82 So.3d 541
Court of Appeal of Louisiana,
Fifth Circuit.

Ann RICHARD and Kirt Richard
v.
LOUISIANA NEWPACK SHRIMP COMPANY, INC.

No. 11–CA–309. | Dec. 28, 2011.

Synopsis
Background: Pedestrian, who allegedly fell and sustained serious injuries while walking on levee walkway to reach her friend's boat in adjacent bayou, brought action against lessee of the property, alleging claims of negligence and strict liability. Lessee moved for summary judgment, claiming immunity under the recreational use immunity statutes. The Twenty–Fourth Judicial District Court, Parish of Jefferson, No. 680–125, Division "H", Glenn B. Ansardi, J., granted summary judgment in lessee's favor. Pedestrian appealed.

Holdings: The Court of Appeal, Fredericka Homberg Wicker, J., held that:

[1] recreational use immunity statutes applied to pedestrian's suit, and

[2] immunity exception for willful or malicious failure to warn against dangerous condition did not apply.

Affirmed.

West Headnotes (9)

[1]	**Judgment** Absence of issue of fact
	Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. Cases that cite this headnote

[2]	**Negligence** Construction of statutes in general
	Recreational use immunity statutes should be construed with reference to each other. LSA–R.S. 9:2791, 9:2795. Cases that cite this headnote

[3]	**Negligence** Construction of statutes in general

	The recreational use immunity statutes are in derogation of common or natural right and, therefore, are to be strictly interpreted, and must not be extended beyond their obvious meaning. LSA–R.S. 9:2791, 9:2795. Cases that cite this headnote

[4]	**Negligence** Property, conditions, activities and persons covered
	Recreational use immunity statutes, providing limitation of liability for owners and operators of property used for recreational purposes, do not require that the injury arise out of the recreational activity per se, as long as the person injured was on the property for a recreational purpose. LSA–R.S. 9:2791, 9:2795. 2 Cases that cite this headnote

[5]	**Negligence** Property, conditions, activities and persons covered
	Levee walkway on which pedestrian fell was integral part of recreational activities and, thus, was recreational within the meaning of recreational use immunity statutes for purposes of pedestrian's negligence suit, even if the levee was not primarily recreational in character; walkway allowed persons the ability to reach their boats in the bayou, and pedestrian's sole purpose of walking over lessee's levee property was to gain access to her friend's boat for recreational purposes. LSA–R.S. 9:2791, 9:2795. 1 Cases that cite this headnote

[6]	**Negligence** Willful or malicious acts; gross negligence
	A failure to warn of a dangerous condition, within immunity exception in recreational use immunity statutes, connotes a conscious course of action, and is deemed willful or malicious when action is knowingly taken or not taken, which would likely cause injury, with conscious indifference to consequences thereof. LSA–R.S. 9:2795(B)(1). Cases that cite this headnote

[7]	**Negligence** Duty to inspect or discover **Negligence** Duty to warn
	As a general rule, a property owner owes a duty to discover any unreasonably dangerous condition on the premises and either correct it or warn potential victims of its existence; however, this duty does not extend to potentially dangerous conditions which should have been observed by an individual in the exercise of reasonable care or which are as obvious to a property owner as to a visitor. Cases that cite this headnote

[8]	**Negligence** Duties and care required
	Lessee's duty to discover any unreasonably dangerous condition on property he allowed persons to use for recreational purposes, and to either correct the condition or warn potential victims of its existence, did not extend to alleged potentially dangerous condition, consisting of ruts in the levee, so as to deprive lessee of immunity from pedestrian's negligence claims under recreational use immunity statute, where pedestrian was aware of ruts in the levee before the alleged accident. LSA–R.S. 9:2795(B)(1). Cases that cite this headnote

[9]	**Negligence** Willful or malicious acts; gross negligence
	There was no evidence that lessee of recreational property was aware of alleged danger allegedly causing pedestrian to fall on the property, and thus, he was not negligent under exception in recreational use immunity statutes for willful or malicious failure to warn against dangerous condition. LSA–R.S. 9:2795(B)(1). Cases that cite this headnote

Attorneys and Law Firms

***542** Robert B. Evans, III, Cesar R. Burgos, Attorneys at Law, New Orleans, LA, for Plaintiff/Appellant.

Guy D. Perrier, Rodney J. Lacoste, Jr., Gerard J. Dragna, Attorneys at Law, New Orleans, LA, for Defendant/Appellee.

Panel composed of Judges WALTER J. ROTHSCHILD, FREDERICKA HOMBERG WICKER, and MARC E. JOHNSON.

Opinion

FREDERICKA HOMBERG WICKER, Judge.

**2 This is a personal injury suit in which the trial judge granted summary judgment in favor of the defendant. The plaintiffs/appellants, Ann Richard and Kirt Richard, appeal the judgment in favor of the defendant/appellee, Louisiana Newpack Shrimp Co., Inc. The issue presented here is whether the plaintiffs' claims are barred by the Louisiana Recreational Use Immunity Statutes, La.R.S. 9:2791 and La.R.S. 9:2795. Finding that the plaintiffs' claims are barred by the Recreational Use Statutes, we affirm.

Procedural History

The plaintiffs filed a petition for damages alleging that on April 11, 2009 around 7:30 PM, Mrs. Richard was walking on a levee when she fell in a hole and sustained serious injuries. They alleged that the hole was caused by the defendant's delivery trucks as the trucks entered and exited the defendant's facility. The plaintiffs asserted that the defendant was negligent or strictly liable in several respects, including failure to warn patrons of the levee's hazardous condition.

**3 The defendant denied the allegations and raised affirmative defenses, including the defense that it was immune from liability pursuant to the Recreational Use Statutes. Relying on the alleged immunity, the defendant filed a motion for summary judgment asserting that it was entitled to judgment as a matter of law. To support *543 its motion, the defendant filed an act of sale and property description, a property survey, Edward Lee's affidavit, and the plaintiffs' depositions.

Mr. Lee attested to the following:

He manages the Edward Lee Family Investment Company, LLC (the Lee property), the owner of the property where Mrs. Richard claimed she injured herself. The Lee property is leased to the defendant, which operates a wholesale seafood processing business on the site. Bayou Segnette runs adjacent to the seafood plant. There are boat docks in the bayou that have been used for many years by recreational and commercial fisherman as well as boaters. Those docks are built into the canal or bayou. Neither the defendant nor the Lee property company does any business with the boaters and/or fishermen who use the docks adjacent to the seafood plant property. For many years, individuals have been allowed to gain access to their docks and boats free of charge by entering from the seafood plant property. Often, these individuals park their vehicles on the seafood plant property. Neither the defendant nor the Lee property company has ever charged these individuals a fee or collected any revenue from the individuals who use the docks and boat slips. Neither the Lee Company nor the defendant operates a commercial recreational enterprise at the seafood plant property. At the time that Mrs. Richard claimed to have fallen, the seafood plant was closed and there were no employees of the defendant or the Lee property company present.

**4 Mrs. Richard's deposition testimony was consistent with Mr. Lee's attestation that for many years, individuals have been allowed to gain access to their docks and boats by entering from the seafood plant property. She stated that on the date of the alleged accident, she had been staying at a friend's camp located on the water in Bayou Segnette. This marsh area can only be accessed by boat. The camp is approximately 12 to 15 minutes from the seafood plant. She testified that over the course of 20 years, people have always parked in the seafood plant property area to get to the boats. The seafood plant operated during those 20 years with trucks coming and going there. Before the alleged accident, she had been to the camp approximately 50 times over the course of 20 years. People with boats who want to launch their boats use the road that cuts through the seafood plant property all of the time. At the time she fell, around 7:00 PM or 7:15 PM on a Saturday evening, the shrimp plant was closed.

Likewise, Mr. Richard testified that during the entire time that he has been coming to the camp by boat it was customary for vehicles to park alongside the seafood factory. Each day, there is fairly steady traffic going up and down that road with people coming to launch their boats at the public launch in the rear.

Mrs. Richard testified that on the day in question, she fell while she was at the seafood property. She explained that her family had been at the camp for the Easter weekend, arriving a few days before the alleged fall. Upon arriving, she and her husband parked their vehicle on the seafood plant's property and accessed their friend's boat, which was already in the water. The boat was by the "little levee" on the seafood plant's property. She testified that she had crossed the "little levee" before that day approximately hundreds of times and never had a problem crossing. She described the "little levee" as a 2–1/2 to 3 foot dirt mound that runs along the waterway and also along the road that cuts through the defendant's property.

**5 Mrs. Richard testified that at the camp, people fished and canoed. She left *544 the camp that day by boat accompanied by her husband and friend in order to purchase groceries and items for the children. Upon returning to the boat to depart to the camp, she realized that she left her jacket on the back of the truck. She walked on the levee, a path she had previously walked hundreds of times without incident, in order to retrieve the jacket. Before the fall, she made six trips across the levee loading groceries into the boat. Finally, while crossing the levee in the same area as before to retrieve her coat, surprisingly, the ground gave way causing her to fall.

Mrs. Richard stated that she fell when her leg got caught in a rut. According to Mrs. Richard, the defendant's failure to accommodate trucks entering and leaving its business allowed trucks little room to negotiate the turn. Thus, the truck's tires caught the bottom of the "little levee" making tire tracks and cuts into the levee. She had seen these ruts after the plant built a fence and before the accident. She had never, however, complained to the defendant about the ruts.

The plaintiffs opposed the motion on two grounds. First, they asserted that the Recreational Use Statutes do not apply because the defendant's lot only incidentally services recreational activity and the recreational activity is exclusively and always engaged in away from the defendant's property. Second, they argued that the Recreational Use Statutes do not provide immunity for a willful failure to warn against a dangerous condition, use, structure, or activity.

In granting summary judgment, the trial judge concluded that the defendant was immune under the Recreational Use Statutes. This appeal followed.

****6 Analysis**

A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La.C.C.P. art. 966(B). We apply the *de novo* standard of review in reviewing a district court judgment on a motion for summary judgment. *Robinson v. Jefferson Parish Sch. Bd.,* 08–1224, p. 13 (La.App. 5 Cir. 4/7/09), 9 So.3d 1035, 1043, *writ denied,* 09–1187 (La.9/18/09), 17 So.3d 975 (citations omitted).

The movant bears the burden of proof. La.C.C.P. art. 966(C)(2). If the movant meets this initial burden, the burden then shifts to the plaintiff to present factual support adequate to establish that he will be able to satisfy the evidentiary burden at trial. Thereafter, if the plaintiff fails to meet this burden, there is no genuine issue of material fact and defendant is entitled to summary judgment as a matter of law. *Id.*

[1] Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. *Richard v. Hall,* 03–1488, p. 5 (La.4/23/04), 874 So.2d 131, 137 (citations omitted).

Immunity

The first issue presented on appeal is whether the Immunity Act is applicable, thereby immunizing the defendant from liability. The plaintiffs argue that at the time of the alleged accident, Mrs. Richard was not engaging in recreational activity; the activity did not begin until she was in the boat. They also argue that the levee served more than one purpose. It served the defendant's own commercial enterprise, the commercial enterprises of other ***545** fisherman, and allowed ****7** others a "pass through" to enter the bayou for a recreational purpose in another area. Thus, according to the plaintiffs, the levee only incidentally serviced recreational activity.

Louisiana's Recreational Use Statutes are contained in La.R.S. 9:2791 and La.R.S. 9:2795. These statutes generally provide immunity to certain parties, including a lessee, when the subject land is used for a recreational purpose. La.R.S. 9:2795(B)(1) does, however, retain liability for willful or malicious failure to warn against a dangerous condition, use, structure, or activity.

La.R.S. 9:2791(A) provides:

> An owner, lessee, or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, camping, hiking, sightseeing, or boating or to give warning of any hazardous conditions, use of, structure, or activities on such premises to persons entering for such purposes, whether the hazardous condition or instrumentality causing the harm is one normally encountered in the true outdoors or one created by the placement of structures or conduct of commercial activities on the premises. If such an owner, lessee, or occupant gives permission to another to enter the premises for such recreational purposes he does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to persons or property caused by any act of person to whom permission is granted.

"Premises" as used in the above section, "includes lands, roads, waters, water courses, private ways and buildings, structures, machinery or equipment thereon." La.R.S. 9:2791(C). Thus, the levee, the land, is included in the definition of premises.

The later-enacted statute, La.R.S. 9:2795, pertinently provides:[12]

> ****8** B. (1) Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:
>
> (a) Extend any assurance that the premises are safe for any purposes.
>
> (b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.
>
> ***546** (c) Incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring or man-made.
>
> La.R.S. 9:2795(B).

The defendant leases the property owned by the Lee company. (La.R.S. 9:2795(B)(1), provides an exception to immunity as to an "owner.") La.R.S. 9:2795(A)(2) defines "owner" as "the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises." Thus, the immunity exception extends to lessees such as the defendant.

[2] [3] In separate years, the Legislature passed these two remarkably similar statutes designed to encourage landowners to open their lands, on a basically nonprofit basis for recreational use. *Richard v. Hall,* 03–1488, pp. 21–22 (La.4/23/04), 874 So.2d 131, 147–48 (citation omitted). The statutes should be construed with reference to each other. *Id.* The Recreational Use Statutes are in derogation of common or natural right and, therefore, are to be strictly interpreted, and must not be extended beyond their obvious meaning. *Id.* at 22, 874 So.2d at 148. However, the enactment of La.R.S. 9:2795, a second more expansive immunity statute, evidences an intent on the Legislature's part that these statutes are to grant a broad immunity from liability. ****9** *Hall, supra,* at 29–30, 874 So.2d at 151–52. Thus, in *Hall*, the Louisiana Supreme Court placed a construction on La.R.S. 9:2795(B)(1), the section at issue therein, which was consistent with the obvious intent of the Legislature to grant a broad immunity from liability and did not extend the statutes beyond their obvious meaning. *Id.*

The Immunity Act grants immunity for recreational activities. La.R.S. 9:2791(A) provides a restrictive list of recreational activities: hunting, fishing, camping, hiking, sightseeing, or boating. On the other hand, the later enactment, La.R.S. 9:2795(A)(3), provides for a more expansive list of recreational activities. La.R.S. 9:2795(A)(3) broadly defines "recreational purposes" as including but not limited to

> any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized, or nonmotorized vehicle operation for recreation purposes, nature study, water skiing, ice skating, roller skating, roller blading, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or viewing or enjoying historical, archaeological, scenic, or scientific sites.

Here, we must determine whether Mrs. Richard had been engaged in a "recreational purpose." Given that La.R.S. 9:2795(A)(3) expansively defines "recreational purposes" as including but not limited to the enumerated list, we find that Mrs. Richard's activity was covered by that omnibus clause "includ[ing] but not limited to." La.R.S. 9:2795(A)(3). The "including, but not limited to" language makes clear that the Legislature did not intend that the list of enumerated activities was exhaustive. Although loading a boat and preparing to depart to a camp are not any of the specific enumerated activities, the definition of recreational purpose is broad enough to include the normal activities associated with boating and camping.

[4] The plain wording of the Immunity Act only requires that the lessee permits with or without charge any person to use his land for recreational purposes. ****10** La.R.S. 9:2795(B)(1). The statute does not require that the injury arise out of the recreational activity *per se,* as long as the person injured was on the property for a recreational purpose. ***547** *Webb v. Parish of St. Tammany,* 06–0849, p. 6 (La.App. 1 Cir. 2/9/07), 959 So.2d 921, 925, *writ denied,* 07–0521 (La.4/27/07), 955 So.2d 695 (citation omitted).

The levee walkway granted access to the bayou and allowed people to continue to enjoy the recreational purposes provided by boating and camping. In *Broussard v. Dep't of Transp. & Dev., State of La.,* 539 So.2d 824, 832 (La.Ct.App. 3 Cir.1989), the plaintiff, who was injured on a concrete boat launch ramp, sued the State for its alleged failure to maintain the ramp. The Third Circuit concluded that a boat ramp that the owner built to make marsh areas available to the public for recreational purposes fell within the purview of the Immunity Act. LSA–R.S. 9:2791 and 9:2795.

[5] We hold that the levee was recreational within the meaning of the Immunity Act. Because of the expansive definition of "recreational purpose", we find that the levee itself need not be recreational in character. Although the levee walkway

adjacent to Bayou Segnette might not be primarily recreational in character, boating in the bayou is certainly recreational and the levee walkway allowed boaters the ability to reach their boats. Taken as a whole, we find that the bayou and its adjacent levee walkway were intended or permitted to be used for recreational purposes.

Mrs. Richard's purpose at the time of her alleged injury had undoubtedly been recreational, within the meaning of the recreational use statute. She was in the process of boarding the boat to resume camping activities. Boating and camping fall within the definition of "recreational purposes," to which the recreational use statute applied.

****11** In this case, the plaintiffs were using the levee located on the defendant's property for the purpose of engaging in camping and boating recreational activities. The levee afforded the means through which the plaintiffs could access a boat to the camp site.

The sole purpose of Mrs. Richard's walk over the defendant's levee property was to gain access to the boat to use for recreational purposes. The walk was an integral part of the recreational activities. Assuming non-recreational use of the levee for commercial fishing did take place, it did not affect the recreational use in question. As we see it, the inquiry in any given case is whether the permitted use in question is for recreational purposes on a noncommercial basis. *Broussard v. Dep't of Transp. & Dev., State of La.,* 539 So.2d 824, 831 (La.App. 3 Cir.1989).

We conclude, therefore, that the Recreational Use Statute is applicable and, in the absence of any exception, bars the instant claim.

Exception

[6] Appellants argue that even if this Court were to find that the Immunity Act applies, there is an issue of material fact precluding summary judgment because the defendant could still be found without immunity under La.R.S. 9:2795(B)(1) for "willful or malicious failure to warn against a dangerous condition, use, structure, or activity." "A failure to warn of a dangerous condition connotes a conscious course of action, and is deemed willful or malicious when action is knowingly taken or not taken, which would likely cause injury, with conscious indifference to consequences thereof." *Robinson v. Jefferson Parish Sch. Bd.,* 08–1224, p. 18 (La.App. 5 Cir. 4/7/09), 9 So.3d 1035, 1046, *writ denied,* 09–1187 (La.9/18/09), 17 So.3d 975 (citations omitted).

[7] ****12** As a general rule, the defendant owed a duty to discover any unreasonably dangerous condition on the premises and either correct it or warn potential victims ***548** of its existence. However, this duty does not extend to potentially dangerous conditions which should have been observed by an individual in the exercise of reasonable care or which are as obvious to a property owner as to a visitor. *Wood v. State, ex rel. Dept. of Wildlife & Fisheries,* 43,457, p. 13 (La.App. 2 Cir. 8/13/08), 989 So.2d 280, 288, *writ denied,* 08–2192 (La.11/14/08), 996 So.2d 1094 (citations omitted).

[8] In this case, Mrs. Richard testified that she was well aware of the ruts in the levee before the alleged accident. Thus, the defendant's duty did not extend to the alleged obvious potentially dangerous condition.

[9] Furthermore, once the defendant established that it was entitled to immunity under La.R.S. 9:2795, the burden of establishing a malicious or willful failure to warn of a dangerous condition shifted to the plaintiffs, who presented no summary judgment evidence in this regard. *DeLafosse v. Vill. of Pine Prairie,* 08–0693, p. 5 (La.App. 3 Cir. 12/10/08), 998 So.2d 1248, 1252, *writ denied,* 09–0074 (La.2/4/09), 999 So.2d 766. Specifically, the plaintiffs made no showing that the defendant was aware of the alleged danger.

In *Robinson v. Jefferson Parish Sch. Bd.,* 08–1224, p. 18 (La.App. 5 Cir. 4/7/09), 9 So.3d 1035, 1046, *writ denied,* 09–1187 (La.9/18/09), 17 So.3d 975, the plaintiffs asked the Court to assume that since the person who arranged the ROTC trip was aware of the a sudden drop off into the lake, then the recreational facility was also aware of the alleged danger to swimmers. This Court declined to adopt that assumption, and found that the plaintiffs failed to meet their burden of showing a willful or malicious failure to warn against a dangerous condition, use, structure, or activity. *Id.*

****13** Therefore, since the plaintiffs, who would bear the burden of proof at trial, failed to produce factual support sufficient to establish that they will be able to satisfy their evidentiary burden of proof at trial on this matter, there is no genuine issue of material fact.

Conclusion

Accordingly, for the reasons stated, the judgment is affirmed.

AFFIRMED

All Citations

82 So.3d 541, 11-309 (La.App. 5 Cir. 12/28/11)

Footnotes	
1	The language in La.R.S. 9:2791, which provides that the Immunity Act shall not apply "when the premises are used principally for a commercial, recreational enterprise for profit" conflicts with the language in La.R.S. 9:2795, which provides the immunity is afforded to the owner, "except an owner of commercial recreational developments or facilities[.]" Because Acts 1975, No. 615, § 7 specifically provides all parts of laws in conflict with La. R.S. 9:2795 are repealed, the controlling provision in determining who is afforded immunity when the premises are a commercial recreational enterprise is the language of La.R.S. 9:2795. *Richard v. Hall,* 03–1488, p. 25 (La.4/23/04), 874 So.2d 131, 150. Therefore, the person claiming the immunity must utilize the premises for a commercial recreational enterprise for profit to be excluded from the immunity provisions. *Id.* at 29, 874 So.2d at 152.
2	La.R.S. 9:2795(A)(1) broadly defines "land" as "urban or rural land, roads, water, watercourses, private ways or buildings, structures, and machinery or equipment when attached to the realty." Prior to its amendment in 2001, La.R.S. 9:2795 did not specifically include urban land. The amendment inserted "urban or rural" preceding "land, roads, water" in paragraph (A)(1).

959 So.2d 921
Court of Appeal of Louisiana,
First Circuit.

Robert Gene WEBB
v.
THE PARISH OF ST. TAMMANY, Recreational District No. 1, the Louisiana Department of Transportation and Development, XYZ Management Company, ABC Insurance Company and 123 Insurance Company.

No. 2006 CA 0849. | Feb. 9, 2007. | Writ Denied April 27, 2007.

Synopsis
Background: Motorcyclist brought action against parish recreation district, as park operator, to recover for personal injuries received in incident in which motorcyclist, when attempting to leave park property after softball game, lost control of motorcycle and landed in storm drain when softball field lights, which provided incidental light to roadway, were

extinguished. The 22nd Judicial District Court, No. 2003-13866, Division E, Parish of St. Tammany, William J. Burris, J., granted summary judgment for recreation district. Motorcyclist appealed.

Holdings: The Court of Appeal, McDonald, J., held that:

[1] there was no showing of an unreasonably dangerous condition on park property, as required to avoid application of recreational use immunity statute;

[2] injury during softball game itself was not required for application of recreational use immunity statute; and

[3] location of accident on a paved road rather than a rural locale did not preclude application of recreational use immunity statute.

Affirmed.

Whipple, J., concurred and assigned reasons.

West Headnotes (4)

[1]	**Automobiles** Notices, Warning Signals, or Lights
	There was no showing of an unreasonably dangerous condition on park property, as required to avoid application of recreational use immunity statute to preclude liability on part of parish recreation district, as park operator, for motorcyclist's personal injuries received in incident in which motorcyclist, when attempting to leave park after softball game, lost control of motorcycle and landed in storm drain when softball field lights, which provided incidental light to roadway, were extinguished. LSA-R.S. 9:2795(B). Cases that cite this headnote

[2]	**Automobiles** Notices, Warning Signals, or Lights
	Injury during softball game itself was not required for application of recreational use immunity statute to preclude liability on part of parish recreation district, as park operator, for motorcyclist's personal injuries received in incident in which motorcyclist, when attempting to leave park after softball game, lost control of motorcycle and landed in storm drain when softball field lights, which provided incidental light to roadway, were extinguished; motorcyclist went to park to participate in recreational activities and was still on park property at time of accident. LSA-R.S. 9:2795. 1 Cases that cite this headnote

[3]	**Municipal Corporations** Parks and Public Squares and Places **States** State Parks, Injuries In
	Recreational use immunity statute, providing limitation of liability for owners and operators of property used for recreational purposes, including state or municipal public parks, does not require that the injury arise out of the recreational activity per se, as long as the person injured was on the property for a recreational purpose. LSA-R.S. 9:2795. 4 Cases that cite this headnote

[4]	**Automobiles** Places to Which Liability Extends **Automobiles** Notices, Warning Signals, or Lights
	Location of motorcyclist's accident on a paved, developed road on public park property rather than a rural locale did not preclude application of recreational use immunity statute to preclude liability on part of parish recreation district, as park operator, for motorcyclist's personal injuries received in incident in which motorcyclist, when attempting to leave park after softball game, lost control of motorcycle and landed in storm drain when softball field lights, which provided incidental light to road, were extinguished; provisions of immunity statute applied to urban lands, pursuant to statutory amendment that occurred prior to incident. LSA-R.S. 9:2795. Cases that cite this headnote

Attorneys and Law Firms

***922** Hector R. Lopez, Brian G. Meissner, Rykert O. Toledano, Jr., Gordon R. Herrin, Covington, Counsel for Plaintiff/Appellant Robert Gene Webb.

Stephen D. Enright, Jr., Lauren E. Brisbi, Metairie, Counsel for Defendant/Appellee Recreation District Number 1 of St. Tammany Parish.

Before: CARTER, C.J., WHIPPLE and McDONALD, JJ.

Opinion

***923** McDONALD, J.

****2** Plaintiff, Robert Gene Webb, appeals a district court judgment granting the defendant's motion for summary judgment. We affirm.

FACTUAL AND PROCEDURAL HISTORY

On April 18, 2002, Mr. Webb participated in an organized softball game at Pelican Park in Mandeville, Louisiana. Upon completion of the game, Mr. Webb mounted his motorcycle in the parking lot adjacent to the softball field and prepared to leave the park. Just before he exited the parking lot onto the roadway leading out of the park, the lights on the softball field, which had provided incidental lighting to the roadway, were extinguished. Thereafter, while still on park property, Mr. Webb failed to properly negotiate an "S" curve in the roadway and lost control of his motorcycle. As a result, Mr. Webb landed in a storm drain near the roadway, sustaining severe personal injuries.

Mr. Webb subsequently filed suit against various defendants, including Recreation District Number One of St. Tammany Parish (the District),[1] the operator of Pelican Park. The District filed a motion for summary judgment, contending that it was entitled to immunity pursuant to LSA-R.S. 9:2795. After a hearing, the district court granted the motion in open court. A judgment granting the motion and dismissing Mr. Webb's claims against the District was signed on December 8, 2005. It is from this judgment that Mr. Webb has appealed.

APPLICABLE LAW

Appellate courts review summary judgments *de novo* under the same criteria that govern the trial court's determination of whether a summary judgment is appropriate. *Duplantis v. Dillard's Dept. Store,* 2002-0852, p. 5 (La.App. 1 Cir. 5/9/03), 849 So.2d 675, 679, *writ denied,* **3 2003-1620 (La.10/10/03), 855 So.2d 350. A motion for summary judgment should only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial, its burden on the motion does not require it to negate all essential elements of the adverse party's action, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2). Because it is the applicable law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can be seen only in light of the substantive law applicable to the case. *Dickerson v. Piccadilly Restaurants, Inc.,* 99-2633, pp. 3-4 (La.App. 1 Cir. 12/22/00), 785 So.2d 842, 844.

Louisiana Revised Statute 9:2795 provides:

> A. As used in this Section:
>
> (1) "Land" means urban or rural land, roads, water, watercourses, private ways or buildings, structures, and machinery ***924** or equipment when attached to the realty.
>
> (2) "Owner" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.
>
> (3) "Recreational purposes" includes but is not limited to any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized, or nonmotorized vehicle operation for recreation purposes, nature study, water skiing, ice skating, roller skating, roller blading, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or viewing or enjoying historical, archaeological, scenic, or scientific sites.
>
> ****4** (4) "Charge" means the admission price or fee asked in return for permission to use lands.
>
> (5) "Person" means individuals regardless of age.
>
> B. (1) Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:
>
> (a) Extend any assurance that the premises are safe for any purposes.
>
> (b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring or man-made.

(2) The provisions of this Subsection shall apply to owners of commercial recreational developments or facilities for injury to persons or property arising out of the commercial recreational activity permitted at the recreational development or facility that occurs on land which does not comprise the commercial recreational development or facility and over which the owner has no control when the recreational activity commences, occurs, or terminates on the commercial recreational development or facility.

C. Unless otherwise agreed in writing, the provisions of Subsection B shall be deemed applicable to the duties and liability of an owner of land leased for recreational purposes to the federal government or any state or political subdivision thereof or private persons.

D. Nothing in this Section shall be construed to relieve any person using the land of another for recreational purposes from any obligation which he may have in the absence of this Section to exercise care in his use of such land and in his activities thereon, or from the legal consequences of failure to employ such care.

E. (1) The limitation of liability provided in this Section shall apply to any lands or water bottoms owned, leased, or managed by the Department of Wildlife and Fisheries, regardless of the purposes for which the land or water bottoms are used, and whether they are used for recreational or nonrecreational purposes.

(2)(a) The limitation of liability provided in this Section shall apply to any lands, whether urban or rural, which are owned, leased, or managed as a public park by the state or any of its political subdivisions and which are used for recreational purposes.

(b) The provision of supervision on any land managed as a public park by the state or any of its political subdivisions does not create any ****5** greater duty of care which may exist and does not create ***925** a duty of care or basis of liability for personal injury or for damage to personal property caused by the act or omission of any person responsible for security or supervision of park activities, except as provided in Subparagraph (E)(2)(d) of this Section.

(c) For purposes of the limitation of liability afforded to parks pursuant to this Section this limitation does not apply to playground equipment or stands which are defective.

(d) The limitation of liability as extended to parks in this Section shall not apply to intentional or grossly negligent acts by an employee of the public entity.

F. The limitation of liability extended by this Section to the owner, lessee, or occupant of premises shall not be affected by the granting of a lease, right of use, or right of occupancy for any recreational purpose which may limit the use of the premises to persons other than the entire public or by the posting of the premises so as to limit the use of the premises to persons other than the entire public.

DISCUSSION

In his first assignment of error, Mr. Webb contends that the district court erred in granting summary judgment because the District failed to demonstrate that it did not willfully or maliciously fail to warn against a dangerous condition on the park property. The parties do not dispute that the District operated Pelican Park or that the park was made available to the public for recreational purposes. It is further undisputed that Mr. Webb had gone to Pelican Park on the day in question to participate in recreational activities. Thus, as the party moving for summary judgment, the District had sustained its initial burden of proof and established a prima facie case that it was entitled to immunity pursuant to LSA-R.S. 9:2795.

[1] After the District carried its initial burden, the burden shifted to Mr. Webb to prove the existence of an unreasonably dangerous condition on the park property. However, Mr. Webb failed to introduce any evidence that any such condition existed on the property. Therefore, Mr. Webb failed to demonstrate that he would be able to meet his burden of proof at trial.

[2] ****6** In his second assignment of error, Mr. Webb contends that the trial court erred in granting summary judgment because there was a genuine issue of material fact as to whether he was engaging in recreational activity at the time of the accident. According to Mr. Webb, because the softball game had been completed, and he was merely exiting the park at the time of the accident, the District was no longer entitled to the immunity provided by LSA-R.S. 9:2795.

[3] A plain reading of the statute does not provide support for this argument. The statute does not require that the injury arise out of the recreational activity *per se,* as long as the person injured was on the property for a recreational purpose. *Cooper v. Cooper,* 34,717, p. 6 (La.App. 2 Cir. 5/9/01), 786 So.2d 240, 244, *writ denied,* 2001-1681 (La.9/21/01), 797 So.2d 675. The record is clear that Mr. Webb went to Pelican Park on the date of the accident to participate in recreational activities, and he was still on park property at the time of the accident. Thus, we find no merit in this assignment of error.

[4] In his final assignment of error, Mr. Webb avers that the district court erred in granting the summary judgment because there were genuine issues of material fact about whether he was on land used for recreational purposes at the time of the incident. In support of this argument, ***926** Mr. Webb relies on the jurisprudentially established three-prong test for determining whether the property in question is used for recreational purposes within the meaning of the statute. Specifically, Mr. Webb relies on the first prong, which requires that the property on which the injury occurs must be an undeveloped, nonresidential, and rural or semi-rural locale. *Johnson v. City of Morgan City,* 99-2968, p. 3 (La. App 1 Cir. 12/22/00), 787 So.2d 326, 329, *writ denied,* 01-0134 (La.3/16/01), 787 So.2d 315. Mr. Webb suggests that this prong has not been met because at the time of the accident, he was exiting the park on a paved, developed road. He further contends that the road ****7** was not intended or used for recreational purposes as it was merely intended to provide access to and from the park.

We note that the incident in Johnson occurred prior to the 2001 amendment of LSA-R.S. 9:2795, which extended the provisions of the statute to urban lands as well. Therefore, the plain language of the statute does not preclude its application to the paved road on Pelican Park property.[2] Furthermore, the record is clear that Mr. Webb was still on park property at the time of the accident, and that the park was used for recreational purposes. Thus, his specific location on the property is irrelevant.

After a *de novo* review of the record, we find no error in the judgment of the district court. Accordingly, we affirm the judgment of the district court. All costs of this appeal are assessed to Robert Gene Webb.

AFFIRMED.

WHIPPLE, J., concurs for reasons assigned.

WHIPPLE, J. concurring.

****1** In accordance with the recreational use immunity statute, after the District carried its initial burden, the burden shifted to Mr. Webb to prove the existence of an unreasonably dangerous condition on the park property and the District's willful or malicious failure to warn of such a condition. *See* LSA-R.S. 9:2725(B). Pretermitting whether Mr. Webb made a showing of willful or malicious failure to warn, clearly, Mr. Webb failed to introduce any evidence that any such unreasonably dangerous condition existed. Therefore, as the majority correctly notes, Mr. Webb failed to make the required showing that he would be able to meet his burden of proof at trial. For these reasons, I concur in the majority's decision to affirm the judgment of the district court.

All Citations

959 So.2d 921, 2006-0849 (La.App. 1 Cir. 2/9/07)

Footnotes	
1	The District is interchangeably referred to throughout the record as "Recreational District No. 1," "Recreation District No. 1," and "Recreation[al] District Number One."
2	We do not address the continued applicability of Johnson in light of the amendment; rather, we merely note that the amended language of the statute specifically indicates that it is applicable to this property.

2012 WL 5866061
Only the Westlaw citation is currently available.
United States District Court,
E.D. Louisiana.

Darla DHILLON
v.
OAK ALLEY FOUNDATION, L.L.C., et al.

Civil Action No. 11–3064. | Nov. 19, 2012.

Attorneys and Law Firms

Maria I. O'Byrne Stephenson, Kathleen Diane Lambert, Stephenson, Chavarri & Lambert, LLC, New Orleans, LA, for Plaintiff.

Andrew D. Weinstock, Philip G. Watson, Ryan M. Malone, Duplass, Zwain, Bourgeois, Pfister & Weinstock, Metairie, LA, for Defendants.

ORDER AND REASONS

ELDON E. FALLON, District Judge.

***1** The Court has received Defendants Oak Alley Foundation and Catlin Specialty Insurance Company's motion for summary judgment. (Rec.Doc.21). The Court has reviewed the briefs and the applicable law and now issues this Order and Reasons.

I. BACKGROUND

This cases arises out of personal injuries to Plaintiff Darla Dhillon, a California resident. Plaintiff alleges that on April 17, 2011, she visited Oak Alley Plantation, a national historic landmark located in Vacherie, Louisiana. Oak Alley Plantation is operated by Defendant Oak Alley Foundation ("Oak Alley"), a Louisiana organization with 501(c)(3) nonprofit status, and has a liability insurance policy with Defendant Catlin Specialty Insurance Company ("Catlin"), a Delaware corporation. The grounds of Oak Alley Plantation contain a mansion and a 300–year–old alley of oak trees.

Plaintiff claims to have been injured while walking from the mansion's entrance to the front of the house to view the alley of oak trees. She alleges that she walked straight out toward the trees through an opening between the pillars of the veranda, and that "there was a difference in height between the veranda and the surrounding ground, which was not discernible." (First Amend. Compl., Rec. Doc. 10 at ¶ 8). Plaintiff claims that as a result of this difference in height, she lost her balance and broke both ankles. *Id.* at ¶¶ 8–9. She brings claims against Defendants for negligence and strict liability in failing to maintain the property in a safe condition and failing to warn Plaintiff of the allegedly dangerous condition that caused her injuries.

II. PRESENT MOTIONS

Defendants Oak Alley and Catlin now move for summary judgment. (Rec.Doc.21). They argue that Oak Alley is entitled to immunity under the Louisiana Recreational Use Immunity Statutes, and as a result, liability exists only if Oak Alley acted willfully or maliciously in failing to warn Plaintiff of the difference in height between the veranda and the ground. Plaintiff opposes Defendants' motion and argues that Oak Alley is not entitled to immunity, and even if it were, there is a genuine issue of material fact with respect to whether the failure to warn was willful or malicious.

III. LAW AND ANALYSIS

A. Standard of Review

Summary judgment is appropriate if the moving party can show "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Under Federal Rule of Civil Procedure 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). When the moving party has met its Rule 56(c) burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. *See Prejean v. Foster,* 227 F.3d 504, 508 (5th Cir. 2000). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 253 (1986). Furthermore, "[t]he non-movant cannot avoid summary judgment ... by merely making 'conclusory allegations' or 'unsubstantiated assertions.' " *Calbillo v. Cavender Oldsmobile, Inc.,* 288 F.3d 721, 725 (5th Cir.2002) (quoting *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir .1994)). In deciding a summary judgment motion, the court reviews the facts drawing all reasonable inferences in the light most favorable to the nonmovant. *Id.* at 255.

B. Louisiana Recreational Use Immunity Statutes

***2** The Louisiana Recreational Use Immunity Statutes limit the liability of landowners who open their property to the public for non-commercial recreational purposes. There are two main statutes that govern this immunity. The first, located at § 9:2791, provides:

> (A) An owner, lessee, or occupant of premises owes no duty of care to keep such premises safe for entry or use by others for hunting, fishing, camping, hiking, *sightseeing,* or boating or to give warning of any hazardous conditions, use of, *structure,* or activities on such premises to persons entering for such purposes, *whether the hazardous condition or instrumentality causing the harm is one normally encountered in the true outdoors or one created by the placement of structures or conduct of commercial activities on the premises.* If such an owner, lessee, or occupant gives permission to another to enter the premises for such recreational purposes he does not thereby extend any assurance that the premises are safe for such purposes or constitute the person to whom permission is granted one to whom a duty of care is owed, or assume responsibility for or incur liability for any injury to persons or property caused by any act of person to whom permission is granted.
>
> (B) This Section does not exclude any liability which would otherwise exist for deliberate and willful or malicious injury to persons or property.... Furthermore the provisions of this Section shall not apply when the premises are used principally for a commercial, recreational enterprise for profit....
>
> (C) The word "premises" as used in this Section includes lands, roads, waters, water courses, private ways and *buildings,* structures, machinery or equipment thereon.
>
> ...

La.Rev.Stat. § 9:2791 (emphasis added). The second statute is located at § 9.2795:

> (A) As used in this Section:
>
> (1) "Land" means *urban or rural* land, roads, water, watercourses, private ways or *buildings,* structures, and machinery or equipment when attached to the realty....
>
> (3) "Recreational purposes" includes but is not limited to any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized, or nonmotorized vehicle operation for recreation purposes, nature study, water skiing, ice skating, roller skating, roller blading, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or *viewing or enjoying historical, archaeological, scenic, or scientific sites.*
>
> ...
>
> (B)

(1) Except for willful or malicious failure to warn against a dangerous condition, use, structure, or activity, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:

(a) Extend any assurance that the premises are safe for any purposes.

***3** (b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Incur liability for any injury to person or property caused by any defect in the land *regardless of whether naturally occurring or man-made.*

...

La.Rev.Stat. § 9:2795 (emphasis added). With respect to the relationship between the two statutes, the Supreme Court of Louisiana has stated: "Inasmuch as La.Rev.Stat. § 9:2795 was the later expression of legislative will and has been amended six times, we conclude the Legislature has impliedly expressed an intention that § 2795 be controlling as between these two statutes." *Richard v. Hall,* 874 So.2d 131, 151 (La.2004).

Historically, § 2791 and § 2795 provided narrower immunity than they currently do. The Supreme Court of Louisiana interpreted older versions of those statutes and concluded that their purpose was "to confer immunity on owners of undeveloped, nonresidential rural or semi-rural land areas." *Keelen v. State, Dept. of Culture, Recreation & Tourism,* 463 So. 2d 1287, 1289 (La.1985). This interpretation produced a three-part test to determine whether immunity applied: (1) the injury had to occur on "undeveloped, non-residential, and rural or semi-rural" land; (2) the injury had to be "the result of recreation that can be pursued in the 'true outdoors' "; and (3) the instrumentality that caused the injury had to be "of the type normally encountered in the 'true outdoors' and not 'of the type usually found in someone's backyard.' " *Fournerat v. Farm Bureau Ins. Co.,* —— So.3d ——, 2012 WL 4320226, at *9 (La.Ct.App.2012) (quoting *Keelen,* 463 So.2d at 1290). The Supreme Court of Louisiana has also provided guidance on the principles of interpreting the Recreational Use Immunity Statutes, noting that they are "in derogation of a common law right and therefore, are to be strictly interpreted." *Monteville v. Terrebonne Parish Consol. Gov't,* 567 So.2d 1097, 1100 (La.1990).

However, subsequent amendments to these statutes have broadened their grant of immunity. The current version of the statutes includes both "urban" and "rural" lands, § 2795(A)(1), and covers defects in the land that are both "naturally occurring" and "manmade," § 2795(B)(1)(c). A 2001 amendment also added new activities to § 2795(A)(1), including nonmotorized vehicle operation, roller skating, and skate boarding. La. Acts 2001, No. 1199, § 1. Furthermore, a 2003 amendment to § 2791(A) resulted in the inclusion of hazardous conditions and harm-causing instrumentalities "normally encountered in the true outdoors" as well as those "created by the placement of structures or conduct of commercial activities on the premises." La. Acts 2003, No. 716, § 1. Thus, Louisiana courts have held on multiple occasions that the first and third prongs of the *Keelen* test no longer apply. *See, e.g., Fournerat,* 2012 WL 4320226, at *10; *Lambert v. State,* 912 So.2d 426, 430 (La.Ct.App.2005).

C. Analysis

1. Immunity

***4** Defendants' primary basis for their summary judgment motion is their contention that Oak Alley is entitled to immunity under the Recreational Use Immunity Statutes. Defendants assert, and Plaintiff does not appear to dispute, that Oak Alley does not operate the plantation as a commercial enterprise for profit; § 2795 expressly provides that the existence of an admission charge does not disqualify a non-commercial enterprise from immunity under the statute. *See* La.Rev.Stat. § 9:2795(A)(4), (B)(1). As Defendants note, it is undisputed that Oak Alley is 501(c)(3) nonprofit organization. As such, it is evident that Oak Alley is not excluded from coverage under the Recreational Use Immunity Statutes on the grounds that it is actually the owner of a commercial recreational facility.

However, Plaintiff and Defendants disagree over whether Plaintiff was injured while engaged in a recreational activity within the coverage of the statutes. Defendants cite statutory language in both § 2791 and § 2795 to argue that Plaintiff's injury, which occurred as she was walking across the veranda of Oak Alley Plantation in order to the view the alley of oak trees, is within the statutes' purview. Section 2795 includes "viewing or enjoying historical ... sites" in its definition of "[r]ecreational purposes," La.Rev.Stat. § 9:2795(A)(3), and includes attached "buildings" and "structures" in its definition of covered "[l]and," *id.* § 9:2795(A)(1). Though not controlling in the case of a conflict, § 2791 includes "sightseeing" in its list of covered activities, *id.* § 9:2791(A), and also includes "buildings" and "structures" in its definition of covered "premises," *id.* § 9:2791(C). Defendants argue that they are entitled to immunity because Plaintiff was injured while "viewing or enjoying [a] historical ... site[ ]," or "sightseeing," on a "building [ ]" attached to the land.

Plaintiff responds by citing the original purpose of the Recreational Use Immunity Statutes, as well as the second prong of the *Keelen* test described above. As the court noted in *Keelen,* the original purpose of the immunity statutes was "to confer immunity upon owners of undeveloped, nonresidential rural or semi-rural land areas" in order to encourage them to make those lands available for public recreational use. 463 So.2d at 1290 (citing 1975 La. Acts, No. 615, § 1). Thus, the *Keelen* Court developed the three-prong test described above. Although Plaintiff concedes that the first and third prongs of that test have subsequently been removed, Plaintiff asserts that the second prong still applies and precludes immunity in this case. As described above, the second prong of the *Keelen* test requires that the person be injured while engaged in "recreation that can be pursued in the 'true outdoors.' " *Id.* Plaintiff argues that she was not engaged in this type of activity when injured.

Furthermore, Plaintiff argues that only some "buildings" and "structures" are included in the Recreational Use Immunity Statutes. In *Keelen,* the court noted:

> ***5** The existence of some improvements on relatively undeveloped rural or semi-rural property does not change the character of the land so as to deprive its owner of the immunity granted by the statutes. Improvements such as shelters, toilet facilities, fireplaces, etc. are merely conveniences incidental to the use of the land for enumerated recreational activities and do not of themselves take property out of a rural, undeveloped classification. This view is reinforced by the fact that the definitions of "premises" in La.Rev.Stat. § 9:2791 and of "land" in La.Rev.Stat. § 9:2795 include "buildings, structures and machinery."

463 So.2d at 1290. Plaintiff argues that the Oak Alley mansion is not included within the statutory scheme, because "the property is highly developed," and the building "is not incidental to the use of the land for enumerated recreational activities."

In support of these arguments, Plaintiff notes the general lack of similar cases in which immunity was found to exist, and suggests that in the cases in which immunity has been found, the activity was of a much more "outdoor" nature. *See, e.g., Richard v. Hall,* 874 So.2d 131 (La.2004) (injury on plantation while duck hunting); *Richard v. La. Newpack Shrimp Co., Inc.,* 82 So.3d 541, 547 (La.Ct.App.2011) (injury on levee walkway granting access to bayou for boating and camping); *Ramos v. State, ex rel. Dept. of Transp. & Dev.,* 977 So.2d 1066 (La.Ct.App.2008) (injury on rope swing into creek); *Benoit v. City of Lake Charles,* 907 So.2d 931 (La.Ct.App.2005) (injury in public park).

The Court understands the original purpose of the Recreational Use Immunity Statutes, but that context alone is insufficient to permit a departure from the clear and explicit statutory text cited by Defendants. Plaintiff was on Oak Alley's property for the purpose of"viewing or enjoying [a] historical site [ ]," or "sightseeing." She was injured while engaged in that activity, on a "building[ ]" attached to Oak Alley's property. As Defendants note, it is no longer completely clear whether the second prong of the *Keelen* test applies, but even if it does, viewing a historic alley of oak trees is arguably the type of activity that can be pursued only in the outdoors. Moreover, Plaintiff's arguments regarding the highly developed nature of the property speak more directly to the third (now repealed) prong of the *Keelen* test, which related to the instrumentality or condition that caused Plaintiff's injury, and are no longer wholly relevant now that this element has been removed.

For these reasons, Oak Alley is entitled to immunity under the Recreational Use Immunity Statutes in this case.

2. Willful or Malicious Failure to Warn

Because Defendants are covered by the Recreational Use Immunity Statutes, they are liable for Plaintiff's injuries only for "willful or malicious failure to warn against a dangerous condition, use, structure, or activity." La.Rev.Stat. § 9:2795. "[A] failure to warn of a dangerous condition connotes a conscious course of action, and is deemed willful or malicious when action is knowingly taken or not taken, which would likely cause injury, with conscious indifference to consequences thereof." *Lambert v. State,* 912 So.2d 426, 434 (La.Ct.App.2005); *see also Robinson v. Jefferson Parish Sch. Bd.,* 9 So.3d 1035, 1046 (La.Ct.App.2009); *DeLaFosse v. Village of Pine Prairie,* 998 So.2d 1248, 1251–52 (La.Ct.App.2008). Defendants argue that there is no evidence of such willful or malicious conduct in this case.

***6** In opposition, Plaintiff argues that Defendants were on notice of the dangerous condition, yet they did not act to remedy that condition. In support of this contention, Plaintiff cites Defendants' admission in written discovery that other, similar injuries have occurred on the veranda (Ex. B to Pl.'s Opp., Rec. Doc. 22–3 at 5) and attaches copies of three incident reports in which guests suffered somewhat similar injuries (Ex. C to Pl.'s Opp., Rec. Doc. 22–4 at 5–10). Thus, Plaintiff argues that there remains a genuine issue of material fact with respect to whether Oak Alley willfully or maliciously failed to warn Plaintiff because Oak Alley was aware of the danger posed by its veranda, yet did nothing—that is, Oak Alley exhibited "conscious indifference" to the consequences of its failure to act.

In response to this argument, Defendants first note that two of the three incident reports involve guests who missed the step down from the patio because they were looking up at the oak trees. Defendants then argue that the difference in height is not an "unreasonably dangerous condition." (Defs.' Reply, Rec. Doc. 25 at 4). Furthermore, Defendants argue that Plaintiff's evidence speaks more to a general negligence standard—that Oak Alley knew, or should have known, of the danger—than to the heightened "willful or malicious" standard that applies here. Finally, Defendants note that it would be impossible for them "to post warnings and blockades at every conceivable location where there is a 'difference in height' from the surrounding ground. *Id.*

The Court first notes that under this statute, a condition does not have to be "unreasonably dangerous," as Defendants argue, but merely "dangerous," meaning "likely [to] cause injury." *Lambert,* 912 So.2d at 434. Nonetheless, Plaintiff has not shown a genuine issue of material fact with respect to whether Defendants' failure to warn of the difference in height between the veranda and the surrounding ground was "willful or malicious." The mere fact that between one and four other guests to Oak Alley out of the millions of visitors since 1976 had previously tripped in the same vicinity as the Plaintiff in this case does not render Oak Alley's failure to warn "willful or malicious," particularly given the differing circumstances and nature of the other reported injuries. This case is not like *Lambert v. State,* 912 So.2d 426, in which the dangerous condition at issue had resulted in at least 30 similar deaths over the course of 20 years, and protective measures had been discussed and taken, then allegedly abandoned. *Id.* at 435. Instead, this case resembles *Robinson v. Jefferson Parish School Board,* 9 So.3d 1035 (La.Ct.App.2009), in which the court held that mere evidence of awareness of a dangerous condition did not suffice to prove willful or malicious failure to warn of that condition. *Id.* at 1046.

In short, it is not entirely clear that the difference in height between the veranda and the ground—apparently, a difference of several inches-is actually "dangerous," but regardless, there is no a genuine issue of material fact with respect to whether Oak Alley willfully or maliciously failed to warn of that condition.

IV. CONCLUSION

***7** For the foregoing reasons, IT IS ORDERED that Defendants' motion for summary judgment (Rec.Doc.21) is GRANTED. Plaintiff's claims are DISMISSED WITH PREJUDICE.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5866061

2013 WL 3894106
Only the Westlaw citation is currently available.
United States District Court,
W.D. Louisiana,
Lake Charles Division.

Summer SEXSON, et al
v.
BOISE CASCADE CORPORATION.

No. 2:12–CV–02846–PM–KK. | July 25, 2013.

Attorneys and Law Firms

S. Christie Smith, IV, Smith Law Firm, Leesville, LA, for Summer Sexson, et al.

Andrew H. Meyers, Breaud & Meyers, Lafayette, LA, for Boise Cascade Corporation.

MEMORANDUM RULING

PATRICIA MINALDI, District Judge.

***1** Before the court is a Motion for Summary Judgment [Doc. 17], filed by the defendant, Boise Packing & Newsprint, LLC. ("Boise"). The plaintiff, Summer Sexson, filed an opposition [Doc. 20], as did her workers' compensation provider/the intervenor-plaintiff, Vernon Parish School Board [Doc. 19]. Boise then filed a reply [Doc. 24]. For the foregoing reasons, Boise's Motion for Summary Judgment is GRANTED.

FACTUAL BACKGROUND

This case arises out of personal injuries sustained by the plaintiff, Ms. Sexson (a Leesville High School cross country coach), when her leg fell into a covered hole on the premises of Boise's paper mill facility during a high school cross country meet.[1] Ms. Sexson originally filed suit in the Thirty–Sixth Judicial Court of Beauregard Parish in October 2012, and Boise then timely removed to this court on the basis of diversity jurisdiction, 28 U.S.C. § 1332.[2]

The undisputed facts are as follows:

For a number of years, Boise has allowed DeRidder High School to hold an annual crosscountry meet (the DeRidder High School Boise Cascade Meet) on its property, known as the Boise paper mill, in DeRidder, Louisiana.[3] Boise does not charge DeRidder High School or any other party to use the premises for the meet, although high schools must pay an entry fee to DeRidder High School to participate in the meet.[4]

Participants in the DeRidder High School Boise Cascade Meet run through the property in predefined jogging trails and pass by a location known as the "Bocade Recreation Park."[5] The Bocade Recreation Park includes a structure that provides spectators, coaches, and athletes shade, restroom facilities, and Boise-supplied refreshments.[6]

On October 13, 2011, Ms. Sexson was at the Boise paper mill for the annual meet. Prior to the race, Ms. Sexson was in the area of the Bocade Recreation Park assisting one of her cross-country runners.[7] She then spoke to her team before turning and walking away.[8] One of the runners then "hollered" at Ms. Sexson, which made her turn and walk back to speak to the runner.[9] While en route, she stepped into what appeared to be a man-made hole about two and a half to three feet deep and eight to ten inches in diameter.[10] The hole was concealed by grass.[11] She sustained various injuries as a result of stepping into the hole.

Boise now moves for summary judgment on Ms. Sexson's claim for damages, arguing that it is immune from liability under Louisiana's Recreational Use Immunity Statutes.

MOTION FOR SUMMARY JUDGMENT STANDARD

A court should grant a motion for summary judgment when the pleadings, including the opposing party's affidavits, "show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party moving for summary judgment is initially responsible for demonstrating the reasons justifying the motion for summary judgment by identifying portions of pleadings and discovery that show the lack of a genuine dispute of material fact for trial. *Tubacex, Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir.1995). The court must deny the moving party's motion for summary judgment if the movant fails to meet this burden. *Id.*

***2** If the movant satisfies this burden, however, the nonmoving party must "designate specific facts showing that there is a genuine issue for trial." *Id.* (quoting *Celotex,* 477 U.S. at 323). In evaluating motions for summary judgment, the court must view all facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). There is no genuine issue for trial, and thus a grant of summary judgment is warranted, when the record as a whole "could not lead a rational finder of fact to find for the non-moving party ..." *Id.*

LAW AND ANALYSIS

The dispositive issue in this case is whether Louisiana's Recreational Use Immunity Statutes, La.Rev.Stat. ann. §§ 9:2791, 9:2795 provide immunity to Boise from Ms. Sexson's claims.

Ms. Sexson argues that Boise does not enjoy immunity from suit in this case, and is therefore liable for injuries she sustained on the Boise paper mill property. In support of this claim, she alleges that the Recreational Use Immunity Statutes are not applicable for the following reasons: (1) the cross-country meet that brought her onto Boise's land was not the type of event contemplated by the language of § 9:2795; (2) she was not on Boise's property for "recreational" purposes; (3) Boise's active role in hosting the event was outside the scope of the statutes; and, (4) Boise was grossly negligent in failing to warn the plaintiff of the hole on the property. The intervenor-plaintiff, Vernon Parish School District, additionally claims that the Bocade Recreation Park falls outside the protection of § 9:2795 because it is a property primarily used for commercial recreational purposes, and echoes Ms. Sexson's sentiments that Boise was grossly negligent in its failure to warn.

Boise counters that the Recreational Use Immunity Statutes provide total immunity against Ms. Sexson's claims. It avers that the legislature wrote the Recreational Use Immunity Statutes broadly to prevent private land owners from closing off their lands from the public out of fear of liability, and that failing to grant summary judgment would thus directly contradict the purpose of the legislation. Further, it claims that Ms. Sexson has failed to meet her burden of showing a genuine dispute of material fact as to Boise's alleged gross negligence in failing to warn of the hole in the property.

I. Is the Recreational Use Immunity Statute broad enough to cover Ms. Sexosn's claims?

Boise claims that the Recreational Use Immunity Statutes, which limit landowners' liability to third party injuries in some situations, clearly shields it from the suit at bar. As the plaintiff's first three arguments against application of the statute are interrelated on this point, the undersigned will address these arguments together.

As background, the court notes that §§ 9:2791 and 9:2795 relate to the same subject matter, and thus are to be read together. *Keelen v. State, Dept. of Culture, Recreation and Tourism,* 463 So.2d 1287, 1289 (La.1985). The two statutes were passed in 1964 and 1975, respectively. While the statutes differ slightly in "phraseology," they "essentially accomplish the same purpose ... to encourage landowners to open their lands, on a basically nonprofit basis for recreational use." *Fournerat v. Farm Bureau Ins. Co.,* 2011–1344 (La.App. 1 Cir. 9/21/12); 104 So.3d 76, 8081. As succinctly explained by the Louisiana First Circuit:

> ***3** [The Recreational Use Statutes] are in derogation of common or natural right and, therefore, are to be strictly interpreted, and must not be extended beyond their obvious meaning. *Monteville v. Terrbonne Parish Consol. Government,* 567 So.2d 1097, 1100 (La.1990). However, the enactment of La. R.S. 9:2795, a second more expansive immunity statute, evidences an intent on the Legislature's part that these statutes are to grant a broad immunity from liability. *Richard,* 2003–1488 at 28, 874 So.2d at 151. The statement of purpose of La. R.S. 9:2795 is contained in 1975 La. Acts, No. 615, § 1 and provides: "The purpose of this Act is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." *Richard,* 2003–1488 at 26, 874 So.2d at 150. Furthermore, 1975 La. Acts, No. 615, § 7 provides that all laws or parts of laws in conflict with La. R.S. 9:2795 are repealed. Inasmuch as La. R.S. 9:2795, as enacted by Act 615 of 1975, was the later expression of legislative will and has been amended six times, we conclude that the legislature has impliedly expressed an intention that La. R.S. 9:2795 be controlling as between these two statutes. *See Peterson v. Western World Ins. Co.,* 536 So.2d 639, 643 (La.App. 1 Cir.1988), *writ denied,* 541 So.2d 858 (La.1989). Thus, if there is a conflict between the statutes, the later enacted one, La. R.S. 9:2795, controls. *Richard,* 2003–1488 at 28, 874 So.2d at 151.

Id. at 81. Turning to § 9:2795, the statute states, in relevant part:

> A. (1) "Land" means urban or rural land, roads, water, watercourses, private ways or buildings, structures, and machinery or equipment when attached to the realty.
>
> * * *
>
> (3) "Recreational purposes" includes but is not limited to any of the following, or any combination thereof: hunting, fishing, trapping, swimming, boating, camping, picnicking, hiking, horseback riding, bicycle riding, motorized or nonmotorized vehicle operation for recreation purposes, nature study, water skiing, roller skating, roller blading, skate boarding, sledding, snowmobiling, snow skiing, summer and winter sports, or viewing or enjoying historical, archaeological, scenic, or scientific sites."
>
> * * *

B.(1) Except for willful or malicious failure to warn against a dangerous condition [or] structure, an owner of land, except an owner of commercial recreational developments or facilities, who permits with or without charge any person to use his land for recreational purposes as herein defined does not thereby:

(a) Extend any assurance that the premises are safe for any purpose.

(b) Constitute such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Incur liability for any injury to person or property caused by any defect in the land regardless of whether naturally occurring or man-made.

***4** Older court decisions construed the Recreational Use Statutes narrowly, applying a three-part test to ascertain whether a defendant was entitled to immunity: (1) the injury had to occur on undeveloped, non-residential, or rural/semi-rural land; (2) the injury had to result from recreation that can be pursued in the "true outdoors;" and, (3) the injury-causing instrumentality had to be the type encountered in the "true outdoors" and not "of the type usually found in someone's backyard." *Fournerat,* 104 So.3d at 82 (citing *Keelen,* 463 So.2d at 1290–91). Subsequent amendments to the statutes, however, did away with both the first prong[12] and third prong of this test.[13] Accordingly, as explained in more detail *infra,* courts in Louisiana have greatly expanded the reach of immunity under these statutes.

One such example which showcases the broad scope of the Recreational Use Statutes in the aftermath of the 1995 and 2001 amendments is the Louisiana Third Circuit case, *Benoit v. City of Lake Charles,* 2005–89 (La.App. 3 Cir. 7/20/05); 907 So.2d 931. Since *Benoit* bears some similarity to the case at bar, it is heavily discussed by both Boise and Ms. Sexson. In *Benoit,* a mother was injured when she fell while attending her son's youth baseball tournament, which was held in a city-owned, developed park in Lake Charles, Louisiana. *Id.* at 932. The mother subsequently sued the City of Lake Charles, the United States Specialty Sports Association (hereafter "USSSA," the organization that had hosted and organized the tournament), and USSSA's insurer. *Id.* At the trial court level, all of the defendants moved for summary judgment, arguing that § 9:2795 shielded them from immunity, with the trial court denying this motion. *Id.* at 933. The defendants then appealed, arguing that the trial court's denial of summary judgment was improper. *Id.*

On appeal, in discerning whether § 9:2795 would apply, first, the Third Circuit Court of Appeal found that the City-owned park would fall under § 9:2795's "sufficiently expansive" definition of "land." *Id.* at 935. The court was persuaded by the fact that the Louisiana legislature had expanded the statute in 2001 to include "*urban* or rural land," thus allowing the developed park to fall under the ambit of the statute. *Id.* (emphasis in original). Second, the court found that the baseball tournament fell within the "expressly nonexclusive" category of "summer and winter sports" listed in § 9:2795, and therefore could be considered a recreational use under the statute. *Id.* at 935–36. Finally, the court rejected the plaintiff's argument that the City fell under the definition of § 9:2795(B)(1) as "an owner of commercial recreational developments or facilities" which would not receive immunity under the statute. *Id.* at 936. The court noted that there was no evidence the City itself had charged anyone to use the land, and that even if it had charged a fee, immunity would still be available because "9:2795(B)(1) indicates immunity extends to an owner of land 'who permits *with or without charge* any person to use his land for recreational purposes.' " *Id.* (emphasis in original). Importantly, however, the court noted that the same conclusion would not extend to USSSA, the organization that had actually sponsored the event and charged fees to spectators and participants. *Id.* Since USSSA had only presented "general" testimony on how the organization used the baseball fields, the Third Circuit found it was appropriate for the trial court to deny USSSA summary judgment based on § 9:2795 immunity. *Id.*

***5** Construing *Benoit,* Boise thus argues that: (1) if a developed public park can fall under the definition of "land" within the statute, then the Boise paper mill certainly qualifies as well; (2) if the Benoit mother's spectator activities at a baseball game qualify as "recreational purposes," then Ms. Sexson's participation as a cross-country coach also falls within the ambit of the statute; and, (3) much like the City, because Boise did not charge anyone fees to use the land for the meet, Boise could not be considered a "commercial enterprise."

Ms. Sexson notes in her opposition, however, that the *Benoit* decision drew two strong dissents from Judges Thibodeaux and Saunders. In Judge Thibodeaux's dissent, he cautioned that the majority had "turn[ed] the interpretation of th [e] restrictive statute topsy-turvy" by broadly (as opposed to strictly) construing it. *Id.* at 939 (Thibodeaux, J., dissenting in part). He noted that the passive action of watching a baseball game should not fall under the statute's definition of "recreational use," and that previous case law indicated that a developed park certainly would not fall within the ambit of the statute. *Id.* Judge Saunders similarly criticized the majority's definition of baseball as a "summer sport" which could fall under the definition of "recreational use," arguing that baseball was an organized sport not explicitly mentioned in the statute, unlike other activities (hunting, fishing, trapping, swimming, boating, etc.). *Id.* (Saunders, J. concurring in part and dissenting in part). He also echoed Judge Thibodaux's concern that extending the statute's application to passive spectators impermissibly expanded the scope of immunity to defendants. *Id.* at 940. Ms. Sexson thus asks this court to heed the "slippery slope" warnings from the *Benoit* dissents: essentially, if the court finds immunity in this instance, there is a danger that many tort victims may be precluded from recovery because of an impermissibly broad reading of § 9:2795.

Addressing these arguments, the undersigned disagrees with Judge Thibodeaux's narrow reading of what type of land falls under the ambit of the statute. As noted *supra,* § 9:2795 was amended in 2001 to include "urban" land, and thus citations to case law from before this amendment (which require the land to be "open and undeveloped") are unpersuasive. Additionally, while Vernon Parish, perhaps trying to distinguish *Benoit,* makes the argument that Boise's land does not fit the definition of a "public park," the undersigned notes that this does not make a difference—the statute will apply whether the land is publicly or privately owned. *See Stuart v. City of Morgan City,* 504 So.2d 934 (La. Ct.App. 1 Cir.1987). Based on the terms of the statute, therefore, the Boise paper mill falls under § 9:2795's definition of "land."

Further, Boise's passive providing of a location for the cross country meet does not rise to the level of "commercial enterprise" contemplated by the statute. As argued by Boise, it did not charge any fees to use its land: instead, DeRidder High School itself charged entry fees to participating schools.[14] It is immaterial whether the Bocade Recreation Park primarily served as a recreational facility—as noted by other courts, the inquiry on this prong will turn on whether the owner operated the facility for a profit. *See, e.g., Richard v. Hall,* 2003–1488 (La.4/23/04); 874 So.2d 131 (finding that lessee was not a "commercial enterprise" under § 9:2795 because the lessee did not utilize the premises for commercial profit); *Van Pelt v. Morgan City Power Boat Ass'n, Inc.,* 489 So.2d 1346 (La.App. 1 Cir.1986), writ granted, 493 So.2d 627, cause dismissed (finding that a boat race sponsor who collected admission fees was not a "commercial enterprise" under § 9:2795 because the sponsor was a nonprofit corporation); *Thomas v. Jeane,* 411 So.2d 744 (La.App. 3 Cir.1982) (finding that the state did not operate a park as a "commercial enterprise" under § 9:2795 because the park was not operated for profit).

***6** Turning to the last factor, while Ms. Sexson cautions that applying the "recreational use" definition to her activities would be an impermissibly broad reading of the statute, the court notes that the "recreational purposes" definition expressly notes that it "*includes but is not limited to* " the long laundry list of activities set forth in the statute. § 9:2795(A)(3) (emphasis added). This indicates that the list was not meant to be "exhaustive." *Richard v. Louisiana Newpack Shrimp Co. Inc.,* 11–309 (La.App. 5 Cir. 12/28/11); 92 So.3d 541, 546. Further, as noted by the Louisiana Fifth Circuit in a recent decision, § 9:2795 "does not require that the injury arise out of the recreational activity *per se,* as long as the person injured was on the property for a recreational purpose. *Id.* at 547 (finding that § 9:2795's "recreational use" definition was broad enough to cover a woman who was injured while boarding a boat to resume camping activities); *see also Webb v. Parish of St. Tammany,* 2006–0849 (La.App. 1 Cir. 2/9/07); 959 So.2d 921 (finding that a motorcycle driver who was injured in motorcycle accident on park premises while leaving softball game still fell under the "recreational use" definition of § 9:2795). Based on the broad language within the "recreational use" definition itself, cases construing the term liberally, and the statutes' legislative history itself (which indicates that the Recreational Use Statutes have been greatly broadened in recent years), the undersigned finds that Ms. Sexson's activity would also fall under the "recreational use" definition. Accordingly, summary judgment is proper on this issue.

II. Was Boise grossly negligent?

Ms. Sexson and Vernon Parish next claim that Boise willfully or maliciously failed to warn of the hole that caused Ms. Sexson's injury. Essentially, they contend that because Boise staff maintained the premises, which included mowing the lawn in the area where Ms. Sexson fell, Boise *must* have had constructive notice of the hole.

Once a defendant establishes that it is entitled to immunity under § 9:2795, the burden of establishing a malicious or willful failure to warn of a dangerous condition shifts to the plaintiff. *Souza v. St. Tammany Parish,* 11–2198 (La.App. 1 Cir.2012); 93 So.3d 745, 750. "[A] failure to warn of a dangerous condition connotes a conscious course of action, and is deemed willful or malicious when action is knowingly taken or not taken, which would likely cause injury, with conscious indifference to the consequences thereof." *Id.* A land owner must know of the dangerous condition, and a mere probability that a land owner knew of such a dangerous condition is not sufficient to establish actual knowledge. *See Bertoniere v. United States,* No. 01–3719, 2003 WL 21488127, *3 (E.D.La. June 25, 2003).

As an example, in the Eastern District of Louisiana case *Bertoniere v. United States,* a plaintiff was injured when, while swinging on a frayed rope swing in Kisatchie National Forest, the rope broke off in midair. *Id.* at *1. Analyzing the Recreational Use Statutes, Judge Engelhardt concluded that the plaintiff's production of two affidavits, which stated that the rope swing was in view of nearby trails, was not enough to suggest the defendant had actual knowledge of the defective rope swing. *Id.* at *3. Accordingly, Judge Engelhardt found that the defendant was immune from liability. *Id.*

***7** Similarly, in this case, Ms. Sexson has not supplied any supporting evidence that Boise knew of the hole that caused her injury. Instead, Ms. Sexson argues that, due to the proximity of the Bocade Recreation Area, the area's high foot traffic while in use, and Boise's grounds-keeping of the area in question, Boise *must* have known of the hole that caused the plaintiff's injury. Like *Bertoniere,* however, Ms. Sexson's argument is insufficient to persuade this court that Boise willfully or maliciously failed to warn of the hole, and thus Ms. Sexson has failed to carry her burden on this point.

CONCLUSION

Accordingly, because the court has found that Boise is entitled to immunity under the Recreational Immunity Statutes, and Ms. Sexson has failed to meet her burden in showing willful or malicious failure to warn, Boise is entitled to summary judgment on Ms. Sexson's claims.

All Citations

Slip Copy, 2013 WL 3894106

Footnotes	
[1]	*See* Pl.'s Compl., [Doc. 1–3] at ¶¶ 6 –10.
[2]	Not. of Removal, [Doc. 1].
[3]	Dep. of Michael Roy Greene, Ex. to Def.'s Mot. for Summ. J., [Doc. 17–6] at p. 14.
[4]	*Id.* at p. 32.
[5]	*Id.* at p. 23.
[6]	*Id.*
[7]	Dep. of Summer Sexson, Ex. to Def.'s Mot. for Summ. J., [Doc. 17–2] at p. 44.
[8]	*Id.* at p. 45.
[9]	*Id.*
[10]	*Id.* at p. 61.
[11]	*Id.* at p. 80.
[12]	The 2001 amendment to § 9:2795 added "urban or rural" to section (A)(1) and E(2)(a)).
[13]	The 1995 amendment to 9:2795(B)(1)(c) substituted "caused by any defect in the land regardless of whether naturally occurring or man-made" for "incurred by such person."
[14]	Greene Dep. at pp. 16, 23.