433. In order to accomplish her left turn, Ms. McConnell would first cross through a southbound turn lane,[2] then she would cross through the adjacent southbound lane of Highway 433, and then turn into the single northbound lane of the highway. While waiting to make her turn, Ms. McConnell was signaled by a motorist who was stopped in the turn lane waiting to cross over Sylve Road, that Ms. McConnell could cross in front of her. Ms. McConnell testified that she then slowly and cautiously proceeded into the turn lane, but she stated that she stopped her vehicle when she saw Mr. Hudspeth's motorcycle approaching in the southbound lane of Highway 433.

Mr. Hudspeth testified that immediately prior to the accident he was traveling on Highway 433, southbound, in bumper-to-bumper traffic. He stated that he passed two vehicles successfully by driving around them via the northbound lane. However, Mr. Hudspeth admitted that when he attempted to pass a third vehicle in the same manner, a northbound vehicle approached and he became "sandwiched" between that vehicle and the vehicle in the southbound lane that he was passing. Nevertheless, Mr. Hudspeth testified that he was able to pass the vehicle without incident. Upon returning into the southbound lane after making this pass, Mr. Hudspeth was travelling approximately thirty miles per hour as he approached Highway 433's intersection with Sylve Road, when he saw Ms. McConnell entering the intersection. Mr. Hudspeth testified that the vehicle driven by Ms. McConnell "shot out" in front of him and that he knew that he was going to "collide with her." Mr. Hudspeth testified that he hit his

[2] As stated in the deposition of Alan Dale, a traffic engineer with the Louisiana Department of Transportation and Development, this turn lane was constructed in approximately 1997-1998, to accommodate traffic waiting to turn into LCPS's Highway 433 driveway. The turn lane begins in the southbound lane of Highway 433 just before its intersection with Sylve Road and continues through the intersection, terminating at the LCPS driveway on Highway 433.

brakes, locking them up, and that he began to lay his motorcycle down while Ms. McConnell's car was still moving. Mr. Hudspeth's body impacted the roadway causing him serious injury. Neither he nor his motorcycle made contact with Ms. McConnell's vehicle.

Mr. Hudspeth admitted that prior to the accident, he was very familiar with Highway 433 and the area around the LCPS school. He was also aware of the traffic conditions associated with the school and with parents dropping off and picking up children there.

Mr. Hudspeth further admitted that prior to the accident he had been prescribed Norcos, a narcotic pain reliever, for a pre-existing back injury. Mr. Hudspeth indicated that he suffered back pain from the prior injury on a daily basis, for which he took Norcos. Mr. Hudspeth testified that the medication did not affect his ability to function, rather, he stated that his ability to function was improved, as the medication relieved his pain. Although Mr. Hudspeth admitted that he would at times take Norcos before operating his motorcycle, he denied that taking the medication affected his ability to safely operate his motorcycle.

Louisiana State Trooper Erin Williams, who investigated the accident, testified that when he arrived on the scene, he observed the injured Mr. Hudspeth lying on the roadway being provided with emergency medical assistance. Mr. Hudspeth was unable to give a statement. Mr. Hudspeth's body had come to rest beneath the front bumper of Ms. McConnell's vehicle, but had not made physical contact with the vehicle. Mr. Hudspeth's motorcycle was lying five feet beyond the intersection of Highway 433 and Sylve Road. Trooper Williams stated that the posted speed limit was thirty-five miles per hour during school hours and fifty miles per hour at other times. Trooper Williams obtained a statement from Ms. McConnell, who

said that, just prior to the accident, she was driving approximately five miles per hour and turning onto Highway 433, when Mr. Hudspeth's motorcycle "came out of nowhere." Trooper Williams also interviewed a passing motorist, Ross Stuart Pool, who stated to Trooper Williams that just prior to the accident he had observed Mr. Hudspeth driving in an unsafe manner on the broken yellow line separating the northbound and southbound lanes. Mr. Pool reported that Mr. Hudspeth had passed him in the same lane he was traveling in. On the basis of these statements, Trooper Williams concluded that Mr. Hudspeth was in violation of LSA-R.S. 32:191.1(B).[3] Trooper Williams also concluded that Ms. McConnell had failed to yield the right of way to Mr. Hudspeth.

The affidavit of Mr. Pool is in the trial court record and indicates that he was driving southbound on Highway 433 on the date and at the time of the accident. Mr. Pool stated that traffic in the southbound lane of Highway 433 was backed up all the way to Highway 190, that the traffic was stop and go, and that there was some traffic traveling in the other lane, northbound. Mr. Pool observed a motorcycle "cutting" in and out of the line of southbound vehicles, which he later came upon at the scene of the accident and discovered was driven by Mr. Hudspeth. Mr. Pool further stated that Mr. Hudspeth had "passed between his vehicle and an oncoming vehicle, splitting the difference between the two cars."

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[3] Louisiana Revised Statute 32:191.1 provides:

> A. All motorcycles are entitled to full use of a lane and no motor vehicle shall be driven in such manner as to deprive any motorcycle of the full use of a lane. This Subsection shall not apply to motorcycles operated two abreast in a single lane.
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> B. The operator of a motorcycle shall not overtake and pass in the same lane occupied by the vehicle being overtaken.
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> C. No person shall operate a motorcycle between lanes of traffic or between adjacent lines or rows of vehicles.
>
> D. Motorcycles shall not be operated more than two abreast in a single lane.
>
> E. Subsections (B) and (C) shall not apply to police officers in the performance of their official duties.

The affidavit of St. Tammany Parish Public Works Director Shannon Davis also appears in the record. In her affidavit, Ms. Davis stated that while Sylve Road is maintained by the Parish of St. Tammany, the intersection of Sylve Road and Highway 433 falls within the jurisdiction of the state and was designed by the state, not by the parish. Further, Ms. Davis stated that the stop signs at that intersection were installed by the state. DOTD traffic engineer, Alan Dale, also agreed in his deposition that this intersection was controlled by the state and that DOTD installed the stop signs at the intersection. Further, the affidavit of Vernon O. "Dean" Tekell, Jr., a registered professional civil engineer, was also filed in the record, and states that he has been nationally certified as a traffic operations engineer, that he examined the stop signs at this intersection, and that these traffic control devices are in compliance with the Manual of Uniform Traffic Control Devices ("MUTCD") (issued by the U.S. Department of Transportation, Federal Highway Administration).

On August 10, 2006 Mr. Hudspeth filed suit against Ms. McConnell and her insurer, Allstate Insurance Company, alleging that Ms. McConnell caused his accident and injuries by: failing to stop at the stop sign controlling Sylve Road, failing to maintain reasonable and proper control of her vehicle, operating her vehicle in a reckless and negligent manner, failing to see what should have been seen, and citing any other act of fault that might have caused the collision.

Mr. Hudspeth later amended his petition to also name as defendants LCPS and its insurer, Clarendon America Insurance Company ("Clarendon"). Mr. Hudspeth alleged that LCPS was at fault and proximately caused his accident by: failing to provide proper safety measures for traffic conditions caused by its operation, creating

unreasonably dangerous traffic conditions, failing to supervise traffic conditions on its premises affecting public right-of-ways, failing to take measures to safeguard against unreasonably dangerous traffic conditions caused by its operations, and failing to monitor traffic conditions causing unreasonably dangerous conditions to the driving public. Mr. Hudspeth later amended his petition to further allege that unreasonably dangerous traffic conditions existed on Highway 433 due to vehicles entering LCPS's premises from Highway 433 and leaving LCPS's premises onto Sylve Road. Mr. Hudsepth further alleged, in sum, that LCPS was at fault for failure to adequately and properly supervise and control the high volume of traffic entering and leaving its premises and for failure to notify state and parish officials of the dangerous traffic conditions it was creating.

The State of Louisiana, through the Department of Transportation and Development ("DOTD"), and the Parish of St. Tammany ("Parish") were also added as defendants. Mr. Hudspeth alleged both DOTD and the Parish were at fault and proximately caused his accident by failing to: properly design and maintain the public roads, direct and maintain proper traffic signs and signals, exercise proper control over the public roads, maintain the public roads in a reasonably safe condition, and conduct proper investigation and inspection of the public roads.

Mr. Hudspeth also alleged that Sylve Road is a parish road under the care, custody, and control of the Parish, and that the Parish was negligent for failing to address and rectify the unreasonably dangerous traffic conditions it knew or should have known existed on Sylve Road adjacent to LCPS. Specifically, Mr. Hudspeth asserts the Parish contributed to the allegedly unreasonably dangerous traffic conditions by: failing to properly monitor the traffic conditions on Sylve Road; improperly issuing operating permits to

LCPS; failing to conduct sufficient, timely, and proper traffic studies for Sylve Road; failing to properly design Sylve Road to accommodate traffic patterns; failing to install an adequate and proper traffic control signal on Sylve Road at its intersection with Highway 433; and failing to provide personnel to monitor, supervise, and regulate traffic conditions.

Among other affirmative defenses raised by the defendants, it was alleged that Mr. Hudspeth was contributorily negligent, in that at the time of or immediately preceding the accident he: failed to take due care and caution for his own safety, failed to see what he should have seen and do what he should have done, illegally passed a vehicle using the travel lane of Highway 433, operated his motorcycle on the center dividing line of Highway 433, operated his motorcycle at a high rate of speed, and operated his motorcycle in a careless and reckless fashion without taking into account traffic conditions.

LCPS, Clarendon, the Parish, and DOTD filed motions for summary judgment in the trial court. Summary judgments were granted in favor of LCPS, Clarendon, and the Parish, dismissing the claims of plaintiff as to those defendants. DOTD's motion for summary judgment was denied.

In this appeal, Mr. Hudspeth asserts that the trial court erred in granting summary judgment and dismissing LCPS and Clarendon, essentially arguing that discovery was not complete, there were pending discovery motions, there were genuine issues of material fact remaining, and these defendants were not entitled to judgment as a matter of law.[4]

[4] A separate appeal was taken from the summary judgment in favor of the Parish, which is also decided this date. See **Hudspeth v. Allstate Insurance Company**, 2009-0120 (unpublished).

LAW AND ANALYSIS

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the mover if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact and that mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern a trial court's consideration of whether summary judgment is appropriate. **Samaha v. Rau**, 2007-1726, pp. 3-4 (La. 2/26/08), 977 So.2d 880, 882; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-30.

In ruling on a motion for summary judgment, the judge'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. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

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. 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.**, 2004-0806 at p. 1, 876 So.2d at 765-66.

On motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof on the issue at trial and 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 non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. LSA-C.C.P. art. 966(C)(2).

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967, an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided above, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B). See also **Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority**, 2007-0107, p. 9 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 79-80; **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885

So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-39.

With respect to LCPS, Mr. Hudspeth alleges in essence that the school was at fault for failing to control and/or to implement safety measures pertaining to the high volume of traffic on the roadways adjacent to the school resulting from the dropping off and picking up of school children.

A property owner is responsible for damages resulting from a defect or obstruction in an adjoining highway where he has endangered the plaintiff by his negligence or created an unreasonably dangerous or hazardous condition. See **Babin v. Burnside Terminal, Greater Baton Rouge Port Commission**, 577 So.2d 90, 97 (La. App. 1 Cir. 1990) (citing **Allemand v. Zip's Trucking Co., Inc.**, 552 So.2d 1023, 1030 (La. App. 1 Cir. 1989), writ denied, 558 So.2d 569 (La. 1990)).

The Louisiana Supreme Court had adopted a duty-risk analysis to determine whether liability exists under the particular facts presented. Under this analysis, the plaintiff must prove that the conduct in question was the cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant, and the risk of harm was within the scope of protection afforded by the duty breached. Under the duty-risk analysis, all four inquiries must be affirmatively answered for a plaintiff to recover. **Estate of Loveless ex rel. Loveless v. Gay**, 41,575, p. 9 (La. App. 2 Cir. 12/13/06), 945 So.2d 233, 238 (citing **Posecai v. Wal-Mart Stores, Inc.**, 99-1222, p. 4 (La. 11/30/99), 752 So.2d 762, 765, and **Meany v. Meany**, 94-0251, p. 6 (La. 7/5/94), 639 So.2d 229, 233).

A threshold issue in any negligence action is whether the defendant owed the plaintiff a duty. Whether a duty is owed is a question of law. In

deciding whether to impose a duty in a particular case, the court must make a policy decision in light of the unique facts and circumstances presented. The court may consider various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and similarly situated parties; the need for an incentive to prevent future harm; the nature of the defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving. **Estate of Loveless ex rel. Loveless v. Gay**, 41,575 at p. 8, 945 So.2d at 238 (citing **Posecai v. Wal-Mart Stores, Inc.**, 99-1222 at pp. 4-5, 752 So.2d at 766).

In deciding whether a duty has been violated, a court must decide whether the defendant's conduct conforms to the standard of a reasonable man under like circumstances; various factors considered in the "reasonable man" analysis include the likelihood of harm, the gravity of harm, the burden of prevention, and the social utility of the defendant's conduct. **Estate of Loveless ex rel. Loveless v. Gay**, 41,575 at p. 9, 945 So.2d at 238 (citing **Meany v. Meany**, 94-0251 at p. 6, 639 So.2d at 233-34).

Under the particular circumstances of the present case, and considering the tremendous importance that society places on the education of children, we cannot say that the increase in the traffic burden on surrounding streets occasioned by the operation of the LCPS school constitutes actionable negligence against the school. Increased traffic congestion has become an expected circumstance of urban life, which local and state governments lack the financial resources to adequately address. Consequently, we are unwilling to impose upon an individual school such a duty, particularly in the present case, where the plaintiff admits that he was fully aware of the traffic conditions existing around the school.

Mr. Hudspeth further argues on appeal that summary judgment was improperly granted when discovery was not complete and certain discovery requests had not been satisfactorily answered.

After ***adequate*** discovery or after a case is set for trial, a motion that shows that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law shall be granted. LSA-C.C.P. art. 966(C)(1) (emphasis added). If it appears from the affidavits of a party opposing the motion that for reasons stated he cannot present by affidavit facts essential to justify his opposition, the court ***may*** refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just. LSA-C.C.P. art. 967 (C) (emphasis added).

There is no absolute right to delay action on a motion for summary judgment until discovery is completed. Under LSA-C.C.P. art. 967, a trial court clearly has the discretion to issue a summary judgment after the filing of affidavits, or the judge may order a continuance to permit affidavits to be obtained, depositions to be taken, or discovery to be had. Or the trial court may make such other order as is just, pursuant to LSA-C.C.P. art. 967. Unless plaintiff shows a probable injustice, a suit should not be delayed pending discovery when it appears at an early stage that there is no genuine issue of fact. The only requirement regarding discovery is that the parties be given a fair opportunity to present their claim. The mere claim by an opponent to a motion for summary judgment that he does not have in his possession the facts and information necessary to counter such a motion will not defeat a summary judgment motion. **Vanderbrook v. Coachmen Industries, Inc.**, 2001-0809, p. 8 (La. App. 1 Cir. 5/10/02), 818 So.2d 906, 911 (citing **Simoneaux v. E.I. du Pont de Nemours and Company, Inc.**,

483 So.2d 908, 913 (La. 1986)). See also **Ploue v. Intercoastal Financial Group, Inc.**, 2088-2314, p. 5 (La. App. 1 Cir. 5/8/09) (unpublished), 9 So.3d 356 (table); **Bardwell v. Faust**, 2006-1472, pp. 12-13 (La. App. 1 Cir. 5/4/07), 962 So.2d 13, 20, writ denied, 2007-1174 (La. 9/21/07), 964 So.2d 334; **Judson v. Davis**, 2004-1699, pp. 13-14 (La. App. 1 Cir. 6/29/05), 916 So.2d 1106, 1115-16, writ denied, 2005-1998 (La. 2/10/06), 924 So.2d 167.

In the instant case, we have carefully considered the allegations made by the plaintiff against LCPS and the additional discovery desired; we do not find that additional discovery would produce evidence of a nature to overcome the holding of this court. Therefore, we conclude that the plaintiff had adequate discovery available to him, but no material issue of fact remained and LCPS was entitled to summary judgment as a matter of law.

CONCLUSION

For the reasons assigned herein, we affirm the summary judgment granted in favor of Lake Castle Private School, Inc. and Clarendon American Insurance Company. All costs of this proceeding are to be borne by the plaintiff/appellant, Michael Hudspeth.

JUDGMENT AFFIRMED.