NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 CA 2439

VIRGIL W. NORRED

VERSUS

MYRT HALES, JR. AND THE STATE OF LOUISIANA THROUGH THE DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

RDD

Judgment Rendered: OCT 24 2008

On Appeal from the 21st Judicial District Court
Parish of Livingston, State of Louisiana
Number 101579, E
The Honorable Brenda Bedsole Ricks, Judge Presiding

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BEFORE: WHIPPLE, PARRO, KUHN, GUIDRY AND DOWNING, JJ.

Kuhn, J. dissents and assigns reasons.
Parro, J. concurs. by RDD RDD
Guidry, J. concurs in the result.

DOWNING, J.

Plaintiff-appellant, Virgil W. Norred, appeals the trial court's grant of summary judgment dismissing his claims against the defendant-appellee, the Town of Springfield (the Town), for damages arising from the personal injuries he sustained after his pick-up truck collided with a pine tree that had fallen across the roadway. For the following reasons, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On September 24, 2002, shortly after 11 p.m., as Norred drove his Ford pick-up truck on Highway 22, heading east toward Springfield, he rounded a curve and collided with a pine tree that had fallen across the roadway. His vehicle went under the tree, veered off the road, impacted a telephone box, and landed in a ditch. Norred was rendered unconscious. He was extricated from his vehicle by Livingston Parish Fire Protection District (LPFPD) personnel and taken by Acadian Ambulance to North Oaks Hospital in Hammond. He remained in the hospital for three months, suffering personal injuries including brain damage, broken bones, and complications to his kidneys.

Norred subsequently filed this lawsuit, naming the Town as a defendant, in addition to the Department of Transportation and Development (DOTD), the property owner of the land the tree was situated on at the time of its fall, and his insurer. According to the allegations of Norred's petition, the Town, through the Springfield Police Department (SPD),[1] was at the site of the fallen tree prior to the time of his accident, had custody of the roadway, and failed to adequately warn him of the obstacle.

[1]In its answer, the Town admits that it is the correct entity to be sued for the acts of members of its police department.

The Town filed a motion for summary judgment, averring entitlement to dismissal from the lawsuit. The trial court agreed and rendered summary judgment, dismissing Norred's claims against the Town.[2] Norred appeals.

DISCUSSION

Appellate courts review summary judgments *de novo*, 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. 3 (La. 2/26/08), 977 So.2d 880, 882-823. Under La. C.C.P. art. 966(B), summary judgment shall only be entered when there is no genuine issue as to material fact and the mover is entitled to judgment as a matter of law.

Material facts are those that potentially insure or preclude recovery, affect the litigant's success, or determine the outcome of a legal dispute. Because it is the applicable substantive law that determines materiality, whether or not a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Young v. Capitol Concrete Products, Inc.**, 02-1822, pp. 2-3 (La. App. 1st Cir. 6/27/03), 858 So.2d 513, 516.

Louisiana Civil Code article 2317 provides, "We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody." The owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. This duty is the same under the strict liability theory of La. C.C. art. 2317 (as modified by La. C.C. art. 2317.1) and the negligence liability theory of La. C.C. art. 2315. Under either theory, the plaintiff has the burden of proving that: (1) the property that caused the damage

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[2] The trial court's judgment is immediately appealable under La. C.C.P. art. 1915A(1). La. C.C.P. art. 1911; **Motorola, Inc. v. Associated Indem. Corp.**, 02-0716, pp. 10-11 (La. App. 1 Cir. 4/30/03), 867 So.2d 715, 721.

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) the defendant had actual or constructive knowledge of the risk. ***Bozeman v. Scott Range Twelve Ltd. Partnership***, 03-0903, p. 5 (La. App. 1st Cir. 4/2/04), 878 So.2d 615, 619, ***writ not considered***, 04-1945 (La. 11/8/04), 885 So.2d 1142.

In support of its entitlement to summary judgment, the Town offered the deposition testimony of Officer Richard Sticker. Officer Sticker testified that he worked part time for the SPD. On September 24, 2002, he was patrolling through town, specifically tending to duties with the nightly close down of the River Stop, a commercial business in Springfield, when at approximately 11:10 – 11:20 p.m., a passerby told him a tree had fallen across the road, apparently on Highway 22. Officer Sticker left the River Stop, radioed the Livingston Parish Sherriff's Office (LPSO), who served as the SPD dispatcher, and advised of the report of a downed tree. Officer Sticker headed west on Highway 22. When he crossed the town limits, he realized he was no longer in his jurisdiction, but nevertheless proceeded along the highway, looking for the downed tree, believing that he could get to it before LPSO.

Upon his arrival, about four or five minutes after he had received the report, Officer Sticker saw the tree suspended across the roadway and then noticed a vehicle in the ditch to his left. He asserts that he activated his emergency overhead bar lights, radioed the LPSO, told them there was a vehicle in the ditch, and requested assistance. As he was exiting his marked unit to check on the driver of the vehicle in the ditch, a pick-up truck, traveling east on Highway 22, hit the tree. Officer Sticker heard the noise from the pick-up truck braking, which caused him to turn, look, and see the pick-up truck collide into the tree. Officer Sticker testified that he had not yet spoken with the driver of the first vehicle when the pick-up truck appeared.

The pick-up truck went under the tree and slid off the roadway into a ditch to the officer's right, i.e., on the opposite side of roadway from the first vehicle that he had observed. Officer Sticker recalled that the pick-up truck passed right in front of him as it slid into the ditch, stating that it came "pretty close" to actually hitting him. Officer Sticker proceeded to the first vehicle, where he found the driver conscious with limited injuries. He crossed the roadway and checked on the driver of the pick-up truck, ultimately determined to be Norred, who was unconscious and suffering from apparent injuries. LPFPD first responders soon arrived and began the process of extricating Norred from his pick-up truck.

The Town also offered the deposition testimony of LPFPD chief, Brian Drury, who arrived on the scene at 11:32 p.m.; LPSO Deputy Jason Harris, who arrived at 11:35 p.m.; and Louisiana State Police (LSP) Trooper Raymond Davis, Sr., who arrived at 12:12 a.m.,[3] each of whom recalled the SPD marked unit's emergency lights were illuminated upon his arrival. The Town also introduced into evidence the certified copies of LPSO dispatch records pertaining to the September 24, 2002 accident. The records show that between 11:24 p.m. and 11:29 p.m., LPSO dispatched Acadian Ambulance, LSP Troop A, DOTD, LPFPD #2 (located in Springfield), as well as LPSO deputies to the scene.

Conversely, Norred offered excerpts of the deposition testimony of John Douglas Elliot, the driver of the vehicle travelling east on Highway 22, who had already collided with the tree and run into the ditch by the time Officer Sticker arrived on the scene. Elliot had been rendered unconscious as a result of his accident. When he came to, he did not recall seeing any police lights. He stated that no one had come to his aid at the time he regained consciousness. He did not recall having seen a SPD police officer on the scene. Although Elliot testified that he had head trauma or

[3] Trooper Davis investigated Norred's accident, issued citations to him for driving while intoxicated and driving under suspension, and testified that at the time of the accident, a tropical storm had been approaching Louisiana.

a head injury, he stated that he refused medical treatment because he had been drinking alcohol prior to the accident.

Norred also offered his deposition testimony in which he stated that he was traveling on Highway 22 east toward Springfield after having left Charlie's, a restaurant located on the highway where his sister worked and at which he had consumed two beers. He did not know what time he arrived at Charlie's or what time he left. Norred stated that he had entered a curve that "when you round [it] ... [y]ou can't see around." It was raining, and he was driving around 50 m.p.h. with his high beams on because it was his habit to drive through curves with the brighter illumination to help him see.

As he came out of the curve, before striking the tree, Norred asserts that he did not see any flashing lights, which would have indicated a police officer was at the scene, and he did not see a SPD unit. Norred could see the tree was lying across the road and a vehicle in the right-hand lane, "[n]ot all the way off the road; but up to the top right-hand side of the road." He said that he was aware that the vehicle had already been in an accident as soon as he saw it and the tree. He turned the steering wheel to his left and applied his brakes. After that, he does not remember anything else that happened that night.

The affidavit and excerpts of the deposition testimony of Wade Schindler, whom Norred seeks to have qualified as an expert in police procedure, were also admitted into evidence in opposition to the Town's motion for summary judgment. Schindler opined that proper police procedure required that Officer Sticker would have immediately done something to warn drivers of the downed tree to prevent another accident from occurring. Any failure of Officer Sticker to use his emergency lights was either neglect or a nonuse of equipment according to Schindler.

Based on the showings made, Norred asserted that he was entitled to be warned or alerted of the downed tree by the use of emergency lights by Officer Sticker. He also suggests, alternatively, that he demonstrated a genuine issue of material fact about whether Officer Sticker's emergency lights were activated when Norred collided into the tree so as to preclude a finding that the SPD officer took steps to warn him of the downed tree.

The testimony established that Officer Sticker turned on his marked unit's emergency lights at the scene. But the testimony is not as clear on the more narrow issue of whether he had them on when Norred collided with the tree. Officer Sticker stated that he had activated his emergency lights after he spotted the downed tree and the first vehicle in the ditch, just prior to radioing LPSO. Norred testified, however, that as he came out of the curve, he did not see any emergency lights. But Norred did not see Officer Sticker's marked unit either. Elliot, who had been knocked unconscious, did not recall seeing police emergency lights when he regained consciousness. But he too could not recall having seen the SPD officer on the scene. And Elliot's testimony does not establish the time he regained consciousness relative to the arrival of Officer Sticker and Norred.

The initial inquiry to determine if a party may be liable under the duty-risk analysis is cause-in-fact. A party's conduct is a cause-in-fact of the harm if it was a substantial factor in bringing about the harm. The act is a cause-in-fact in bringing about the injury when the harm would not have occurred without it. While a party's conduct does not have to be the sole cause of the harm, it is a necessary antecedent essential to an assessment of liability. ***Toston v. Pardon***, 03-1747, p. 11 (La. 4/23/04), 874 So.2d 791, 799. Whether an action is the cause-in-fact of the harm is a factual determination that is left to the factfinder. **Id.**

It is apparent from the evidence above that there are conflicting views as to whether the unit's lights were in fact activated. As such, a genuine issue of material fact exists concerning the factual timeline of that evening, which affects the determination of cause-in-fact.

Norred stated in his deposition testimony that had the emergency lights been activated, he would have seen them. In a summary judgment affidavit, "a lay witness can only testify to the facts within his knowledge and not to impressions or opinions; however, a witness is permitted to draw reasonable inferences from his personal observations." **Vanderbrook v. Coachmen Industries, Inc.**, 01-0809, p. 5 (La. App. 1st Cir. 5/10/02), 818 So.2d 906, 910. After all, "[a] 'lay' person is not required to be a meteorologist to testify about prevailing wind direction nor does it take a watchmaker to state the time." **Id.** at p. 6, 818 So.2d at 910. Norred's reasonable inference that he would have been able to stop had the emergency lights been on is sufficient support for the cause-in-fact element of the duty/risk analysis.

Additionally, evidence in the record shows the nature of the curve in the road and relevant distances. Whether Norred could have stopped in time is a question of fact to be drawn from the facts and circumstances. "[I]ssues that require the determination of reasonableness of acts and conduct of parties under all facts and circumstances of the case can not ordinarily be disposed of by summary judgment." **Granda v. State Farm Mut. Ins. Co.**, 04-1722, pp. 4-5 (La. App. 1st Cir. 2/10/06), 935 So.2d 703, 707.

Accordingly, we will reverse the summary judgment. Norred's assignments of error have merit.

Additionally, we note that two other possible sources of duty may also exist for the Town. In **Crane v. Exxon Corp., U.S.A.**, 613 So.2d 214, 221 (La. App. 1st Cir. 1992), this court observed that, "[i]f a person undertakes a task which he had no

duty to perform, he must perform the task in a reasonable and prudent manner. Negligent breach of a duty which has been voluntarily or gratuitously assumed may create civil liability." Also, "under Louisiana civil law precepts, a person who observes that another is in obvious peril, has the slight duty to warn of known imminent dangers when he can do so without personal risk." **Beach v. Pointe Coupee Elec. Membership Corp.**, 04-2255, pp. 4-5 (La.App. 1 Cir. 11/16/05), 917 So.2d 556, 558.

DECREE

For these reasons, we reverse the trial court's judgment granting the motion for summary judgment and dismissing Norred's claims against the Town of Springfield. Appeal costs in the amount of $1,608.00 are assessed against the Town of Springfield.

REVERSED

VIRGIL W. NORRED	FIRST CIRCUIT
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KUHN, J., dissenting.

I disagree with the majority's reversal of the trial court's grant of summary judgment and would affirm the dismissal of the Town of Springfield from this lawsuit.

The owner or person having custody of immovable property has a duty to discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence. ***Bozeman v. Scott Range Twelve Ltd. Partnership***, 03-0903, p. 5 (La. App. 1st Cir. 4/2/04), 878 So.2d 615, 619, ***writ not considered***, 04-1945 (La. 11/8/04), 885 So.2d 1142. This duty to remedy arises from knowledge of an unsafe condition of the highway. Thus, it must be shown that the custodian of the highway with the defect had actual or constructive notice of the condition and there must be a sufficient opportunity to remedy the situation or at least warn motorists of its presence. ***Naylor v. Louisiana Dep't of Pub. Highways***, 423 So.2d 674, 682, ***writs denied***, 427 So.2d 439, 429 So.2d 127, and 429 So.2d 134 (La. 1983); ***Coleman v. Houp***, 319 So.2d 831, 834-35 (La. App. 3d Cir. 1975).

After noting that the vast majority of the testimony established that Officer Sticker turned on his emergency lights at the scene, the majority correctly narrows its focus on the issue of whether he had them on at the time Norred collided with the tree. Clearly, Officer Sticker's testimony (he activated the emergency lights after he spotted the accident scene just before he radioed LPSO) and Norred's testimony (as he came out of the curve, he did not see any lights) can be reconciled

with a finding that Officer Sticker and Norred arrived at the accident site nearly simultaneously. The record is devoid of evidence establishing either the exact time of Norred's accident or of Officer Sticker's time of arrival on the scene. Because the deposition testimony of both Officer Sticker and Norred was considered at the hearing, there is no additional evidence available to present to the trier of fact which would establish the time each arrived at the accident site.[1]

In light of the totality of the evidence admitted at the hearing, the Town of Springfield established that Sticker did not have a reasonable opportunity to remedy the roadway by removing the downed tree or to activate his lights in time to warn Norred of the downed tree before the accident occurred. Norred did not offer any evidence to counter this showing by the Town. Thus having failed to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at the trial, there is no genuine issue of material fact, and the trial court correctly granted summary judgment.[2] Accordingly, I dissent.

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[1] Although Elliot testified that he did not recall seeing either emergency lights or Officer Sticker at the accident, the record fails to establish the time he regained consciousness relative to the arrival of either Officer Sticker or Norred.

[2] Because Officer Sticker did not have a sufficient amount of time to activate his lights to warn Norred of the accident, he could not have put flares out on the roadway to alert Norred of the downed tree. Thus, Norred's contention that the Town had a duty to warn him by using flares to alert him of the downed tree is without merit. Likewise, given Officer Sticker's lack of opportunity to warn, Norred's assertion that the Town, through the Springfield Police Department, was liable for failing to adequately train its officers to respond to a downed tree by doing something to warn other drivers of the obstacle is also unsupported under the facts of this case. And since Norred has failed to demonstrate facts sufficient to show that the Town is liable pursuant to La. C.C. arts. 2317, it is unnecessary to determine whether the Town is entitled to immunity under the provisions of La. R.S. 9:2800.