NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 0479

PAUL F. BROUSSARD AND ANDREA V. BROUSSARD, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ARYN PAIGE BROUSSARD

VERSUS

STATE OF LOUISIANA, THROUGH THE OFFICE OF STATE BUILDINGS, UNDER THE DIVISION OF ADMINISTRATION

DATE OF JUDGMENT: MAR 30 2012

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
NUMBER 491,615, DIV. M, SEC. 26, PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

HONORABLE HILLARY CRAIN, JUDGE, PRO TEMPORE

WHIPPLE, J CONCURS & ASSIGNS REASONS

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Disposition: REVERSED AND RENDERED.

KUHN, J.

The defendant-appellant, the State of Louisiana, through the Office of State Buildings, Division of Administration (the state), appeals a judgment finding it liable for sixty percent of the damages sustained by plaintiff, Paul F. Broussard, as a result of an accident that occurred in an elevator located in a state building. Because our review of the record reveals that no reasonable trier-of-fact could conclude that the open and obvious defect in the elevator presented an unreasonable risk of harm, we reverse the judgment imposing liability upon the state.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff was a delivery driver for United Parcel Service (UPS) whose Baton Rouge route for approximately seven years included Wooddale Tower, an office building owned by the state. Having made deliveries to the building for such an extended period, he was aware of long-standing problems with its two elevators, including the fact that intermittently there would be an offset in height between the level of the elevator floor and the building floor. The state also was aware of this problem for at least two years prior to plaintiff's accident.

On January 23, 2001, plaintiff loaded six boxes of computer paper, weighing in the region of three hundred pounds, onto a dolly and entered Wooddale Tower to deliver the paper to an upper floor. As he entered the building, the doors to one of the elevators stood open, with the floor of the elevator being approximately one and one-half to three inches above the lobby floor. A witness who was standing inside the elevator at the time testified that plaintiff approached and attempted to push the dolly forward onto the elevator, but was unable to do so because of the offset. Plaintiff did not recall making this maneuver, but conceded that he may have done so.

In any event, it is undisputed that plaintiff turned around, backed into the elevator, and pulled the dolly towards him, whereupon its wheels encountered resistance. He admitted he was aware of the offset between the elevator and lobby floors at this point. Nevertheless, since he wanted to get to his floor and make the delivery so that he could continue his route, he chose to pull the heavily-laden dolly over the offset onto the elevator. Although he succeeded in pulling the dolly onto the elevator, he lost control of it in the process, which resulted in the dolly's momentum pushing him back against the elevator's rear wall. The accident caused serious injury to plaintiff's back, and he never returned to work for UPS. At the time of trial, plaintiff was working as a deliveryman for a laundry.

Subsequently, plaintiff filed the instant suit for damages against the state.[1] After answering the suit, the state filed a motion for summary judgment on the basis that plaintiff could not establish that the condition of the elevator was unreasonably dangerous, an essential element of his claim, because the offset was open and obvious and plaintiff was aware of it. Upon the denial of the motion, the state filed an application for supervisory writs, which this Court denied. See ***Broussard v. State of Louisiana***, 10-1057 (La. App. 1st Cir. 7/19/10) (unpublished).

A jury trial was held on August 23-26, 2010. At the conclusion of the plaintiff's case, the state moved for a directed verdict, which the trial court denied. Ultimately, the jury returned a verdict finding plaintiff thirty-eight percent at fault

[1] At the time that suit was filed, plaintiff was married to Andrea Broussard, who was also named as a plaintiff, as was their daughter, Aryn Paige Broussard. However, the couple divorced prior to trial. The judgment rendered in plaintiff's favor does not mention either Andrea or Aryn Broussard, and they are not parties to this appeal. Further, the plaintiff's petition was later amended to name Elevator Technical Services, Inc., and Stratos Elevator, Inc., as additional defendants. Prior to trial, Elevator Technical Services was dismissed on an exception of prescription and Stratos Elevator was dismissed with prejudice pursuant to a joint motion for dismissal.

and the state sixty-two percent at fault in causing the accident. Accordingly, after reducing the general and special damages assessed by the jury by the percentage of fault assigned to plaintiff, the trial court rendered judgment in favor of plaintiff and against the state for $985,732.56[2], minus any credits previously awarded to the state, with the state to pay all costs.

The state filed a timely motion for judgment notwithstanding the verdict (JNOV) or, alternatively, new trial on the issue of liability. In response, plaintiff filed a motion to strike several affidavits attached to the state's motion for new trial. Following a hearing, the trial court granted the motion to strike the affidavits and denied the state's motion for JNOV or new trial. The state has now appealed, and the plaintiff filed an answer to the appeal.[3] Additionally, plaintiff filed a motion to dismiss the appeal as untimely.

ASSIGNMENTS OF ERROR

1. The trial court erred in denying the state's motion for summary judgment.

2. The trial court erred in denying the state's motion for directed verdict.

3. The jury erred in finding that the elevator presented an unreasonable risk of harm.

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[2] The damages plaintiff sustained were itemized as follows: $90,155.24 for past medical expenses; $428,008.27 for past loss earnings and earning capacity; $542,181.27 for future loss earnings and earning capacity; $258,636.36 for past and future physical pain and suffering; $115,000.00 for past and future mental anguish and distress; $96,818.18 for past and future loss of enjoyment of life; and $59,091.91 for disability.

[3] In his answer to this appeal, plaintiff requested that the trial court judgment be amended to delete the provision reducing the damages awarded by "any credits due to the defendant in accordance with previous rulings." This Court *ex proprio motu* issued a rule to show cause why plaintiff's answer should not be dismissed, since it appeared to be filed untimely under La. C.C.P. art. 2133(A). Thereafter, a panel of this Court referred the rule to show cause to the merits of this appeal. See ***Broussard v. State of Louisiana***, 11-0479 (La. App. 1st Cir. 10/24/11) (unpublished). We now conclude that our determination that the judgment against the state must be reversed in its entirety renders moot the issue of any credits that may be due to the state. Because this issue was the only one raised in plaintiff's answer, it also renders the timeliness of plaintiff's answer moot. Therefore, the rule to show cause issued by this Court will be dismissed as moot.

4. The trial court erred in refusing to give the state's special proposed jury charges regarding unreasonably dangerous defects and open and obvious defects.

5. The trial court erred in denying the state's motion for new trial, and, alternatively, motion for judgment notwithstanding the verdict.

6. The jury erred in awarding damages to plaintiff, who suffered an intervening injury and failed to mitigate his damages by not returning to work for seven years.

MOTION TO DISMISS

Following the lodging of the state's appeal, plaintiff filed a motion to dismiss the appeal, asserting that this Court lacked jurisdiction because the motion for appeal was untimely filed.[4] In the alternative, plaintiff requested that the affidavits attached to the memorandum in support of the state's motion for new trial be stricken from the appellate record and not considered by this Court. A different panel of this Court referred plaintiff's motion to the merits of this appeal. See ***Broussard v. State of Louisiana***, 11-0479 (La. App. 1st Cir. 10/24/11) (unpublished).

Generally, when either a timely motion for new trial or motion for JNOV is filed, appeal delays commence upon the mailing of notice of the trial court's denial of the motion filed. In such instances, a party has thirty days from that date to take a suspensive appeal, or sixty days to take a devolutive appeal. See La. C.C.P. arts. 2087(A)(2) & 2123(A)(2).

In the instant case, the state filed a timely motion for JNOV or, alternatively, a new trial. Moreover, the state took the present appeal within thirty days of the

[4] The timeliness of an appeal is a jurisdictional issue. ***Travelers Indemnity Company v. State Workers' Compensation Second Injury Board***, 09-1332 (La. App. 1st Cir. 2/12/10), 35 So.3d 311, 315. Under La. C.C.P. art. 2162, an appeal can be dismissed at any time for lack of jurisdiction.

denial of that motion. Nevertheless, plaintiff argues that the state's motion for JNOV or new trial did not interrupt or suspend the delays for taking an appeal pursuant to La. C.C.P. arts. 2087 and 2123, because it was defective, null, and of no effect, since the motion was not verified as required by La. C.C.P. art. 1975.

Article 1975[5] provides that a motion for new trial that is based on the grounds of either newly discovered evidence or juror misconduct shall include verification by the applicant of the facts alleged therein. In this case, the state's motion asserted juror misconduct as a ground for new trial. In conjunction with its motion for new trial, the state simultaneously filed a supporting memorandum to which it attached the affidavit of Perry Sims, a state employee who attested that, based on information and belief, the allegations and factual content of the motion were true and accurate. However, plaintiff asserted that this affidavit did not meet the verification requirement of Article 1975. Specifically, he argues it was deficient because: (1) it was attached to the supporting memorandum, which is not a pleading, rather than to the motion for new trial itself; (2) it was not based on personal knowledge of Mr. Sims; and (3) although Mr. Sims asserted he was an employee of the state, there was no indication that he was authorized to execute the affidavit on behalf of the state, the applicant.

Despite plaintiff's arguments, we find it unnecessary to consider whether the affidavit of Mr. Sims was sufficient to meet the verification requirement of Article 1975 for the following reasons. In addition to the ground of newly

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[5] Louisiana Code of Civil Procedure article 1975 provides that:

> A motion for a new trial shall set forth the grounds upon which it is based. When the motion is based on Article 1972(2) [newly discovered evidence] and (3) [juror misconduct], the allegations of fact therein shall be verified by the affidavit of the applicant.

discovered evidence, the state's motion also asserted that it was entitled to a new trial under La. C.C.P. art. 1972(1), because the judgment was contrary to the law and the evidence. The state further asserted that a new trial also was warranted under La. C.C.P. art. 1973, which authorizes a trial court to grant a new trial in any case where good grounds are shown, except as otherwise provided by law. The terms of Article 1975 do not require verification when a new trial is sought on these grounds. See Revision Comment (a) to La. C.C.P. art. 1975; ***Carlone v. Carlone***, 444 So.2d 1274, 1276-77 (La. App. 4th Cir.), ***writ denied***, 448 So.2d 112 (La. 1984). Similarly, Article 1975 does not by its terms require verification of a motion for JNOV. Therefore, plaintiff's argument that the state's motion for JNOV or new trial was deficient and did not interrupt or suspend applicable appeal delays lacks merit. Accordingly, since the state's motion for appeal was filed within the applicable delay following the denial of its motion for JNOV or new trial, the motion was timely. Thus, plaintiff's motion to dismiss this appeal is denied.

Plaintiff also filed a motion to strike from the appellate record the affidavits attached to the state's motion for new trial, together with any argument made by the state on appeal related thereto. This motion is well founded, since the trial court specifically granted plaintiff's motion to strike the affidavits in the proceedings below. Therefore, since the affidavits in question were stricken from the trial court record, neither the affidavits nor any argument made by the state related to them will be considered on appeal.

UNREASONABLE RISK OF HARM

In its third assignment of error,[6] the state argues the jury erred in finding it liable for plaintiff's injuries, because plaintiff failed to establish that the condition of the elevator presented an unreasonable risk of harm, that the offset between the elevator and lobby floor was a cause-in-fact of plaintiff's injuries, or that the state failed to take corrective action within a reasonable time. However, based on our review, we believe the issue regarding whether or not the elevator presented an unreasonable risk of harm is dispositive of this appeal.

Generally, the owner or custodian of immovable property has a duty to keep the property in a reasonably safe condition. The owner or custodian must discover any unreasonably dangerous condition on the premises and either correct the condition or warn potential victims of its existence. ***Pryor v. Iberia Parish School Board***, 10-1683 (La. 3/15/11), 60 So.3d 594, 596. Thus, in order to impose liability upon a public entity for damages caused by a building or thing, the existence of a defect or condition creating an unreasonable risk of harm must be established. See La. C.C. art. 2317; La. R.S. 9:2800; ***Chambers v. Village of***

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[6] The state complains of the trial court's denial of its motion for summary judgment in its first assignment of error. However, the denial of a motion for summary judgment is a non-appealable interlocutory judgment. ***Enduracoat Technologies, Inc. v. Watson Bowman Acme Corp.***, 09-2346 (La. App. 1st Cir. 7/8/10), 42 So.3d 1107, 1116 n.12. After a full trial on the merits, the affidavits and other limited evidence presented with a motion for summary judgment are of little or no value; in such cases, appellate courts should review the entire record. See ***Hopkins v. American Cyanamid Company***, 95-1088 (La. 1/16/96), 666 So.2d 615, 624. In its second assignment of error, the state contends the trial court erred in denying its motion for directed verdict. Yet, the state chose not to rest on its motion, but instead chose to exercise its right to present evidence. Accordingly, the motion for directed verdict must be deemed abandoned, and this matter must be judged on the entirety of the evidence presented. See ***Dunaway v. Rester Refrigeration Service, Inc.***, 428 So.2d 1064, 1072 (La. App. 1st Cir.), ***writs denied***, 433 So.2d 1056-57 (La. 1983); ***Graves v. Riverwood International Corp.***, 41,810 (La. App. 2d Cir. 1/31/07), 949 So.2d 576, 580 n.3, ***writ denied***, 07-0630 (La. 5/4/07), 956 So.2d 621.

Moreauville, 11-898 (La. 1/24/12), ____ So.3d ____; ***Reed v. Wal-Mart Stores, Inc.***, 97-1174 (La. 3/4/98), 708 So.2d 362, 363. The absence of an unreasonably dangerous condition or defect implies the absence of a duty on the part of the defendant. ***Oster v. Department of Transportation and Development, State of Louisiana***, 582 So.2d 1285, 1288 (La. 1991). The determination of whether an unreasonable risk of harm exists is subject to review under the manifest error standard. Under this standard, the trier-of-fact's determination may be disturbed by a reviewing court only upon a finding that it is clearly wrong or manifestly erroneous. ***Reed***, 708 So.2d at 365.

In determining whether a defect presents an unreasonable risk of harm, the trier-of-fact must balance the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair. ***Chambers***, ____ So.3d at ____; ***Pryor***, 60 So.3d at 596. The relevant factors to be considered are: (1) the utility of the thing; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility, or whether it is dangerous by nature. ***Pryor***, 60 So.3d at 597.

The fact that an accident occurred as a result of a condition or defect does not elevate the condition of the thing to that of an unreasonably dangerous condition or defect. See ***Alexander v. City of Baton Rouge***, 98-1293 (La. App. 1st Cir. 6/25/99), 739 So.2d 262, 267, ***writ denied***, 99-2205 (La. 11/5/99), 750 So.2d 188. Further, the past accident history of the defect in question is a factor to be taken into consideration in determining the relative risk of injury. ***Reed***, 708 So.2d at 365; ***Alexander***, 739 So.2d at 267.

Additionally, the degree to which a danger may be observed by a potential victim should also be considered in determining whether a condition is unreasonably dangerous. ***Alexander***, 739 So.2d at 267. Defendants generally have no duty to protect against a hazard that is open and obvious. ***Eisenhardt v. Snook***, 08-1287 (La. 3/17/09), 8 So.3d 541, 544. Thus, if a dangerous condition is patently obvious and easily avoidable, it may not be considered to present a condition creating an unreasonable risk of harm. See ***Eisenhardt***, 8 So.3d at 544; ***Alexander***, 739 So.2d at 268. A landowner is not liable for damages that result from a condition or defect that a plaintiff should have observed in the exercise of reasonable care, or that was as obvious to a plaintiff as it was to the defendant. See ***Dauzat v. Curnest Guillot Logging Inc.***, 08-0528 (La. 12/2/08), 995 So.2d 1184, 1186.

In applying the factors of the balancing test to the instant case, we note that it is beyond dispute that the elevators in Wooddale Tower served a purpose of social utility. Without the elevators, it would have been extremely difficult, if not impossible in some cases, for the occupants of the upper floors of this twelve-story building to gain access to their offices.

In considering the second factor, which focuses on the likelihood and magnitude of harm, we note that, while there may have been a significant risk of serious harm **if** the offset had not been apparent, the record clearly reflects that it was open and obvious. In fact, plaintiff **admitted** that he was aware of the offset at the time that he pulled the dolly onto the elevator. Nevertheless, he made the ill-considered decision to pull the dolly with its heavy load forcefully over the offset. Plaintiff could have easily avoided any danger by simply waiting for the next elevator or by dividing the heavy boxes into multiple deliveries to lighten the load on the dolly, which would have made it easier to control. Instead, plaintiff

consciously chose to pull the fully loaded dolly over the offset, stating that he thought three hundred pounds was within his limits.

At trial, plaintiff indicated that, when the accident occurred, he was attempting to gain "control of the elevator" and prevent anyone else from entering it, so that he could make his delivery and continue on his route. While understandable, plaintiff's desire to quickly make his delivery does not excuse his decision to ignore the obvious danger inherent in forcefully pulling the approximately three-hundred-pound load over the offset toward him. Further, there is no merit in plaintiff's contention that, even if the offset itself was open and obvious, the latent change in momentum caused by pulling the dolly over the offset was not likewise so apparent. Obviously, the forces and dangers created by momentum are matters within the general knowledge of reasonable persons, and should be especially well known to an experienced deliveryman. Finally, it is also relevant in assessing the relative risk of injury that, although there apparently were multiple reported incidents of elevator malfunctions at Wooddale Tower, no evidence was presented of any incidents involving actual physical injury other than plaintiff's accident.

The third factor of the balancing test focuses on the cost of preventing the harm. Although the state had a contract with an elevator company to repair and maintain the elevators in Wooddale Tower, the record reveals that it was aware as of 1999 that the aging elevators would need to be completely modernized in order to eliminate the recurring problems. The state originally intended to begin the modernization project in 2001. However, due to the problems being experienced, the state began the process in 1999 of drawing up a preliminary budget, as well as drawings and technical bid specifications for the project.

Unfortunately, although the process began prior to plaintiff's accident, a contract was not awarded for the project until after he was injured. Since the projected cost of the project was $275,000.00, state law required that the project be put out to bid. In fact, the project was advertised and put out to bid three separate times. The first time, all the bids received were over budget, so the bid specifications had to be redrawn in order to reduce the costs. There was a bidder irregularity in the second bid process that required all bids to be thrown out. The third bid process was successful, and a contract was awarded on June 20, 2001. The elevator modernization project ultimately was completed on November 7, 2002.

Lastly, plaintiff's activities must be considered in terms of social utility or whether they are dangerous by nature. The act of delivering office supplies clearly has social utility, and is not inherently dangerous by nature. However, by making a deliberate decision to pull the heavily loaded dolly over the offset onto the elevator, plaintiff placed himself at risk of injury. He easily could have avoided this risk by utilizing other available options to make the delivery. See ***Pryor***, 60 So.3d at 598.

Considering all the relevant factors in light of our careful review of the entire record, we conclude that the jury was manifestly erroneous and clearly wrong in finding that the elevator offset created an unreasonable risk of harm. The social utility of the elevator outweighed the risk created by its condition, which was readily apparent. "When a risk is so apparent, obvious, and easily avoidable by persons exercising ordinary care and prudence, it cannot be said to be unreasonably dangerous." ***Alexander***, 739 So.2d at 268. Given that the offset in this instance was so open and obvious, no reasonable factual basis exists to support the jury's determination. Plaintiff admitted that he was aware of the

offset, and he could have easily avoided the risk of injury by waiting for the next elevator or by lightening the load on the dolly. However, due to his apparent haste to make his delivery, plaintiff was not acting with ordinary care or prudence at the time of the accident. Under the circumstances, particularly the open and obvious nature of the defect, the jury was clearly wrong in finding the existence of an unreasonable risk of harm. See ***Chambers***, ____ So.3d at ____ (sidewalk differential did not create an unreasonable risk of harm where its social utility was high, the cost of repairing all similar defects would be exorbitant, no prior accidents were reported, and the differential was readily observable); ***Alexander***, 739 So.2d at 268-69 (trial court was clearly wrong in finding "no parking" sign created an unreasonable risk of harm where the risk was open and obvious, there were no prior reported accidents involving the sign, and the overall cost of corrective action was staggering). Therefore, since plaintiff failed to prove an essential element of his claim, the judgment imposing liability upon the state must be reversed.[7]

CONCLUSION

Accordingly, for the reasons assigned herein, we deny plaintiff's motion to dismiss this appeal as untimely. Plaintiff's motion to strike the affidavits attached to the state's motion for new trial, together with any related arguments made by the state on appeal, is granted. The rule to show cause issued by this Court with respect to plaintiff's answer to this appeal is dismissed as moot. Finally, the judgment of the trial court imposing liability upon the state is reversed. Plaintiff is to bear all costs of this appeal.

[7] In view of this conclusion, consideration of the state's remaining assignments of error is unnecessary.

PLAINTIFF'S MOTION TO DISMISS APPEAL DENIED; PLAINTIFF'S MOTION TO STRIKE GRANTED; RULE TO SHOW CAUSE ISSUED WITH RESPECT TO PLAINTIFF'S ANSWER DISMISSED; JUDGMENT ON APPEAL REVERSED.

PAUL F. BROUSSARD AND ANDREA V. BROUSSARD, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, ARYN PAIGE BROUSSARD

VERSUS

STATE OF LOUISIANA, THROUGH THE OFFICE OF STATE BUILDINGS, UNDER THE DIVISION OF ADMINISTRATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

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VGW BY CLK

WHIPPLE, J., concurring.

While I agree that the result reached herein is correct under the jurisprudence by which this court is bound, I write separately to express my concern that in denying a victim's claim on the basis that the dangerous condition should be obvious to potential victims, the courts of this state are now obligated to place undue emphasis on this one factor with the effect being, in my view, perilously close to resurrecting the doctrine of assumption of risk, a concept which no longer can be utilized in Louisiana as a complete bar to a plaintiff's recovery. See Murray v. Ramada Inns, Inc., 521 So. 2d 1123, 1132-1133 (La. 1988). As noted by the majority, in determining whether a dangerous condition presents an unreasonable risk of harm, a risk-utility balancing test is utilized, considering such factors as: (1) the utility of the thing; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the condition; (3) the cost of preventing harm; and (4) the nature of the plaintiff's activities in terms of social utility, or whether it is dangerous by nature. Pryor v. Iberia Parish School Board, 2010-1683 (La. 3/15/11), 60 So. 3d 594, 596-597.

With regard to the second factor, the Louisiana Supreme Court has ruled that defendants **generally** have **no duty** to protect against an open and obvious hazard and that the degree to which a danger may be observed by a potential victim is but **one factor** in the determination of whether the condition is unreasonably dangerous. See Eisenhardt v. Snook, 2008-1287 (La. 3/17/09), 8 So. 3d 541, 544. However, the Supreme Court has further specifically held that a landowner **is not liable** for an injury which results from a condition which was as obvious to a visitor as it was to the landowner, thus seemingly imposing an assumption of the risk bar to recovery on the injured party. See Eisenhardt, 8 So. 3d at 544-545. Indeed, this court has held that if a dangerous condition is patently obvious and easily avoidable, it **can hardly** be considered to present an unreasonable risk of harm, Alexander v. City of Baton Rouge, 98-1293 (La. App. 1st Cir. 6/25/99), 739 So. 2d 262, 268, writ denied, 99-2205 (La. 11/5/99), 750 So. 2d 188, to more recently stating that it **cannot** be considered to present an unreasonable risk of harm, Williams v. City of Baton Rouge, 98-1293 (La. App. 1st Cir. 3/28/03), 844 So. 2d 360, 366.

The problem with such a rigid rule is readily evident in the instant case, where the State had been aware of the dangerous condition of its elevators **for at least two years**, but admittedly had not corrected the problem. However, simply because the offset between the level of the elevator floor and the building floor could be construed as patently obvious to all users of these elevators, the state of the law appears to be that the State can seemingly ignore, with impunity, its obligation and duty to repair a clearly dangerous condition. Instead, the injured party is effectively barred from recovery under the implicit finding that he or she **assumed the risk** of harm because the dangerous condition was obvious. This case demonstrates

the patent unfairness of the law in this regard, which we, unfortunately, are bound to follow.

For these reasons, I am constrained to concur in the result.