

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 CA 1477

NEELAM PARVEEN, INDIVIDUALLY AND ON
BEHALF OF MANSOOR RAJA AND THEIR MINOR
CHILDREN

VERSUS

TIKI TUBING, LLC AND ABC INSURANCE
COMPANY

Judgment Rendered: March 23, 2012.

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On Appeal from the
21st Judicial District Court,
in and for the Parish of Livingston
State of Louisiana
District Court No. 128,216

The Honorable Elizabeth P. Wolfe, Judge Presiding

* * * * *

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* * * * *

BEFORE: CARTER, C.J., PARRO AND HIGGINBOTHAM, JJ.

APK
TMH
PKB

CARTER, C.J.

The plaintiff appeals the summary judgment dismissing her suit for damages arising from the drowning death of her husband. For the reasons that follow, we affirm.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Tiki Tubing, L.L.C. (Tiki) is a commercial enterprise located on the banks of the Amite River. During peak summer months, Tiki employs 10-15 full time employees. For a fee, Tiki provides customers with parking, tube rental, a bus ride upstream, and a beach entry and exit on the river. The tubing route on the Amite River takes approximately four hours to complete. The Tiki website describes the Amite River as “smooth and slow moving and . . . 1 to 3 feet deep with a few deeper holes from 6 to 8 feet deep.” The website continues: “All bodies of water have some inherent risks. Tiki . . . and its affiliates assume no liability for personal injury or loss of personal property.” The tubers are grouped together at the Tiki hut and bused upstream to the ingress point on the river. At this point, the tubers select their tubes and enter the water.

According to John Fore, the managing member of Tiki, there are no warning signs posted at the hut or along the river. Tiki provides life jackets free of charge to customers; however, customers are not required to wear them. Neither Fore nor the Tiki employees were aware of any prior drowning on the tubing route. There are no lifeguards or rescuers on staff, and employees are not trained in water safety or in cardiopulmonary resuscitation (CPR). Tiki employees do not travel the river with the tubers, and there is no emergency equipment along the river route or at the Tiki

facility. Tiki does hire off-duty Livingston Parish Deputies as independent contractors to assist with crowd control, public drinking, drugs, broken glass, and unlocking of cars. The deputies are not posted on the tubing route; they are not hired to handle medical emergencies.

On June 21, 2009, 37-year-old Mansoor Raja and two of his friends decided to tube the Amite River. Raja had never tubed before, and after reading about Tiki from its internet website, Raja, Akhlaq Akhtar, and Tariq Mehmood drove to the facility. The group was presented with a liability waiver at the hut, and Akhtar printed all three men's names on the bottom of the sheet.¹ Although Raja was with Akhtar when Akhtar completed the form, Raja did not read or sign the waiver. Akhtar remembered the men being given a document containing safety instructions and that this information also was posted on a board. According to Akhtar, all three men read the instructions, which specifically mentioned the availability of life jackets. Akhtar asked the other men if they needed life jackets, but the general consensus was that the water would not be deep enough and that the life jackets were not needed. The waiver sheet is the only "warning" at the Tiki facility.

The three men boarded the bus, rode upstream, retrieved their tubes, and entered the river. According to Akhtar, Raja and Mehmood were playing around and getting caught in trees in the water. Akhtar tried to rush the other two men along so that they would not get separated from the group. The water was shallow, and Raja and Mehmood were leaving their tubes and

¹ The waiver is entitled "Participant's Agreement, Release, and Assumption of Risk." The bottom of the form has multiple lines upon which customers write their names.

swimming freely in the river. The three men continued in this fashion for 15 to 20 minutes.

On the river trip, Raja was “getting excited.” He would leave his tube, swim downstream with the current, then wait for his tube to float to him. Raja did this four or five times. The men stopped to take a photograph, after which Raja said he would swim just one more length. Suddenly, while swimming ahead of his tube, Raja disappeared under the water. Then, Mehmood began having trouble in the water. Akhtar floated toward his friends and was able to help Mehmood get hold of the tube and out of the water. Raja, however, panicked and was unable to grasp the tube. According to Akhtar, the water was “too far deep” and moving much faster underneath the surface. Akhtar did not leave his tube in an attempt to pull Raja from the water because, according to Akhtar, the water was too deep and the current would have pulled him under too. Akhtar explained: “If you go to somebody who’s drowning, he’ll take you with him even if you are [a] good swimmer....”

Other floaters, noticing the commotion, began calling for help; the authorities were alerted with a call to 911, and another tuber ran toward the ingress point where several employees were working to notify them that someone was “lost.” Christopher Seese, a teenage employee of Tiki, stated that he first thought someone had simply gotten off his tube and run off. Upon realizing there was a problem, three employees ran to the scene. Fifteen to twenty tubers were sitting on the beach, and several tubers were swimming around in the deeper area of the river. The employees immediately entered the river. It took Christopher five to ten minutes to

locate Raja in the eight-foot-deep pocket in the river by dragging his foot in the water. Raja's body was resting against a submerged log. According to Christopher, the current in the pocket was no stronger than the rest of the river; however, the water was deeper. It was estimated that it took an additional three to four minutes to get Raja out of the water and onto the shore.

Raja was brought to the shore, and another tuber was the first to attempt CPR. Because he was on the opposite side of the river, Akhtar estimated that it took him ten minutes to get to Raja after he was pulled from the water. Upon reaching shore, Akhtar observed that the unidentified tuber was performing CPR incorrectly, so Akhtar took over.² Akhtar blew air into Raja's chest, and Tiki employee Jacob Bourgeois assisted with chest compressions. Ultimately, four different people performed chest compressions on Raja, assisting Akhtar with CPR until the rescue helicopter arrived. According to Akhtar, Raja's pulse was restored and he was warm to the touch prior to the arrival of paramedics and being airlifted to a hospital. Raja's death certificate indicates he died the next day, June 22, 2009.

Raja's surviving spouse, Neelam Parveen, filed this wrongful death and survival action for damages against Tiki and its insurer, alleging Tiki's negligent acts and omissions were a proximate cause of Raja's death. After answering the petition, Tiki filed a motion for summary judgment, alleging Tiki did not breach any legal duty to Raja. Subsequent to the filing of Tiki's motion for summary judgment, but prior to the hearing on the motion, the trial court granted the plaintiff leave to file a supplemental and amending

² Akhtar explained that he had received training in CPR during military service.

petition for damages. Therein the plaintiff alleged that she was entitled to punitive damages under general maritime law in that Tiki's conduct was grossly negligent, reckless, and wanton. Thereafter, the plaintiff filed an opposition to Tiki's motion for summary judgment, with attachments thereto, as well as a supplemental opposition.

Following a hearing, the trial court granted Tiki's motion for summary judgment, and the plaintiff's claims against Tiki were dismissed with prejudice. The plaintiff appeals, asserting several arguments in support of her position that summary judgment was improperly granted.

SUMMARY JUDGMENT

A motion for summary judgment is a procedural device used to avoid a full-scale trial when there is no genuine issue of material fact. *All Crane Rental of Georgia, Inc. v. Vincent*, 10-0116 (La. App. 1 Cir. 9/10/10), 47 So. 3d 1024, 1027, writ denied, 10-2227 (La. 11/19/10), 49 So. 3d 387. Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. Code Civ. Proc. Ann. art. 966B. Summary judgment is favored and designed to secure the just, speedy, and inexpensive determination of every action. La. Code Civ. Proc. Ann. art. 966A(2).

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. *All Crane*, 47 So. 3d at 1027. On a motion for summary judgment, the burden of proof is on the mover. La. Code Civ. Proc. Ann.

art. 966C(2). If, however, the mover will not bear the burden of proof at trial on the matter that is before the court on the motion, the mover's burden does not require that all essential elements of the adverse party's claim, action, or defense be negated. *Id.* Instead, the mover must 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. *Id.* Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. *Id.* If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. Code Civ. Proc. Ann. art. 966C(2); *All Crane*, 47 So. 3d at 1027.

In ruling on a motion for summary judgment, the court's role is not to evaluate the weight of the evidence or to determine the truth of the matter but, instead, to determine whether there is a genuine issue of triable fact. *All Crane*, 47 So. 3d at 1027. A court cannot make credibility decisions on a motion for summary judgment. *Id.* In deciding a motion for summary judgment, the court must assume that all of the witnesses are credible. *Id.* Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Id.* Whether a particular fact in dispute is "material" for summary judgment purposes is viewed in light of the substantive law applicable to the case. *Richard v. Hall*, 03-1488 (La. 4/23/04), 874 So. 2d 131, 137.

DISCUSSION

The plaintiff advances several theories of recovery for the alleged negligence or gross negligence of Tiki. Broadly stated, the plaintiff maintains that Tiki had custody of the tubing route on the Amite River and, accordingly, that Tiki owed its patrons a duty to maintain the river so that its guests would not be injured by the river's vices and defects, a duty to train Tiki employees in emergency rescue and life-saving procedures, and a duty to properly warn Tiki customers of the hazards associated with tubing on the Amite River. The plaintiff also alleges that once Tiki employees involved themselves in attempted life-saving procedures on Raja, those employees assumed a duty to perform those life-saving measures properly.

The elements of a cause of action in tort are fault, causation, and damage. *Seals v. Morris*, 410 So. 2d 715, 718 (La. 1981). The existence of a legal duty and a breach of that duty are prerequisites to any determination of fault. *Id.* Although the determination of whether to assign a legal duty is fact-specific, the issue of whether there is a duty ultimately is a question of law. *Bowman v. City of Baton Rouge/Parish of East Baton Rouge*, 02-1376 (La. App. 1 Cir. 5/9/03), 849 So. 2d 622, 627, *writ denied*, 03-1579 (La. 10/3/03), 855 So. 2d 315. The inquiry is whether the plaintiff has any law—statutory, jurisprudential, or arising from general principles of fault—to support her claim. *Faucheaux v. Terrebonne Consol. Government*, 615 So. 2d 289, 292 (La. 1993); *Fredericks v. Daiquiris & Creams of Mandeville, L.L.C.*, 04-0567 (La. App. 1 Cir. 3/24/05), 906 So. 2d 636, 639, *writ denied*, 05-1047 (La. 6/17/05), 904 So. 2d 706.

Under Louisiana Civil Code article 2317, “[w]e 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.” Louisiana Civil Code article 2317.1 modifies Article 2317 and provides in pertinent part:

[The] custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.

The plaintiff alleges that in accordance with Article 2317.1, Tiki, as custodian³ of the tubing route on the Amite River, owed a duty to its patrons to employ safety measures to prevent drowning and to discover any unreasonably dangerous condition and to either correct the condition or warn of its existence. In order to prevail on a claim of negligence under Articles 2317 and 2317.1, the plaintiff will have the ultimate burden at trial of proving by a preponderance of the evidence each of the following elements: (1) Tiki is the custodian of the portion of the Amite River that includes the tubing route; (2) that portion of the Amite River is defective and that the defect presented an unreasonable risk of harm; (3) Tiki knew or should have known of the defect; (4) the plaintiff was damaged by the defect; and (5) Tiki could have prevented the damage to the plaintiff by the exercise of reasonable care, which Tiki failed to exercise. *See Riggs v. Opelousas General Hosp. Trust Authority*, 08-591 (La. App. 3 Cir. 11/5/08), 997 So. 2d 814, 817. Failure to prove any one of these elements will defeat the

³ There are no allegations or evidence suggesting that Tiki owned the area of the river, or the land abutting that portion of the river, in which Raja drowned.

plaintiff's claim and thus establish the defendant's entitlement to summary judgment. *See Grogan v. Women's and Children's Hospital, Inc.*, 07-1297 (La. App. 3 Cir. 4/16/08), 981 So. 2d 162, 165.

The Louisiana Supreme Court has instructed that determining who has custody of a thing is a fact-driven determination. *Dupree v. City of New Orleans*, 99-3651 (La. 8/31/00), 765 So. 2d 1002, 1009. Courts should consider: (1) whether the person bears such a relationship as to have the right of direction and control over the thing; and (2) what, if any, kind of benefit the person derives from the thing. *Dupree*, 765 So. 2d at 1009. "The person who has custody or garde of a thing is he who has the legal duty to prevent its vice or defect from harming another." *Id.* at 1009. This court has held that a state-owned river cannot be in the custody of a landowner. *See Tobey v. State*, 454 So. 2d 144, 145 (La. App. 1st Cir. 1984) (a tubing accident did not result from any condition of the land).

Even if the plaintiff were to establish that material issues of fact remain in dispute regarding custody of the tubing route on the Amite River, the plaintiff also must prove that the portion of the Amite River at issue suffered from a vice or defect in order to recover damages under Articles 2317 and 2317.1. A defect is defined as a condition that creates an unreasonable risk of harm. *Moory v. Allstate Ins. Co.*, 04-0319 (La. App. 1 Cir. 2/11/05), 906 So. 2d 474, 480, *writ denied*, 05-0668 (La. 4/29/05), 901 So. 2d 1076. The record establishes that Raja drowned in an area of the river described as a drop or a deep pocket. This court has held that the "existence of a hole in a natural lake, that renders the depth of the lake deeper than other portions, would not, *ipso facto*, constitute a defective

condition.”⁴ *Johnson v. City of Morgan City*, 99-2968 (La. App. 1 Cir. 12/22/00), 787 So. 2d 326, 330-31, writ denied, 01-0134 (La. 3/16/01), 787 So. 2d 315. Further, “variations in water depth within natural swimming areas are standard.” *Johnson*, 787 So. 2d at 330. Citing this court in *Johnson*, the Fourth Circuit has concluded that there is no distinction between a hole in a lake and a drop off in a river. *Sevin v. Parish of Plaquemines*, 04-1439 (La. App. 4 Cir. 4/27/05), 901 So. 2d 619, 623-24, writ denied, 05-1790 (La. 1/27/06), 922 So. 2d 550. The plaintiff fails to establish that the deeper pocket in this natural body of water constitutes a defect for purposes of Article 2317.1.

The plaintiff argues that Tiki had a duty to provide an adequate and correct warning to customers regarding the dangers of tubing and the depth and current of the Amite River, and also had a duty to post lifeguards along the tubing route.⁵ Tubing has been defined as an activity that is obviously and inherently dangerous. *See Tobey*, 454 So. 2d at 146. Drowning because of currents is a natural and inevitable risk to swimmers in a natural body of water. *See Hall v. Lemieux*, 378 So. 2d 130, 132 (La. App. 4th Cir. 1979),

⁴ Moreover, not every defect gives rise to statutory liability under Articles 2317 and 2317.1. *Ruschel v. St. Amant*, 11-78 (La. App. 5 Cir. 5/24/11), 66 So. 3d 1149, 1153. The defect must be of such a nature as to constitute a dangerous condition that reasonably would be expected to cause injury to a *prudent person* using ordinary care under the circumstances. *Ruschel*, 66 So. 3d at 1153.

⁵ Louisiana’s general negligence liability provision is found in Louisiana Civil Code article 2315. Louisiana courts have adopted a duty-risk analysis in determining whether to impose liability under Article 2315. *Pinsonneault v. Merchants & Farmers Bank & Trust Co.*, 01-2217 (La. 4/3/02), 816 So. 2d 270, 275. In order for liability to attach under a duty-risk analysis, the plaintiff must prove five separate elements: (1) the defendant had a duty to conform his or her conduct to a specific standard of care (the duty element); (2) the defendant failed to conform his or her conduct to the appropriate standard of care (the breach of duty element); (3) the defendant’s substandard conduct was a cause-in-fact of the plaintiff’s injuries (the cause-in-fact element); (4) the defendant’s substandard conduct was a legal cause of the plaintiff’s injuries (the scope of protection element); and (5) actual damages (the damage element). *Pinsonneault*, 816 So. 2d at 275-76.

writ denied, 381 So. 2d 1220 (La. 1980). When a risk is obvious, there is no duty to warn or protect against it. *Moory*, 906 So. 2d at 478. Akhtar described Raja as “not a good swimmer.”⁶ Despite his limited swimming abilities and knowing that the water was over his head in parts, Raja voluntarily left his tube to swim freely in the river without a life jacket, allowing the current to carry him away from his tube.

Finally, citing to *Harris v. Pizza Hut of La., Inc.*, 455 So. 2d 1364 (La. 1984), the plaintiff argues that Tiki assumed a duty when its employees attempted life-saving measures on Raja and then breached that duty by improperly performing CPR on Raja. In *Harris*, the supreme court held that a restaurant had a duty, once it hired a security guard, to have that guard protect patrons from the criminal activities of third persons in a reasonable and prudent manner. *Id.* at 1369. This court has recognized that the negligent breach of an assumed duty may create civil liability. *McGowan v. Victory and Power Ministries*, 99-0235 (La. App. 1 Cir. 3/31/00), 757 So. 2d 912, 914. If a person voluntarily or gratuitously undertakes a task that he otherwise has no duty to perform, he must nevertheless perform that task in a reasonable or prudent manner. *McGowan*, 757 So. 2d at 914; *see* La. Civ. Code Ann. art. 2315.

Tiki employees acknowledged having no formal CPR training. Akhtar stated that he had been trained in CPR, and Akhtar was performing breathing assistance on Raja, while several others—including Tiki employees—assisted with chest compressions on Raja. The affidavit of the

⁶ During the few times that Akhtar and Raja swam together in a pool, Raja would swim one pool length at a time, keeping his head out of the water the entire time. Raja would go in water over his head; however, he would hold onto a “pipe.”

plaintiff's expert, Dr. Adam Broussard, set forth the CPR guidelines and concluded that, based on Jacob's deposition, "the responders did not correctly perform CPR." Dr. Broussard's affidavit establishes that early CPR "performed correctly is the single most important intervention that can be performed in the field by a lay person."

Raja was pulled from the water after being submerged for at least ten minutes. Akhtar stated that when Raja was brought up to the surface, he was not moving and not conscious. Akhtar began breathing into Raja with the assistance of four others, who took turns doing chest compressions. Akhtar observed that after the second person's turn with chest compressions, Raja was warm to the touch and a pulse was discernible. Although Dr. Broussard's affidavit establishes that CPR was performed improperly, his affidavit does not establish that the efforts of Tiki employees were unreasonable, imprudent, or, more importantly, a cause-in-fact of Raja's death or that there was a reasonable probability that proper CPR would have been lifesaving in these circumstances.

CONCLUSION

The plaintiff failed to produce factual evidence sufficient to establish that she would be able to meet her burden at trial of proving by a preponderance of the evidence all of the elements of a cause of action in negligence or gross negligence. Despite not being a good swimmer, Raja willingly entered the river without a life jacket and chose to swim away from his tube. It was Raja's own imprudent actions that led to his tragic death. *See Sevin*, 901 So. 2d at 624. For the above-stated reasons, we affirm the trial court's grant of summary judgment in favor of the defendant, Tiki

Tubing, L.L.C., dismissing the suit filed against it by Neelam Parveen, individually and on behalf of Mansoor Raja and their minor children. Costs of this appeal are assessed to the plaintiff, Neelam Parveen.

AFFIRMED.