No. 22-____

IN THE

Supreme Court of the United States

JESSICA MACKEY,

Petitioner,

v.

AMERICAN MULTI-CINEMA, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Except in very rare instances such as the complete lack of proof, black letter Louisiana tort law holds that determination of breach of duty is a question of fact to be decided by the factfinder at trial. In *Broussard v. State of Louisiana, ex rel. Office of State Buildings*, 113 So.3d 175 (La. 2013), the Supreme Court of Louisiana expressly established this rule when applying Louisiana's four-factor risk-utility balancing test for determining whether an allegedly defective condition presents an unreasonable risk of harm.

The question presented here is whether the Fifth Circuit violated the *Erie* requirement of vertical uniformity by adopting a legal rule on premises liability that directly conflicts with *Broussard*, failed to conduct *Broussard's* risk-utility balancing test, ignored *Broussard's* holding disapproving determination of unreasonable risk of harm on summary judgment, and disregarded multiple precedents of this Court applying Fed. R. Civ. P. 56 to deprive Petitioner of the right to trial by jury under the Seventh Amendment.

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PETITION FOR A WRIT OF CERTIORARI

Jessica Mackey respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 2022 WL 2070393 and reprinted at Appendix A. The district court's Order and Reasons is reported at 2021 WL 4657313 and reprinted at Appendix B. The Order of the court of appeals denying rehearing is unreported and reprinted at Appendix C.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2022. The court of appeals denied rehearing on November 1, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Seventh Amendment to the Constitution of the United States provides in pertinent part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, ...

2. LA. REV. STAT. § 9:2800.6(B)(1) provides in pertinent part:

> In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have

> the burden of proving, in addition to all other elements of his cause of action, all of the following:
>
> (1) The condition presented an unreasonable risk of harm to the claimant . . . .

3. Federal Rule of Civil Procedure 56(a) provides, in pertinent part:

> The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

INTRODUCTION

This case involves a perfect storm of departures by the Fifth Circuit, sitting in diversity, from the accepted and usual course of judicial proceedings that would pertain in a Louisiana state court, thus warranting the exercise of this Court's supervisory review. After adopting a legal rule that directly conflicts with the Louisiana Supreme Court's landmark decision in *Broussard v. State, ex rel. Office of State Buildings*, 113 So.3d 175 (La. 2013) regarding the determination of whether a defective condition is unreasonably dangerous, the Fifth Circuit proceeded to ignore *Broussard*'s two essential holdings: it failed to conduct a risk-utility balancing test to determine whether the uneven concrete that caused Petitioner's accident constituted an unreasonable risk of harm and it disregarded *Broussard's* instruction that evaluation of unreasonable risk of harm is a question of fact to be determined at trial.

The Fifth Circuit compounded these errors by failing to give credence to Petitioner's evidence and by

weighing other evidence in favor of respondent, all in violation of this Court's multiple precedents interpreting Fed. R. Civ. P. 56. The most conspicuous example of the court's crediting AMC's evidence over Petitioner's was the court's inclusion in the opinion of a photo of the accident site taken in sunny and dry conditions, despite the fact that Petitioner had introduced photos taken by AMC shortly after the accident showing the same area wet from rain. These photos were extremely relevant, because they depicted how the uneven concrete that caused Petitioner's accident was obscured – a relevant factor in the risk-utility balancing test.

Given the combination of significant legal errors above it is apparent that the evidence in this case is "such that a reasonable jury could return a verdict for [Petitioner]."[1] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). And because the evidence creating a genuine dispute of material fact for trial was plentiful, the Fifth Circuit's affirmance of summary judgment for AMC in a *per curiam* opinion effectively deprived Petitioner of her right to trial by jury under the Seventh Amendment.

The Court should grant the petition to correct the Fifth Circuit's multiple violations of the *Erie* doctrine and of this Court's settled law governing application of Fed. R. Civ. P. 56.

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[1] As discussed in more detail below, the initiating judge on the screening panel approved the staff attorney's recommendation that Petitioner's appeal be placed on the oral argument calendar. *Infra*, Section VII, at 30. This separate determination by an active member of the Fifth Circuit strongly supports that a reasonable jury could return a verdict for Petitioner.

STATEMENT

A. Undisputed Factual Summary of Petitioner's Accident

This case arises out of an accident sustained by Jessica Mackey ("Petitioner") on a sidewalk within the front pad of American Multi-Cinema, Inc.'s ("AMC") Westbank Palace 16 movie theater in Harvey, Louisiana.[2]

On the day of the accident, May 4, 2019, Petitioner was accompanied by her husband, Reverend Elroy Mackey. Upon arrival at the theater around 12:00 o'clock noon, it was "rainy" with a "light drizzle" and "overcast." R.167. The couple was walking together under an umbrella, which Rev. Mackey held in his right hand, while Petitioner's arms were gripped in her husband's left arm. Petitioner was wearing leather sandals, and the couple was "[w]alking, normal walk, not hurrying, at a slow pace, snug together." R.167-168. As she walked, Petitioner was "[l]ooking at the ground, being careful." R.168. Neither she nor her husband was on the phone, and nothing was distracting her. *Id.*

Approximately midway to the theater box office, Petitioner tripped and fell face forward after the tip of her sandal caught uneven concrete in the sidewalk. Although she tried to brace the fall with her hands, Petitioner struck the pavement with her forehead and blacked out for a few minutes. As a result of the fall, Petitioner suffered serious personal injuries.

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[2] The jurisdiction of the district court was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Louisiana and the defendant being a citizen of Missouri.

Very shortly after the accident, AMC's manager on duty completed an Incident Report, which found the cause of the accident was "[t]he ground was uneven." R.213.

B. Petitioner's Suit Against AMC

In May 2020 Petitioner filed suit against AMC in the United States District Court for the Eastern District of Louisiana. Petitioner sought recovery against AMC based on the defective condition of the sidewalk where she tripped and fell and requested trial by jury on all issues. Petitioner created a fact issue for trial through the collection of a variety of evidence: opinion testimony of an expert architect, interrogatories, requests for production, the deposition of AMC's facility manager, and subpoenaed records regarding facility repairs by an outside contractor.

1. Report of Petitioner's Expert Nicholas Musso

The report of Petitioner's expert architect, Nicholas Musso, was attached as an exhibit to AMC's Motion for Summary Judgment. In his report Mr. Musso measured the height differential between the adjacent concrete sections where Petitioner tripped and fell as between ¾ and 7/8 inches. R.74-76. Mr. Musso also noted the expansion joint showed little and deteriorated caulking, which is indicative of poor maintenance of the walking surface at the front of the movie theater. R.84.

Mr. Musso observed the location of the uneven concrete was in an accessible route that leads to and from the movie theater entrance. R.71, 76. Further, the uneven condition of the walking surface was not acceptable by ASTM (American Society for Testing

and Materials) or ICC (International Code Council) standards and is in violation of the ADA (Americans with Disabilities Act) Guidelines and the Life Safety Code. R.74, 81. The ADA Guidelines and the Life Safety Code both require signage for warning of non-conforming conditions. R.76. At AMC's theater there was no warning. Viewed together Mr. Musso concluded the non-uniform condition of the walking surface and AMC's failure to provide any temporary warning or barrier to assist the user created an unreasonable risk of harm to patrons of AMC's movie theater.[3] R.81.

2. Discovery

Through discovery Petitioner obtained numerous documents and extensive information relevant to Louisiana's risk utility balancing test including:

- AMC's facility manager, Louis Russ, testified although he had walked the area where Petitioner fell numerous times, he had never noticed the concrete was uneven (R.323);
- the front pad and sidewalks of the theater failed AMC's annual Facility Evaluations required by AMC's Standard Operating Procedures (SOPs) in 2015, 2016, 2018, and 2019, and in each of those years the theater's sidewalks did not meet AMC's standards for "clean", "safe", and "good repair" (R.182, 184-185, 188-189, 190-191); and

[3] *See, e.g., Cashman v. Mr. B's Bistro, Inc.*, 20-645, 2021 WL 53311, at *2 (E.D. La. January 6, 2021). In a trip and fall case before another judge in the Eastern District of Louisiana in which summary judgment was denied, the district judge stated: "Courts have denied summary judgment . . . where there is expert testimony suggesting a condition is unreasonably dangerous."

- there is no evidence AMC completed repairs recommended in the 2015 Facility Evaluation for "damaged and uneven concrete" in the theater's front pad and sidewalks (R.228) or repairs recommended in the 2019 Facility Evaluation "to patch small areas which may pose a safety risk out front" (R.348).

3. AMC's Motion for Summary Judgment

AMC's narrow motion sought to characterize a fact issue as a legal issue, i.e., whether the height differential between two sections of concrete in a sidewalk leading to the theater entrance that is between ¾ and 7/8 of an inch constitutes an unreasonably dangerous condition. AMC contended "the alleged unreasonably dangerous condition" that Petitioner claimed caused her fall was not unreasonably dangerous "as a matter of law" (R.60) and therefore Petitioner could not carry her burden of proving liability at trial.

In addition to opposing AMC's characterization of the breach of duty as a legal issue, Petitioner contested many of the statements in AMC's Statement of Uncontested Material Facts. For example Petitioner contested AMC's estimate of the cost to repair uneven concrete similar to that where Petitioner fell, which was in dispute due to Mr. Musso's expert opinion that the defective concrete could have been remediated by less costly measures such as providing a warning. R.81, 150. Petitioner also challenged AMC's statement that the cost to monitor and repair similarly uneven concrete conditions at its theaters was cost prohibitive, because it conflicted with multiple documents in the record detailing AMC's ongoing maintenance and inspection program at the Westbank Palace 16. R.150-151.

C. The District Court's Decision

Petitioner timely filed her opposition to AMC's motion along with a separate statement of facts in dispute that included sixteen exhibits. One week later on the evening before the submission date, AMC filed a motion for leave to file a reply memorandum. Besides referring briefly to the depositions of Petitioner and AMC's facility manager, AMC did not address any of the fourteen other exhibits introduced by Petitioner creating a genuine dispute as to material facts on whether the uneven concrete presented an unreasonable risk of harm. The district court granted AMC's motion for leave to file a reply brief, issued its Order and Reasons granting AMC's motion for summary judgment, and entered a judgment dismissing Petitioner's claims with prejudice.

Notwithstanding the substantial material evidence above obtained through discovery and put in the record by Petitioner in opposition to AMC's motion, except for Petitioner's deposition testimony that she was being careful at the time of her accident, the district court did not address any of Petitioner's other evidence. App.5a-15a. Instead, the district court focused on the height difference between the sections of concrete, the disputed issue of Petitioner's awareness of the uneven concrete, and AMC's assertion that no accident had been reported previously at that location. The district court essentially found that these select facts, when analyzed under several mostly pre-*Broussard* cases, were insufficient to establish the uneven concrete "was unreasonably dangerous as a matter of law." App.5a.

D. The Decision of the Court of Appeals

Petitioner timely appealed from the Judgment and Order and Reasons granting AMC's motion for summary judgment and dismissing her case. After all briefs had been submitted, the case was calendared for oral argument on June 6, 2022. However, three weeks before argument, the panel to whom the case had been assigned determined oral argument no longer was required. Subsequently, in an unpublished and eight-paragraph *per curiam* opinion, the Fifth Circuit affirmed the summary judgment in favor of AMC. The court reached this result without considering the controlling precedent of the Louisiana Supreme Court in *Broussard v. State of Louisiana ex rel. Office of State Buildings*, 113 So.3d 175 (La. 2013), which established the proper analysis for determining whether a defect presents an unreasonable risk of harm and clarified that this determination generally is reserved for the factfinder at trial.

Whereas the district court below engaged in a limited analysis of Louisiana's four-factor risk-utility balancing test to determine whether the uneven concrete presented an unreasonable risk of harm, the Fifth Circuit performed no such review, believing instead that the ¾-7/8 inch height differential was an issue of law and was the only relevant factor to be considered. The court went so far as to state that Petitioner "does not challenge this legal rule" that height deviations up to 1 ½ inches generally do not present an unreasonable risk of harm (App.3a), when Petitioner extensively challenged the proposition in her brief.

Without specifically discussing any of Petitioner's evidence, the court further claimed Petitioner had not demonstrated the relevance of the evidence she had

introduced below in opposition to AMC's summary judgment. *Id.* And the court claimed most of the evidence concerned "other issues like AMC's custody of the sidewalk." App.3a-4a. The court stated in a conclusory fashion that none of it raised an issue of fact as to the "dangerousness" of the expansion joint in question. App.4a. In fact, Petitioner demonstrated the relevance of her evidence to the material issue of unreasonable risk of harm.

On the separate issue of whether the uneven concrete was "open and obvious", the court briefly quoted Petitioner's deposition but found no error in the district court's application of Louisiana's "objective standard". *Id.* But the court did not address Petitioner's primary argument or evidence that she had demonstrated a dispute of material fact on this issue.

In a catch-all last sentence, the court wrote that it had reviewed Petitioner's other arguments and rejected them "for the reasons explained in the district court's well-reasoned and thorough opinion." *Id.* However, to the extent the district court never addressed Petitioner's legal arguments distinguishing pre-*Broussard* cases, which were decided at trial as opposed to on summary judgment and mostly involved public entities rather than a business such as AMC, in reality the court did not address these arguments either.

On June 22, 2022, Petitioner timely applied for panel rehearing. While waiting for the court's decision, on October 11, 2022, Petitioner filed a letter under Fed. R. App. P. 28(j) providing citation to recent supplemental authority by a Louisiana appellate court (in the same parish as the movie theater) denying supervisory review of a summary judgment denial in a case involving a plaintiff's trip and fall caused by a ¼-5/16 inch protrusion of a tar-like substance from an

expansion joint in a restaurant's sidewalk. *Abel v. Eastern Royal Kitchen, et al.*, 2022-42 (La. App. 5 Cir. 5/20/22), *writ denied*, 347 So.3d 898 (La. 2022). The Louisiana appellate court agreed genuine issues of material fact remained in dispute regarding whether the multiple other conditions of the sidewalk alleged by the plaintiff presented an unreasonable risk of harm.

Two weeks later AMC filed a response to Petitioner's Rule 28(j) letter and referred to a recently decided case by a different Louisiana federal district court. On October 31, 2022, Petitioner filed another Rule 28(j) letter, in which she noted the case cited by AMC not only was distinguishable on the facts, but in it the district court made the point Petitioner had argued from the beginning in opposing AMC's motion for summary judgment: "the height of the elevation is only one factor of the four-part test [risk-utility balancing test], and it is certainly possible that a height differential of 1-1/2 inches or less might, in a different setting, pose an unreasonable risk of harm." *Lacaze v. Wal-Mart Stores, Inc.*, 20-696, 2022 WL 4227240 at *9 (M. D. La. 9/13/22). Despite the favorable precedent in *Abel* and the helpful statement by the district court in *Lacaze*, the Fifth Circuit denied rehearing without reason. App.16a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Violated *Erie*'s Principle Of Vertical Uniformity By Creating A Legal Rule Regarding Premises Liability That Directly Conflicts With The Law Of Louisiana Established By That State's Highest Court In *Broussard v. State, Ex Rel. Office Of State Buildings*, 113 So.3d 175 (La. 2013)

The Fifth Circuit crafted a state tort rule, creating an issue of law where the Louisiana Supreme Court had established an issue of fact. The Fifth Circuit's opinion claimed Petitioner "does not challenge this legal rule" that height deviations up to 1 ½ inches "generally"[4] do not present an unreasonable risk of harm.[5] App.3a. In support of the putative rule's existence, the court cited two cases, the first a pre-*Broussard* decision of the Louisiana Supreme Court, *Chambers v. Village of Moreauville*, 85 So.3d 593 (La. 2012), and the second an unpublished opinion of the Fifth Circuit, *Buchanan v. Wal-Mart Stores,*

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[4] The use of the word "generally" as quoted from Chambers undermines the Fifth Circuit's assertion of a rule that applies in all cases.

[5] In fact Petitioner's brief exhaustively explained how under Louisiana's four-factor risk-utility balancing test set forth in *Broussard* there is no "bright-line rule" that height differentials of 1-1/2 inches or less are not unreasonably dangerous. Petitioner's Brief, at 44-54. And in her reply brief, Petitioner further showed that none of the jurisprudence cited by AMC sets forth a rule of law on unreasonable risk of harm that would support granting summary judgment based solely on the limited facts (height deviation of ¾-7/8 inches) presented in AMC's motion. Petitioner's Reply Brief, at 11-26.

Incorporated, 834 Fed. App'x 58 (5th Cir. 2020),[6] which the Fifth Circuit cited as "collecting Louisiana cases." App.3a.

Contrary to the Fifth Circuit's assertion of a legal rule, in *Chambers* the Louisiana Supreme Court held otherwise: "[t]his Court has applied the risk-utility balancing test to determine whether a defect in a sidewalk creates an unreasonable risk of harm, and determined there is no fixed rule in determining whether a defect in a sidewalk is unreasonably dangerous." *Chambers*, 85 So.3d 593, 598.

The Louisiana Supreme Court cases discussed in *Buchanan* are in accord. In *Reed v. Wal-Mart Stores, Inc.*, 708 So.2d 362 (La. 1998), the Louisiana Supreme Court held the risk-utility balancing test "is not a simple rule of law which can be applied mechanically to the facts of the case. Because of the plethora of factual questions and other considerations involved, the issue necessarily must be resolved on a case-by-case basis." *Id.* at 364. In *Boyle v. Board of Supervisors, Louisiana State University,* 685 So.2d 1080 (La. 1997), the Louisiana Supreme Court quoted from its earlier decision in *White v. City of Alexandria*, 43 So.2d 618 (1949)(also cited in *Buchanan*), that "[f]or determining what is a dangerous defect in a sidewalk . . . there is no fixed rule; the facts and surrounding circumstances of each particular case control." *Boyle*, 685 So.2d 1080, at 1082, *quoting White*, at 620. The sole appellate court decision discussed in *Buchanan*, *Leonard v. Parish of Jefferson*, 902 So.2d 502 (La. App. 5 Cir. 2005), while it cited to *Boyle*, did not address whether a rule existed regarding under what

[6] Under Fifth Circuit Rule 47.5.4, the opinion is not considered precedent.

circumstances a sidewalk may be considered unreasonably dangerous.

The Louisiana Supreme Court's latest and definitive exposition of Louisiana law on whether a "legal rule" exists regarding height deviations in sidewalks is set forth in *Broussard*:

> However, we emphasize again that each case involving an unreasonable risk of harm analysis must be judged under its own unique set of facts and circumstances. **There is no bright-line rule.** The fact-intensive nature of our risk-utility analysis will inevitably lead to divergent results. Moreover, each defect is equally unique, requiring the fact-finder to place more or less weight on different considerations depending on the specific defect under consideration. What may compel a trier-of-fact to determine one defect does not present an unreasonable risk of harm may carry little weight in the trier-of-fact's consideration of another defect.

Broussard, 113 So.3d 175, 191 (emphasis added).

Based on this holding in *Broussard*, the panel's suggestion that a "legal rule" exists regarding uneven concrete conditions is completely unfounded and not a properly stated rule of law. Quite the opposite, the only correct rule regarding whether expansion joint defects are unreasonably dangerous is that there is no rule.[7]

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[7] For a scholarly and thorough discussion of current Louisiana jurisprudence on this subject, *see* Thomas C. Galligan, Jr., *Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach*, 97 Tul. L. Rev., (forthcoming) (App.16a-31a)

II. The Fifth Circuit Violated *Erie*'s Principle Of Vertical Uniformity By Failing To Conduct A Risk-Utility Analysis Required Under *Broussard*

The "Governing Law" cited by AMC as the basis for its summary judgment was the custodial liability provisions of Louisiana Civil Code Articles 2317 and 2317.1. R.92. The latter Code article was specifically cited as the basis for her Complaint's cause of action against AMC (R.9) and as the controlling law for AMC's motion. R.134. Nevertheless, the Fifth Circuit and district court analyzed AMC's motion under Louisiana's Merchant Liability Statute, La. R.S. § 9:2800.6. App.3a, 9a. Regardless of which law liability is premised on, "[b]oth theories of liability consider whether the condition of the sidewalk in

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[hereinafter *Continued Conflation*], in which Professor Galligan criticizes the practice of some courts conflating the separate tort elements of duty and breach:

> In combining duty and breach courts purport to determine duty based on the facts of the particular case but, in fact, they are really deciding a question of breach-whether the defendant exercised the care of a reasonable person under the circumstances. In conflating duty and breach courts are turning a mixed question of fact and law—breach—into a question of law. Concomitantly, those courts are taking the breach question away from the factfinder—often the jury--and improperly making it a judicial decision.

Id., App.17a-18a. Professor Galligan believes the courts err in this practice, "because in making particularistic no duty determinations they are ignoring the fact that there is a general duty to exercise reasonable care under most circumstances." *Id.*, App.20a. As stated by the Louisiana Supreme Court, "[t]here is a 'universal duty on the part of the defendant in negligence cases to use reasonable care so as to avoid injury to another.'" *Doe v. McKesson*, 339 So.3d 524, 531 (La. 2022).

question created an unreasonable risk of harm." *Leone v. Target Corp. of Minnesota*, 09-431, 2016 WL 11706724 at *1, (W.D.La. September 13, 2010).

In a diversity case such as Petitioner's, federal courts must apply state substantive law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). State courts are the final expositors of state law, and federal courts are bound by their constructions. *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). And "[w]hen adjudicating a claim for which state law provides the rule of decision, federal courts are bound to apply the law as interpreted by the state's highest court, ..." *Terrebonne Parish School Board v. Columbia Gulf Transmission Co*., 290 F.3d 303, 317 (5th Cir. 2002).

The question of whether a defect presents an unreasonable risk of harm is a "'disputed issue of mixed fact and law or policy that is peculiarly a question for the jury or trier of the facts.'" *Broussard*, 113 So.3d 175, 183. "As a mixed question of law and fact, it is the fact-finder's role – either the jury or the court in a bench trial – to determine whether a defect is unreasonably dangerous." *Id.* "Thus, whether a defect presents an unreasonable risk of harm is 'a matter wed to the facts' and must be determined in light of facts and circumstances of each particular case." *Id.*

To aid courts in making this "unscientific factual determination," the Louisiana Supreme Court has adopted a "risk-utility balancing test, wherein the factfinder must balance the gravity and risk of harm against individual societal rights and obligations, the social utility of the thing, and the cost and feasibility of repair." *Id.* at 184. The test has been synthesized to a consideration of four pertinent factors: "(1) the utility of the complained-of condition; (2) the likelihood

and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its social utility or whether it is dangerous by nature." *Id.*

It is well settled that a grant of summary judgment is reviewed *de novo* on appeal. *Renwick v. PNK Lake Charles, L.L.C.*, 901 F.3d 605, 611 (5th Cir. 2018). However, close examination of the Fifth Circuit's brief opinion confirms the court never conducted the risk-utility balancing test required by *Broussard*. The first four paragraphs of the opinion recite the basic facts and procedural history of the case. Only three paragraphs of the opinion purport to analyze the legal issues raised on appeal. The first of these paragraphs cites to the Louisiana Merchant Liability Statute's requirement that the allegedly defective condition present "an unreasonable risk of harm." But after referring to the statute, the court failed to follow up with discussion of any of Petitioner's sixteen exhibits introduced in opposition to AMC's motion or even the six exhibits introduced by AMC. Instead of performing the four-factor risk-utility balancing test, the court simply stated "[t]he district court concluded that Mackey failed to create a genuine fact issue as to whether the expansion joint created an unreasonable risk of harm." App.3a.

The court's failure to conduct a risk-utility analysis here is far different from the more than four pages of risk-utility analysis discussed in *Chambers v. Village of Moreauville*, 85 So.3d 593 (2012), which was cited approvingly by the Fifth Circuit. Clearly, the court's dereliction is not the misapplication of a properly stated rule of law but disregard of the applicable

Louisiana law entirely, which supports this Court's supervisory review.

III. The Fifth Circuit Violated *Erie* By Disregarding *Broussard's* Holding That Determination Of Unreasonable Risk Of Harm Involves Analysis Of Breach Of Duty, Which Is A Question Of Fact To Be Decided By The Factfinder At Trial

Besides affirming its four-factor risk utility balancing test when determining whether a defect presents an unreasonable risk of harm, *Broussard* sought to correct unintended conflation of the "duty" and "breach" elements in Louisiana's negligence analysis.[8] *Broussard*, 113 So.3d 175, 185. This conflation had "confused the role of judge and jury in the unreasonable risk of harm inquiry and arguably transferred 'the jury's power to determine breach to the court to determine duty or no duty.'" *Id.*

To correct this problem, the Court provided the following directive:

> [i]n order to avoid further overlap between the jury's role as fact-finder and the judge's

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[8] In Louisiana "[n]egligence has five elements: duty, breach, cause-in-fact, scope of risk, and damages." Galligan, *supra*, App.17a. "Duty" may be defined as the responsibility "to exercise reasonable care to avoid injury to others." *Id.*, App.20a. "Breach" may be defined as "whether the defendant exercised the care of a reasonable person under the circumstances." *Id.*, App.17a. Under both the traditional approach to negligence and the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, all questions but the issue of duty, which is a legal question, are determined by the factfinder. Thomas C. Galligan, Jr., *Let the Jury Decide! A Plea for the Proper Allocation of Decision-Making Authority in Louisiana Negligence Cases*, 94 Tul. L. Rev. 769, 774, 830-831 (2020).

> role as lawgiver, we find the analytic framework for evaluating an unreasonable risk of harm is properly classified as a determination of whether a defendant breached a duty owed, rather than a determination of whether a duty is owed *ab initio.* **It is axiomatic that the issue of whether a duty is owed is a question of law, and the issue of whether a defendant has breached a duty owed is a question of fact. The judge decides the former, and the fact-finder—judge or jury—decides the latter.** . . . In other words, the fact-finder determines whether defendant has breached a duty to keep its property in a reasonably safe condition by failing to discover, obviate, or warn of a defect that presents an unreasonable risk of harm.

Id.[9] (emphasis added).

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[9] As explained recently by Professor Galligan, Jr., Professor of Law, LSU Paul M. Hebert Law Center, and LSU President Emeritus, ". . . judges should exercise restraint out of respect for other actors in the litigation process – the jury as factfinder and the judge herself as factfinder. When a judge conflates duty and breach, the judge usurps the factfinder's right to decide breach." Continued Conflation, *supra*, at 14-15. App.27a-28a. The conflation has "profound practical implications", including a "risk that the judge will decide there is no duty to avoid the particular alleged misconduct" (really a "no breach decision"), which "may lead judges to grant summary judgments based on conclusions there is no duty owed where the issue is really breach and there are underlying factual questions." *Id.* at App.25a. More broadly conflation "weakens the general duty to exercise reasonable care" and "suggests that people may escape liability by exercising less than reasonable care for the safety and property of others." *Id.* at App.29a.

Despite the above instruction, applying the risk-utility principles of *Broussard* proved difficult at the summary judgment stage with some courts concluding because the question of whether a defect presents an unreasonable risk of harm is a mixed question of law and fact, the question should be determined by the fact-finder, which would preclude summary judgment.[10] In a subsequent case, the Louisiana Supreme Court held that any reading of *Broussard* that would limit "summary judgment practice involving issues of unreasonable risk of harm is a misinterpretation of the *Broussard* case." *Allen v. Lockwood*, 156 So.3d 650, 652 (La. 2015). The Court made clear "our jurisprudence does not preclude the granting of a motion for summary judgment **in cases where the plaintiff is unable to produce factual support for his or her claim that a complained-of condition or things is unreasonably dangerous**." *Id.* at 653 (emphasis added). Thus, summary judgment was proper in *Allen*, a case in which the plaintiff not only failed to rebut the defendant's evidence on summary judgment, she could not even say what the defendant did to cause her accident. *Id.*

Allen is clearly distinguishable from the facts herein, where Petitioner has produced, substantial factual support demonstrating the uneven concrete at AMC's movie's theater was unreasonably dangerous. *See* Statement, *supra*, at 5-7. Considering all this evidence, a reasonable juror could conclude the uneven

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[10] Even this Court previously has weighed in on the subject, recognizing "the jury's unique competence in applying the 'reasonable man' standard is thought ordinarily to preclude summary judgment in negligence cases." *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, n.12 (1976), *citing* Wright & Miller, *Federal Practice and Procedure*: Civil § 2729 (1973).

concrete in Petitioner's case presented an unreasonable risk of harm,[11] making the Fifth Circuit's affirmance of summary judgment improper.

IV. The Fifth Circuit Failed To Review And Give Credence To All Of Petitioner's Relevant Evidence In The Record And Weighed Evidence In Favor Of AMC In Violation Of This Court's Precedents Interpreting Fed. R. Civ. P. 56

A. The Fifth Circuit Failed To Review All Of The Evidence In The Record

Under Rule 56 of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that 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). When assessing whether a dispute to any material fact exists, a court "must review the record 'taken as a whole.'" *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), *quoting Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Stated otherwise, "the court should review all of the evidence in the record." *Reeves*, 530 U.S. 133, 150.[12]

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[11] ". . . summary judgment will not lie if the dispute about a material fact is 'genuine,'" that is, if the evidence is such that a reasonable jury could return a verdict in favor for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

[12] Although *Reeves* involved interpretation of Fed. R. Civ. P. 50 (Judgment as a Matter of Law), the Court stated "the standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law, such that 'the inquiry under each is the same.'" *Reeves*, 530 U.S. 133, 150, *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

As already explained above the Fifth Circuit never conducted the four-factor risk-utility balancing test required by *Broussard* and, other than a single quote of Petitioner's deposition testimony, the court never discussed any of Petitioner's sixteen exhibits introduced in opposition to AMC's motion or even the six exhibits introduced by AMC. The court's response to Petitioner's charge that the district court did not consider "each of her exhibits" is as follows: "[m]ost of it concerns other issues like AMC's custody of the sidewalk, and none of it raises a fact issue as to the dangerousness of the expansion joint in question." App.3a-4a. But review of the Statement above summarizing the evidence submitted by Petitioner in opposition to AMC's motion shows Petitioner's evidence touched on much more than the narrow point of custody, including AMC's incident report finding the cause of the accident was "uneven concrete", the defective condition of the uneven concrete (not just the height variance but the width, decayed caulking, and discolored pavement showing the lack of maintenance), Petitioner's expert testimony that the condition violated multiple safety standards, and AMC's annual facility evaluations showing the theater's sidewalks did not meet AMC's standards for "clean", "safe", and "good repair". *See* Statement, *supra*, at 5-7. Considering the relevance of this evidence to *Broussard's* unreasonable risk of harm analysis, it is clear the Fifth Circuit did not follow this Court's standard requiring the appellate court to review the record "taken as a whole".

B. The Fifth Circuit Weighed Evidence In Favor Of AMC, Failing To Give Credence To Petitioner's Relevant Evidence

If the moving party initially shows the non-movant's case lacks support, 'the non-movant must come forward

with 'specific facts' showing a genuine factual issue for trial.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). "[C]ourts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). This is an application of the general rule that at the summary judgment stage "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* And in making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

According to the Fifth Circuit's telling, Petitioner argued "that the district court improperly adjudicated AMC's summary judgment motion by not considering each of her exhibits." App.3. But the court claimed Petitioner "does not show that the undiscussed evidence has any relevance to the unreasonable risk of harm issue." *Id.* Respectfully, Petitioner's original brief spent nearly nineteen pages explaining in detail the relevance of her evidence. Petitioner's Brief, at 23-34, 37-43. Then, after AMC contended in its brief that Petitioner had not shown how the "undiscussed" evidence raised genuine issues of material fact, Petitioner devoted seven pages of her reply brief to demonstrate how each of her exhibits was relevant to one of the factors under Louisiana's four-part risk utility balancing test. Petitioner's Reply Brief, at 5-11. All of this evidence is set forth in detail above. *See* Statement, *supra*, at 5-7. If the Fifth Circuit's opinion does not demonstrate how the "undiscussed" evidence was considered, then there is no way the

evidence was credited by the court in favor of Petitioner as required by this Court's summary judgment precedents.

For a specific illustration of the Fifth Circuit's failure to credit Petitioner's evidence, one need look no further than the sole photo the court selected to incorporate in its opinion, capturing the area of Petitioner's accident. App.2a. The photo purports to show the height deviation between the sections of concrete where Petitioner fell. But because the photo is not a close-up, it is very difficult to perceive the tripping hazard posed by the uneven concrete. More importantly, the photo shows the area in sunny and dry conditions, when in reality at the time of Petitioner's accident the concrete was wet from rain and the deviation at the expansion joint was obscured as a result. The Fifth Circuit did not incorporate Petitioner's evidence: a close-up photo of the uneven concrete (R.216) and five separate photos of the accident site taken by AMC shortly after Petitioner tripped and fell. R.217-221. Although a reasonable juror viewing Petitioner's photos could conclude the deviation at the expansion joint presented an unreasonable risk of harm, the sole photo credited by the Fifth Circuit in granting summary judgment could paint a skewed picture on whether the condition was dangerous.

Another example of the Fifth Circuit failing to give credence to Petitioner's evidence is seen in the court's discussion of whether the uneven concrete that caused Petitioner's accident was "open and obvious". As stated in *Broussard* "[t]he second prong of this risk-utility inquiry [the likelihood and magnitude of harm] focuses on whether the dangerous or defective condition is obvious and apparent." *Broussard*, 113 So.3d 175, at 184. "[T]he hazard should be one that is open

and obvious to all, i.e., everyone who may potentially encounter it." *Id.* Thus, the inquiry "focuses on the global knowledge of everyone who encounters the defective thing or dangerous condition, not the victim's actual or potentially ascertainable knowledge"; and "[a] defendant's duty should not turn on a particular plaintiff's state of mind, but instead should be determined by the standard of care which the defendant owes to all potential plaintiffs."[13] *Id.* (*quoting Murray v. Ramada Inns, Inc.*, 521 So.2d 1123, 1136 (La. 1988)).

The Fifth Circuit's discussion on this point is found in the third and last paragraph of the legal analysis section of its opinion. Specifically, the Fifth Circuit addressed Petitioner's contention that "the district court erroneously disregarded her argument that the expansion joint was not 'open and obvious'[14] by focusing on Mackey's subjective perception that she was '[l]ooking at the ground, being careful.'" App.4a. The court rejected Petitioner's argument and found "no error" in the district court's conclusion that "the expansion joint was not unreasonably dangerous in

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[13] Explaining its rationale for this approach, the Louisiana Supreme Court stated that allowing "the fact-finder to characterize a risk as open and obvious based solely on the plaintiff's awareness of that risk" would "undermine" Louisiana's system of comparative fault under Louisiana Civil Code Article 2323. *Id.* "The plaintiff's knowledge or awareness of the risk created by the defendant's conduct should not operate as a total bar to recovery in a case where the defendant would otherwise be liable to the plaintiff." *Id.*, at 188-189. "Instead, comparative fault principles should apply, and the plaintiff's 'awareness of the danger' is but one factor to consider when assigning fault to all responsible parties under La. Civ. Code art. 2323." *Id.* at 189.

[14] This was the second question presented in Petitioner's statement of the issues appealed.

part because it was 'plainly observable by pedestrians' exercising reasonable caution." *Id.*

However, in affirming the district court's conclusion, the Fifth Circuit failed to credit a significant detail -- it was raining at the time of Petitioner's accident. R.167. The court also ignored the following contradictory evidence: Petitioner's expert testified Petitioner's view of the expansion joint was obscured by the wet and dirty condition of the unclean sidewalk (R.172); photos taken shortly after the accident confirmed Petitioner's view was obscured (R.217-221); and AMC's facility manager testified he had never noticed the uneven concrete where Petitioner tripped and fell (R.323). At a minimum, this evidence created a dispute of fact as to whether the uneven concrete was "apparent to all comers" as required by the Louisiana Supreme Court. *Broussard*, 113 So.3d 175, 192.

In sum by failing to credit Petitioner's evidence showing the ¾-7/8 height variance at the expansion joint was not plainly observable, the Fifth Circuit improperly weighed the evidence. More egregiously, the court's failure to credit the other substantial evidence introduced by Petitioner[15] constituted a more serious "misapprehension" of this Court's summary judgment standards and justifies this Court's intervention to reverse the Fifth Circuit's Rule 56 dismissal. *See Tolan v. Cotton*, 872 U.S. 650, 659 (2014).

V. The Fifth Circuit's Decision Is Clearly Erroneous.

The error of the Fifth Circuit's decision is seen by comparing it to the outcomes in factually similar cases never discussed by the Fifth Circuit or the district

[15] *See* Statement, *supra*, at 5-7.

court. For example, in *Gomes v. Harrah, Inc.*, 16-17483, 2017 WL 6508107 (E.D.La. Dec. 15, 2017), the plaintiff filed suit against Harrah for personal injuries sustained when she fell while walking along a brick sidewalk. Plaintiff stepped onto a "slightly depressed area of the sidewalk" that had a deviation measuring "a depth of less than a one-half (1/2) inch." *Id.* Harrah moved for summary judgment claiming the plaintiff could not prove the sidewalk presented an unreasonable risk of harm, as Louisiana courts have held sidewalk conditions like the one at issue are not unreasonably dangerous. In opposition plaintiff claimed genuine issues of material fact existed precluding summary judgment, especially the affidavit of plaintiff's safety expert, who averred the "walking surface shown in the photographs is not planar, flush or even . . . and constitutes a tripping hazard." *Id.*, at 2. In denying Harrah's motion for summary judgment, the district court concluded there remained issues of material fact as to whether the condition was open and obvious and whether it presented an unreasonable risk of harm. *Id.*, at 5. Citing to *Reed v. Wal-Mart Stores, Inc.*, the court held the size of the deviation (less than 1/2 inch) is "merely one factor for the court to consider in determining whether the sidewalk depression was unreasonably dangerous."[16] *Id.*, at 4.

While *Gomes* may be distinguishable on some minor factual points as contended by AMC, the main take-away is that the case correctly applied the principle that the determination of what constitutes an unreasonable risk of harm is a question closely tied to the facts and one which should be left to the trier of fact to

[16] For another case denying summary judgment based on similar reasoning, *see Abel v. Eastern Royal Kitchen, et al.*, *supra*, at 11.

decide. This is true even when the height deviation in question is less than ½ inch. Accordingly, if a motion for summary judgment can be denied under such facts, all the more reason why a similar result should have been reached here. The height differential between the two concrete sections where Petitioner fell is between ¾ inches and 7/8 inches, and much additional evidence was in dispute on whether the uneven concrete presented an unreasonable risk of harm.

In addition, the Fifth Circuit did not consider the following cases to the contrary of its decision cited by Petitioner: *Prince v. Rouse's Enterprises, L.L.C.*, 305 So. 3d 1078 (La. App. 5 Cir. 2020) (reversing grant of summary judgment, because of genuine issues of material fact in dispute in case of a woman who tripped and fell in the area of an expansion joint with a deviation of less than one inch in a crosswalk leading to defendant's grocery store; the appellate court held "[t]he location in the crosswalk is a factor in the risk-utility analysis as the cost of repairing the concrete in areas where customers are encouraged to cross is different than the cost in maintaining the concrete in the entire parking lot"); *Cline v. Cheema*, 85 So. 3d 260 (La. App. 4 Cir. 2012), *writ denied*, 88 So. 3d 465 (affirming trial judgment for plaintiff who tripped at gas station on uneven portion of concrete measuring 1 ¼ inches); *Buchignani v. Lafayette Insurance Company*, 938 So.2d 1198 (La. App. 2 Cir. 2006) (affirming trial judgment for plaintiff in case involving 1 ½ inch difference in elevation where expansion joint meets steps, which created unreasonable risk of harm); *McAdams v. Willis Knighton Medical Center*, 862 So.2d 1186 (La. App. 2 Cir. 2003) (reversing summary judgment because facts were in dispute as to whether height variance of one inch or a little more at expansion joint in parking lot created unreasonable

risk of harm); and *Joseph v. City of New Orleans*, 842 So.2d 420 (La. App. 4 Cir. 2003) (affirming trial judgment for plaintiff where sidewalk had a variance of over 3 inches in misunion of two concrete sidewalk slabs).

Accordingly, based on the above jurisprudence and for all the other reasons set forth above – the Fifth Circuit's purporting to follow a rule of law on premises liability that directly conflicts with *Broussard*, the court's subsequent failure to conduct a risk-utility analysis required under *Broussard*, the court's disregard of *Broussard's* directive that determination of unreasonable risk of harm involves analysis of breach of duty, which is a question of fact to be decided by the factfinder at trial, and the court's failure to review all the evidence in the record and weighing other evidence in favor of AMC in violation of this Court's precedents interpreting Fed. R. Civ. P. 56 – the Fifth Circuit's decision affirming the grant of summary judgment in favor of AMC and dismissing Petitioner's case is clearly wrong.

VI. The Question Presented is Important and Recurring

Erie's principle of vertical uniformity in diversity cases is paramount: "that with respect to substantive law a case filed in federal court will be handled in the same way as it would be in the courts of the states where the federal court sits." *Carlson v. FedEx Ground Package Systems, Inc.*, 787 F.3d 1313, 1326 (11th Cir. 2015). "The Erie rule is rooted in part in a realization that it would be unfair for the character of result of a litigation materially to differ because the suit had been brought in a federal court." *Hanna v. Plumer*, 380 U.S. 460, 467 (1965). *Erie*'s other aim was to discourage forum shopping as between federal and

state courts in the state of the litigation – in Petitioner's case, Louisiana. *Id.* at 468.

The Fifth Circuit's adoption of a legal rule on premises liability that was in direct conflict with the Louisiana Supreme Court's ruling in *Broussard* contravened *Erie*'s requirement of vertical uniformity. Because myriad cases alleging an unreasonable risk of harm regularly are filed in or removed to Louisiana's federal courts, the summary judgment outcome in Petitioner's case likely will recur.[17] Accordingly, this Court should intervene here so that *Erie*'s concerns about forum shopping and inequitable administration of the laws are not perpetuated by the summary judgment dismissal of cases that would survive in Louisiana's state courts.

VII. This Case Is An Ideal Vehicle

This Court has made clear for years that at the summary judgment stage, a judge's function is not to weigh the evidence and determine the truth of the matter "but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In *Tolan v. Cotton*, 572 U.S. 650,

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[17] A Westlaw search of Louisiana state and federal cases using the terms "unreasonable risk of harm", "summary judgment", and La. Rev. Stat. § 9:2800.6 (Louisiana's Merchant Liability Statute) returned 273 cases since April 2013, when *Broussard* was decided. Of that total, 153 of the cases were either from the Fifth Circuit or one of the three federal district courts in Louisiana. Some of the cases appeared twice if the case was appealed following entry of dismissal on summary judgment. Fewer federal cases were found when plugging in the same terms of "unreasonable risk of harm" and "summary judgment" with Louisiana's Civil Code Article 2317, which concerns liability for things in one's custody. Using the latter search returned 216 cases, of which 65 were federal.

659 (2014), this Court intervened to summarily reverse a Rule 56 dismissal affirmed by the Fifth Circuit, because the court's opinion reflected "a clear misapprehension of summary judgment standards in light of our precedents." *Id.*

Despite this Court's pronouncements, some legal scholars have warned that the motion for summary judgment is "used to dispose of cases that previously might have been considered trial-worthy . . ." in violation of the "right to a meaningful day in court, elements of due process, and trial by jury when applicable." Arthur R. Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard*, 78 La. L. Rev. 739, 771 (2018).

A litigant's right to a meaningful day in court requires meaningful review at the appellate stage. Petitioner's appeal cleared the first screening hurdle, when the court's staff attorney designated her case for oral argument.[18] 5th Cir. R. 34, Internal Operating Procedures B. Petitioner's appeal cleared the second screening hurdle, when an "initiating judge"[19] from a screening panel approved the staff attorney's recommendation for oral argument. *Id.* Having cleared both hurdles, Petitioner's case was calendared for oral argument. *Id.* However, the oral argument panel subsequently determined that oral argument was no longer required. Thus, in the end Petitioner's appeal, which one of the court's active judges had found worthy of oral argument, was treated like a case

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[18] According to the Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit, cases designated for the oral argument calendar "present difficult or new issues." *Id.* at 34-35.

[19] The initiating judge is one of the court's active judges. 5th Cir. R. 34, Internal Operating Procedures B.

assigned to the summary calendar: no oral argument, an unpublished *per curiam* opinion, and virtually no chance of reversal.[20]

Considering the above Petitioner respectfully submits she had no meaningful review of her case on appeal. In affirming the district court's summary judgment dismissal of Petitioner's claims, the Fifth Circuit failed to follow the Louisiana Supreme Court's clear precedent regarding determination of unreasonable risk of harm, failed to credit substantial evidence presented by Petitioner regarding that determination, and improperly weighed evidence in favor of AMC. Given the degree and magnitude of these errors by the Fifth Circuit, Petitioner's case is an ideal vehicle to remind the lower federal courts of their great responsibility to apply the *Erie* requirement of vertical uniformity, to take seriously the standards for summary judgment in light of this Court's precedents, and to uphold this Court's commitment to the right to trial by jury when courts improperly abridge that right on summary judgment.

[20] According to the 2022 Clerk's Annual Report for the United States Court of Appeals for the Fifth Circuit, cases that were decided on the court's oral argument calendar had a 17.3% chance of reversal. *Id.* at 17, Table 26. In contrast, cases on the summary calendar had only a 2.3% chance of reversal. *Id.*

CONCLUSION

The Court should grant the petition for writ of certiorari. Alternatively, in view of the clear conflict of the decision below with controlling precedent of the Louisiana Supreme Court on determining unreasonable risk of harm and with past decisions of this court applying Fed. R. Civ. P. 56, the court may wish to consider a summary reversal.

Respectfully submitted,

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January 30, 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed June 8, 2022]

No. 21-30687

JESSICA MACKEY,

Plaintiff-Appellant,

versus

AMERICAN MULTI-CINEMA, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 2:20-cv-1350

Before Higginbotham, Higginson, and Oldham, *Circuit Judges*.

PER CURIAM:*

Jessica Mackey tripped and fell on an uneven sidewalk while walking into a movie theater. She sued the theater for negligence. The district court granted summary judgment to the theater. We affirm.

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

I.

Around noon on May 4, 2019, Jessica Mackey and her husband drove to a theater operated by American Multi-Cinema ("AMC") in Harvey, Louisiana. As the couple walked toward the theater entrance, the tip of Mackey's sandal caught an uneven expansion joint on the concrete sidewalk. The expansion joint created a height deviation of ¾ to ⅞ of an inch between pavement sections. This is depicted in the red square below:

Mackey fell forward, struck the pavement with her face, and suffered serious personal injuries.

Mackey sued AMC, alleging AMC negligently failed to keep its premises reasonably safe or warn patrons about the expansion joint. The district court granted AMC's motion for summary judgment, finding that Mackey failed to create a genuine dispute of material

fact as to whether the expansion joint was unreasonably dangerous.

Mackey timely appealed. Our review is *de novo*. *Renwick v. PNK Lake Charles, LLC*, 901 F.3d 605, 611 (5th Cir. 2018). AMC was entitled to summary judgment if it could show the absence of "genuine dispute as to any material fact." FED. R. CIV. P. 56(a).

II.

To prove a negligence claim against a merchant in a trip-and-fall case, the plaintiff must show, among other things, that the condition of the premises "presented an unreasonable risk of harm." LA. REV. STAT. § 9:2800.6(B)(1). The district court concluded that Mackey failed to create a genuine fact issue as to whether the expansion joint created an unreasonable risk of harm. That is because all agree that the pavement height deviation was between ¾ to ⅞ of an inch, and Louisiana courts have repeatedly held that deviations of this height or higher do not present an unreasonable risk of harm. *See Chambers v. Vill. of Moreauville*, 85 So. 3d 593, 598 (La. 2012) ("Louisiana jurisprudence has consistently held that a one-and-one half inch deviation does not generally present an unreasonable risk of harm."); *see also Buchanan v. Wal-Mart Stores, Inc.*, 834 F. App'x 58, 62 (5th Cir. 2020) (per curiam) (collecting Louisiana cases). Mackey does not challenge this legal rule.

She instead argues that the district court improperly adjudicated AMC's summary judgment motion by not considering each of her exhibits. But she does not show that the undiscussed evidence has any relevance to the unreasonable risk of harm issue. Most of it concerns other issues like AMC's custody of the

sidewalk, and none of it raises a fact issue as to the dangerousness of the expansion joint in question.

Mackey also argues the district court erroneously disregarded her argument that the expansion joint was not "open and obvious" by focusing on Mackey's subjective perception—specifically, citing to her deposition testimony that she was "[l]ooking at the ground, being careful." We reject this argument, which is based on a stray sentence in a footnote of the district court's opinion. Read fairly, the court's opinion applies Louisiana's objective standard and concludes that the expansion joint was not unreasonably dangerous in part because it was "plainly observable by pedestrians" exercising reasonable caution. We find no error in this conclusion.

We have reviewed Mackey's other arguments and reject them for the reasons explained in the district court's well-reasoned and thorough opinion.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

[Filed October 7, 2021]

Civil Action No. 20-1350

Section M (2)

JESSICA MACKEY

versus

AMERICAN MULTI-CINEMA, INC. and
ABC INSURANCE COMPANY

ORDER & REASONS

Before the Court is a motion for summary judgment filed by defendant American Multi-Cinema, Inc. ("AMC").[1] Plaintiff Jessica Mackey responds in opposition,[2] and AMC replies in further support of its motion.[3] Having considered the parties' memoranda, the record, and the applicable law, the Court grants AMC's motion and dismisses Mackey's claims with prejudice, holding that the condition of the sidewalk was not unreasonably dangerous as a matter of law.

I. BACKGROUND

This case concerns a trip-and-fall accident. On May 4, 2019, Mackey was walking on the sidewalk in front

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[1] R. Doc. 16.

[2] R. Doc. 31.

[3] R. Doc. 37.

of AMC's Westbank Palace 16 movie theater complex in Harvey, Louisiana, when "the tip of her foot was caught on an uneven, raised sidewalk joint, causing her to trip and fall forward to the pavement and sustain serious personal injuries."[4] According to Mackey, the sidewalk had a deviation in height of 3/4 to 7/8 of an inch.[5] Mackey alleges that, although AMC did not own the property, it was responsible for maintaining and repairing the sidewalk.[6] Mackey filed this action against AMC alleging that AMC's negligence in failing to properly inspect, maintain, and repair the sidewalk, and to warn patrons of the alleged defective condition, caused her accident and resultant damages.[7]

II. PENDING MOTION

AMC argues that it is entitled to summary judgment because, as a matter of Louisiana law, the sidewalk did not present an unreasonable risk of harm.[8] Citing numerous cases, AMC argues that Louisiana courts have consistently held that height deviations in sidewalks larger than the one Mackey claims existed at AMC's property do not constitute an unreasonable risk of harm.[9] Thus, AMC contends that Mackey cannot sustain her burden of proof, and it is entitled to summary judgment dismissing her claims.[10]

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[4] R. Doc. 1 at 2-3.

[5] R. Doc. 16-3 at 7-8.

[6] R. Doc. 1 at 2-3.

[7] *Id.* at 3-4.

[8] R. Doc. 16-7 at 5-11.

[9] *Id.* at 9-10.

[10] *Id.* at 11-12.

In opposition, Mackey argues that there are disputed issues of material fact regarding whether the deviation in the sidewalk height constitutes an unreasonable risk of harm.[11] She argues that the deviation was not open and obvious because the sidewalk was dirty and it was raining at the time of the accident.[12] According to Mackey, the jury should determine whether the deviation was open and obvious, and ultimately, whether it created an unreasonable risk of harm.[13] Further, Mackey attempts to distinguish the jurisprudence upon which AMC relies by pointing out that some of the cases involved parking lots rather than sidewalks.[14] She also points out that some of the cases involved public entities as defendants and suggests that a private company like AMC should be held to a higher standard with respect to the condition of its sidewalks.[15]

III. LAW & ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56(c)). "Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against

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[11] R. Doc. 31.

[12] *Id.* at 1-2.

[13] *Id.* at 6.

[14] *Id.* at 6-14.

[15] *Id.*

a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id*. A party moving for summary judgment bears the initial burden of demonstrating the basis for summary judgment and identifying those portions of the record, discovery, and any affidavits supporting the conclusion that there is no genuine issue of material fact. *Id*. at 323. If the moving party meets that burden, then the nonmoving party must use evidence cognizable under Rule 56 to demonstrate the existence of a genuine issue of material fact. *Id*. at 324.

A genuine issue of material fact exists if a reasonable jury could return a verdict for the nonmoving party. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The substantive law identifies which facts are material. *Id*. Material facts are not genuinely disputed when a rational trier of fact could not find for the nonmoving party upon a review of the record taken as a whole. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986); *EEOC v. Simbaki, Ltd*., 767 F.3d 475, 481 (5th Cir. 2014). Unsubstantiated assertions, conclusory allegations, and merely colorable factual bases are insufficient to defeat a motion for summary judgment. *See Anderson*, 477 U.S. at 249-50; *Little v. Liquid Air Corp*., 37 F.3d 1069, 1075 (5th Cir. 1994); *Hopper v. Frank*, 16 F.3d 92, 97 (5th Cir. 1994). In ruling on a summary-judgment motion, a court may not resolve credibility issues or weigh evidence. *See Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co*., 530 F.3d 395, 398-99 (5th Cir. 2008). Furthermore, a court must assess the evidence, review the facts, and draw any appropriate inferences based on the evidence in the light most favorable to the party opposing summary judgment.

See Tolan v. Cotton, 572 U.S. 650, 656-57 (2014); *Daniels v. City of Arlington*, 246 F.3d 500, 502 (5th Cir. 2001). Yet, a court only draws reasonable inferences in favor of the nonmovant "when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

After the movant demonstrates the absence of a genuine issue of material fact, the nonmovant must articulate specific facts showing a genuine issue and point to supporting, competent evidence that may be presented in a form admissible at trial. *See Lynch Props., Inc. v. Potomac Ins. Co.*, 140 F.3d 622, 625 (5th Cir. 1998); Fed. R. Civ. P. 56(c)(1)(A) & (c)(2). Such facts must create more than "some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. When the nonmovant will bear the burden of proof at trial on the dispositive issue, the moving party may simply point to insufficient admissible evidence to establish an essential element of the nonmovant's claim in order to satisfy its summary-judgment burden. *See Celotex*, 477 U.S. at 322-25; Fed. R. Civ. P. 56(c)(1)(B). Unless there is a genuine issue for trial that could support a judgment in favor of the nonmovant, summary judgment must be granted. *See Little*, 37 F.3d at 1075-76.

B. Premises Liability

Under Louisiana law, "[a] merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition." La. R.S. 9:2800.6(A). "This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage." *Id.* To prove a negligence

claim against a merchant in a trip-and-fall case, the plaintiff must prove all the following:

> (1) The condition [existing in or on a merchant's premises alleged to have caused the fall] presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
>
> (3) The merchant failed to exercise reasonable care. …

La. R.S. 9:2800.6(B); *Davis v. Wal-Mart Stores, Inc.*, 774 So. 2d 84, 90 (La. 2000) (citing *Smith v. Toys "R" Us, Inc.*, 754 So. 2d 209 (La. 1999)). "Failure to prove any one element negates a plaintiff's negligence action." *Martin v. Boyd Racing, L.L.C.*, 681 F. App'x 409, 411 (5th Cir. 2017).

Louisiana courts apply a risk-utility balancing test to determine whether a condition presented an unreasonable risk of harm. *Id.* The four factors are: "(1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, including the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of social utility or whether the activities were dangerous by nature." *Bufkin v. Felipe's La., L.L.C.*, 171 So. 3d 851, 856 (La. 2013).

The Louisiana supreme court has "described the question of whether a defect presents an unreasonable risk of harm as 'a disputed issue of mixed fact and law or policy that is peculiarly a question for the jury or

trier of the facts.'" *Broussard v. State ex rel. Office of State Bldgs.*, 113 So. 3d 175, 183 (La. 2013) (quoting *Reed v. Wal-Mart Stores, Inc.*, 708 So. 2d 362, 364 (La. 1998)). Thus, generally, "[a]s a mixed question of law and fact, it is the fact-finder's role – either the jury or the court in a bench trial – to determine whether a defect is unreasonably dangerous." *Id.* However, the Louisiana supreme court also recognizes that a trial court retains the "'obligation to decide which risks are unreasonable based on the facts and circumstances of each case'" and "'to decide if there [is] a genuine issue of material fact as to whether the condition created an unreasonable risk of harm.'" *Martin*, 681 F. App'x at 412 (quoting *Broussard*, 113 So. 3d at 183 n.5) (alteration omitted). Thus, a district court "*can* decide [on a motion for summary judgment] that a condition does not present an unreasonable risk of harm, as a matter of law." *Id.* (emphasis in original). And, indeed, "in the summary judgment context, Louisiana courts have not hesitated to grant summary judgment in favor of defendants in cases in which the nature of the condition is undisputed, and plaintiff has provided no evidence of any unusual feature of the condition suggesting that it is unreasonably dangerous." *Leonard v. Sam's West, Inc*., 2013 WL 121761, at *3 (E.D. La. Jan. 9, 2013) (collecting cases).

Louisiana law does not require perfectly smooth paved surfaces. As the *Reed* court explained:

> It is common for the surfaces of streets, sidewalks, and parking lots to be irregular. It is not the duty of the party having garde of the same to eliminate all variations in elevations existing along the countless cracks, seams, joints, and curbs. These surfaces are not required to be smooth and lacking in deviations, and indeed, such a requirement

> would be impossible to meet. Rather, a party may only be held liable for these defects which present an unreasonable risk of harm.

Reed, 708 So. 2d at 363. In determining whether a defect in a paved surface constitutes an unreasonable risk of harm, courts consider the size of the variation, its location, and its accident history, along with the gravity and risk of harm measured against the cost and feasibility of repair, the surface's social utility, and individual and societal rights and obligations. *Id.* at 363-65. The Louisiana supreme court has recognized that the utility of paved parking lots and sidewalks is clearly apparent and the cost of maintaining a surface free from all defects is "cost prohibitive." *Leonard*, 2013 WL 121761, at *3 (citing *Reed*, 708 So. 2d at 365-67, *Boyle v. Bd. of Supervisors, La. State Univ.*, 685 So. 2d 1080, 1083-84 (La. 1997), and *White v. City of Alexandria*, 43 So. 2d 618, 620 (La. 1949)). More particularly, pavement expansion joints have a recognized social utility because they are "necessary for safety and for maintenance of larger paved surfaces … allow[ing] for the concrete to expand and contract as it heats and cools due to weather," and without them, the concrete would crack, split, shift, and buckle "which would produce far more hazardous deviations" and increase maintenance costs. *Reed*, 708 So. 2d at 366.

It is undisputed that Mackey tripped over a pavement expansion joint having a height deviation of 3/4 to 7/8 of an inch from one section of pavement to the other. Courts in Louisiana have repeatedly held that pavement height deviations of up to two inches do not pose an unreasonable risk of harm, regardless of whether the owner was a public or private entity. *Buchanan v. Wal-Mart Stores, Inc.*, 834 F. App'x 58,

62 (5th Cir. 2020) (holding that a height variance of 1½ to 2 inches was not unreasonably dangerous) (collecting cases); *Chambers v. Vill. of Moreauville*, 85 So. 3d 593, 598 (La. 2012) ("Louisiana jurisprudence has consistently held that a one-and-one-half inch deviation does not generally present an unreasonable risk of harm."); *Reed*, 708 So. 2d at 365-66 (holding that a height variance of ¼ to ½ of an inch did not pose an unreasonable risk of harm); *Boyle*, 685 So. 2d at 1082-84 (holding that a height variance of ½ to 1 inch in sidewalk joints was not an unreasonably dangerous defect); *White*, 43 So. 2d at 619-20 (holding that a height variance of ½ to 2 inches on a sidewalk did not present unforeseeable risk of harm). Thus, the deviation of which Mackey complains is well within the 1½ to 2 inches that Louisiana courts have found do not present an unreasonable risk of harm. The location of the deviation, right in front of the theater, is a highly trafficked area with no history of similar trip-and-fall accidents, which suggests that the likelihood and magnitude of potential harm were low. *Leonard*, 2013 WL 121761, at *3 (citing *Llorence v. Broadmoor Shopping Ctr., Inc.*, 76 So. 3d 134, 137 (La. App. 2001) (noting that "there had been no claims, complaints, or suits arising out of the area either before or since the plaintiff's claim" when holding that an area was not unreasonably dangerous on summary judgment)). Further, although the cost of repair of the deviation at issue might be minimal, a merchant cannot possibly guess over which expansion joint a patron might fall and "the 'cost to eliminate all such minor defects is staggering.'" *Id.* at *4 (quoting *Reed*, 708 So. 2d at 366). "Finally, as Louisiana courts have repeatedly affirmed, a paved parking lot has social utility and is not dangerous by nature." *Id.*

Applying this law to the undisputed facts of this case, Mackey's evidence concerning the height deviation over which she fell is not sufficient to create a genuine issue of material fact about whether the pavement expansion joint was unreasonably dangerous. Mackey insists that such a dispute exists here because, she says, AMC does not argue that "the uneven concrete where [she] tripped and fell was open and obvious."[16] And she claims that the height deviation in the expansion joint was not open and obvious due to rain and dirt.[17] Even if true, it is immaterial because she does not claim that her view of the expansion joint itself was obscured by the light drizzle or non-pressure-washed condition of the sidewalk at the time of the accident.[18] After all, Louisiana courts recognize that sidewalk expansion joints will have limits of unevenness the law tolerates as a reasonable risk of harm, whether or not the deviation is observed by passersby. Mackey's complaint focuses on the deviation in height of the expansion joint as the cause of her fall,[19] and the great weight of Louisiana jurisprudence holds that the deviation at issue here does not present an unreasonable risk of harm under the four prongs of the risk-utility test. Because the Court finds that Mackey has not met her burden on summary judgment to

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[16] R. Doc. 31 at 11.

[17] *Id*. ("the uneven concrete [was] obscured by wet pavement and the cleanliness condition of the sidewalk").

[18] As with most all sidewalks, the expansion joint here was plainly observable by pedestrians (especially one like Mackey who testified that she was "[l]ooking at the ground, being careful"). R. Doc. 31-1 at 13.

[19] R. Doc. 1 at 2-3 ("the tip of her foot was caught on the uneven, raised sidewalk joist, causing her to trip and fall forward").

demonstrate that the alleged defect was unreasonably dangerous – one of the three essential elements of her premises-liability claim – the Court need not address the other elements.

IV. CONCLUSION

Accordingly, for the foregoing reasons,

IT IS ORDERED that AMC's motion for summary judgment (R. Doc. 16) is GRANTED, and Mackey's claims are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 7th day of October, 2021.

/s/ Barry W. Ashe
Barry W. Ashe
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed November 1, 2022]

No. 21-30687

JESSICA MACKEY,

Plaintiff-Appellant,

versus

AMERICAN MULTI-CINEMA, INCORPORATED,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana
USDC No. 2:20-CV-1350

ON PETITION FOR REHEARING

Before Higginbotham, Higginson, and Oldham, *Circuit Judges*.

Per Curiam:

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX D

Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach

Forthcoming in the Tulane Law Review

Abstract

Negligence has five elements: duty, breach, cause-in-fact, scope of risk, and damages. Logic dictates that courts, lawyers, scholars, and law students should keep them separate. But they consistently fail to do so. Courts continue to conflate or collapse elements; they combine duty and scope of risk and they combine duty and breach. In combining duty and breach courts purport to determine duty based on the facts of the particular case but, in fact, they are really deciding a question of breach-whether the defendant exercised the care of a reasonable person under the circumstances. In conflating duty and breach courts are turning a mixed question of fact and law—breach—into a question of law. Concomitantly, those courts are taking the breach question away from the factfinder—

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[1] Professor of Law, LSU Paul M. Hebert Law Center; Dodson and Hooks Endowed Chair in Maritime Law; James Huntington and Patricia Kleinpeter Odom Professorship; LSU President Emeritus. I am indebted to my colleague and friend, Professor William Corbett; my son, Patrick Galligan; and my friend, Ed Walters for reviewing drafts of this piece and making very helpful suggestions and edits. This article is a companion piece to Thomas C. Galligan, Jr., Let the Jury Decide! A Plea for the Proper Allocation of Decision-Making Authority in Louisiana Negligence Cases, 94 Tul. L. Rev. 769 (2020) [hereinafter cited as, Galligan, Let the Jury Decide!], in which I analyzed the allocation of decision-making authority between judge and factfinder regarding duty and scope of duty. Herein, I deal with the judicial conflation of duty and breach.

often the jury--and improperly making it a judicial decision. Even Justice Oliver Wendell Holmes, Jr. notoriously combined duty and breach in his writings and in his articulation of the short-lived stop, look, and listen at grade-crossings "rule." Sadly, Louisiana courts have frequently followed Justice Holmes' perilous lead and combined duty and breach in a number of significant instances. The most unfortunate line of jurisprudence manifesting this conflation of duty and breach is the Louisiana Supreme Court's "open and obvious" risk cases. Herein, building on my prior work on separating duty and scope of risk, I review the jurisprudence from Holmes to the Louisiana open and obvious cases to other Louisiana decisions manifesting the same error. I propose that henceforward courts and scholars clearly separate duty and breach thereby properly allocating the breach decision to the factfinder, unless reasonable minds could disagree.

I. Introduction

Negligence has five elements: duty, breach, cause-in-fact, scope of risk, and damages.[2] Logic dictates that courts, lawyers, scholars, and law students should keep them separate. After all, each element has its own function and definition. But, sadly over the years courts have conflated some of the elements. Originally, courts conflated cause-in-fact and proximate cause as one "causation" element.[3] Happily, twentieth century torts scholars succeeded in separating the two prongs of cause into two separate elements and they also

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[2] Dan B. Dobbs, Paul T. Hayden, and Ellen Bublick, Dobbs Law of Torts, §§ 124, 125 (2d ed. June 2020 update) [hereinafter, Dobbs Law of Torts]; *see also*, Galligan, Let the Jury Decide!, *supra* note 1 at 774.

[3] *See, e.g.*, The Nitro-Glycerine Case, 82 U.S. 524, 537 (1872).

recharacterized proximate cause as "scope of the risk."[4] But even now, courts and scholars continue to conflate cause-in-fact and scope of the risk.[5] Not stopping there, they also combine other elements.

For instance, they have conflated duty and scope of duty. I have written about how Louisiana courts, in adopting a duty/risk method of analyzing negligence combined duty and scope of duty and how that combination has turned out be neither justified nor helpful in most garden variety tort suits.[6] Instead, in a garden variety tort suit, I urged the states' courts to entrust the scope of duty question to the jury or judge as factfinder. I did so because, in most tort cases, the scope of duty inquiry is not based on any broad policy analysis but on fairness, common sense, and the facts of the particular case. And my anti-conflation crusade did not conclude with duty and scope of the risk.

In addition to combining duty and scope, our courts in Louisiana have also regularly conflated duty and breach.[7] But as Professors Dobbs, Hayden, and Bublick have stated, other courts in the nation have made the same mistake.[8] In doing so, courts may state

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[4] Galligan, *Let the Jury Decide*, *supra* note 1 at 778.

[5] For a discussion of conflation in Federal Employer Liability Act and Jones Act cases, *see*, Thomas C. Galligan, Jr., "Even the Slightest": Causation in FELA and Jones Act Cases, 15 Charleston L. Rev. 253 (2021).

[6] CSX Transportation, Inc. v. McBride, 564 U.S. 685 (2011).; Galligan, Jr., Let the Jury Decide!, *supra* note 1 at 774 (2020).

[7] Frank L. Maraist, H. Alston Johnson III, Thomas C. Galligan, Jr., & William R. Corbett, *Answering a Fool According to His Folly: Ruminations on Comparative Fault Thirty Years On*, 70 La. L. Rev. 1105, 1107 (2011).

[8] Dobbs Law of Torts, *supra* note 1 at § 145.

that there is no duty to engage in certain conduct or no duty to take certain protective actions under the circumstances. When making detailed duty decisions in a garden variety tort suit, the court essentially articulates a so-called rule of law, applicable to all similar cases.[9] Unfortunately, there are usually not very many, if any, similar cases. Additionally, some Louisiana courts have decided that there is no duty owed in the case before the court because there is no breach of the standard of care. That is conflation--pure and simple! But that is exactly what Louisiana courts have done in a series of "open and obvious cases."[10] In all these instances, by combining duty and breach, the courts err.

They err because in making particularistic no duty determinations they are ignoring the fact that there is a general duty to exercise reasonable care under most circumstances. The duty to exercise reasonable care is the default rule. The background, basic, underlying principle of negligence is that one person generally has a duty to exercise reasonable care to avoid injury to others. The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(a) provides: "An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical

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[9] *Id.* stating: "*A no-duty variant.* In another version of specific rules that depart from the reasonable person standard, the court may declare a rule of law that the defendant owes no duty to the plaintiff in specific circumstances."

[10] For a very good discussion of the issue as it had developed up to that point, *see*, *Broussard v. State of Louisiana*, Through the Office of State Buildings Under the Division of Administration, 113 So. 3d 175 (La. 2013).

harm."[11] Section 7 (b) recognizes that there may be policy reasons not to recognize a duty in a "class of cases" but those are no-duty rules for broad categories of similar claims, not fact-specific-no-duty determinations.[12] Those broad no-duty rules are based on some overarching policy or policies. Examples include the no-duty-to-act rule,[13] the traditional refusal to recognize a duty to protect against negligently inflicted economic distress,[14] the failure to impose a duty to protect against negligently caused pure economic loss,[15] the refusal to impose a duty to exercise reasonable care to protect the unborn,[16] and the failure to impose a duty to protect against third-party criminal acts,[17] the failure to impose a duty upon a third person to guard against negligent spoliation of evidence.[18] But, as I have written, in these broadly applicable no-duty cases: "the courts perform the policy analysis at a broad level of generality. The decision not to recognize a duty or to create a conditional duty applies to all similar cases; it does not turn on the facts of the particular case."[19]

When a judge merges or conflates the duty and breach elements and decides there is no duty under

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[11] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(a).

[12] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7(b).

[13] Dobbs Law of Torts, § 400.

[14] *Id.* § 390.

[15] *Id.* § 647.

[16] *Id.* § 366.

[17] *Id.* § 423.

[18] *Reynolds v. Bordelon*, 172 So. 3d 589 (2015).

[19] Galligan, Let the Jury Decide, *supra* note 1 at 776.

the particular circumstances, the court is not engaging in a broad analysis of policy at the case specific level; the court is generally deciding that there is no breach, and then tautologically determining that because there is no breach then there is no duty.[20] How could such a thing happen? Rather simply, given human nature. Let me attempt to illustrate.

Suppose Arya was driving down the street in a rainstorm, at 30 m.p.h. when Arya came upon a puddle that was deeper than one might have anticipated because of the town's failure to maintain the road safely. Moving through the puddle, Arya lost control of the vehicle, left the road, vaulted onto the sidewalk and hit Sansa, who was walking her pet dire wolf, Lady. Sansa was not hurt but the dire wolf was grievously injured. Sansa sued Arya for negligence for the damage to Lady.[21] Sansa alleged that Arya was driving too fast given the conditions. Arya denied the

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[20] Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 7, *comment i* provides, in part:

> *i. No duty and no negligence as a matter of law.* Sometimes reasonable minds cannot differ about whether an actor exercised reasonable care under § 8(b). In such cases, courts take the question of negligence away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes inaptly express this result in terms of duty. Here, the rubric of duty inaccurately conveys the impression that the court's decision is separate from and antecedent to the issue of negligence. In fact, these cases merely reflect the one-sidedness of the facts bearing on negligence, and they should not be misunderstood as cases involving exemption from or modification of the ordinary duty of reasonable care.

[21] One sister has no immunity from suit by a sister.

allegation and argued that she was driving at a perfectly safe speed.

Here is how the conflation can occur. If the defendant moved for summary judgment and claimed that there was no "duty" to drive any slower and presented expert testimony, a court might conclude that Arya owed Sansa no duty to drive slower than 30 m.p.h. and, thus, Arya owed Sansa no duty under the circumstances. That no duty conclusion would be wrong. In fact, Arya owed Sansa (and generally all pedestrians and drivers) a duty to exercise reasonable care. The question was not whether Arya owed Sansa a duty—she did. The question was: did Arya exercise reasonable care when she drove 30 m.p.h. in the rainstorm? That is a question of breach, not a question of duty. If Arya was not exercising reasonable care by driving too fast, a fact finder would conclude she breached the duty to exercise reasonable care. If she was exercising reasonable care when driving 30 m.p.h., then a fact finder would conclude she did not breach her duty to exercise reasonable care. A court should not hold or conclude that she had no duty to exercise reasonable care; she did have a duty; the issue is breach.[22]

Note again how the error could occur. The judge, at the defense lawyer's behest, took the particular alleged act of negligence—driving too fast under the circumstances—and made the particular alleged act of negligence a part of the duty inquiry: was there a duty to drive under 30 m.p.h. in the rainstorm. The judge then answered that question—no—and concluded

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[22] *See also*, F. Maraist, T. Galligan, J. Church, and W. Corbett, Louisiana Tort Law § 3.02.

there was no duty, ignoring the generally applicable, overarching duty to exercise reasonable care.

But who cares? So, what? Well...everyone should care! The difference is very important; indeed, it is critical. Why? Because duty is a question of law; it is a question for the court as law giver and law decider. Breach is a mixed question and law and fact, generally entrusted to the jury or judge as factfinder in a non-jury trial. In deciding mixed questions, the law or standard is clear; the factfinder then decides factual issues (where the facts are in contention or where reasonable minds might reach different conclusions on the breach question); and, then, the factfinder must determine whether the facts satisfy the standard.[23] That is the factfinder must decide: "whether the rule of law as applied to the established facts is or is not violated."[24] Of course, the phrase rule of law is really a bit misleading. The rule of law involved is not a specific definition of acceptable behavior, as might appear in a statute. Rather, the rule of law is the general obligation to exercise reasonable care. In a negligence case, the factfinder decides if the defendant[25] violated the so-called "rule of law," i.e., the standard of care of a reasonable person under the circumstances.

But when the court conflates duty and breach, there is a risk that the judge will decide there is no duty to avoid the particular alleged misconduct. In doing so, the court is really making a no-breach decision. And, it is improperly taking the breach question from the jury (or itself as factfinder) and treating a mixed question of fact and law (breach) as a legal question

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[23] Pullman-Standard v. Swint, 456 U.S. 273, 289n.19 (1982).

[24] *Id.*

[25] And the plaintiff if the defendant alleged comparative fault.

(no duty). When an appellate court conflates duty and breach, it litters the jurisprudence with supposed legal decisions that are, in fact, case specific applications of the reasonable care standard. This jurisprudential detritus confuses all of us. And it has profound practical implications because no-duty decisions on what are really questions of breach may lead judges to grant summary judgments based on conclusions there is no duty owed where the issue is really breach and there are underlying factual questions.

In this article, I shall discuss the historical evolution of the conflation of duty and breach in which Justice Oliver Wendell Holmes, Jr. figured prominently. I will then turn to Louisiana decisions where the courts have ignored, or minimized, the general duty to exercise reasonable care and essentially merged the duty and breach questions, including Louisiana's "open and obvious" jurisprudence. Thereafter, I will briefly discuss how Louisiana's particular duty-risk approach to analyzing negligence cases may have aggravated the conflation problem. Then, I discuss cases in which the plaintiff alleges that the defendant's violation of a statute constitutes a violation of the standard of care negligence cases. I will not attempt to be encyclopedic in any section. I am discussing what I contend is a common error; I am not attempting to plumb the legal depths. In each section, I will critique the relevant jurisprudence and offer my own opinion how the courts might have handled the cases before them. Thereafter, I will briefly conclude.

II. Holmes' Confidence—Misplaced and Misleading

In the classic work, The Common Law, Oliver Wendell Holmes, Jr., discussed negligence and said that the "law considers ... what would be blameworthy in the average man, the man of ordinary intelligence

and prudence, and determines liability by that."[26] Holmes was expressing the standard of care of the reasonable person—the core concept of negligence: the duty to exercise reasonable care. Holmes expressly admitted that the reasonable person standard was a rather "vague test."[27] He also noted that one person may have to pay and another may not under similar circumstances depending upon the "different feelings of different juries."[28] Today these things are truisms for the tort lawyers and scholars. Where one jury may find a breach of the duty to exercise reasonable care under the circumstances, another may find no breach.

But Holmes continued; he did not stop and leave well enough alone. He continued:

> [I]t is obvious that it ought to be possible, sooner or later, to formulate these [liability] standards at least to some extent, and that to do so must at last be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under the or those circumstances.[29]

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violation-of-statute negligence case is really no different than any other negligence case. In deciding the fact finder can consider the violation of statute as some

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[26] Oliver Wendell Holmes, Jr., The Common Law 108 (1881).

[27] *Id.* at 110.

[28] *Id.* at 111.

[29] *Id.*

evidence of negligence the judge is essentially deciding an evidentiary matter: that the violation of the statute is relevant and can be admitted in evidence. But the statute really does not constitute a rule of law for decision. It just goes into the hopper that the factfinder sifts through as it decides whether the defendant exercised reasonable care. That is, the statute is some of the evidence which the factfinder may consider in determining whether the defendant breached the standard of care of a reasonable person. Indeed, in a jurisdiction where violation of statute is only some evidence of negligence there seems there should be less confusion regarding the conflation of duty and breach. That is, violation of statute should have no stronger impact than merely evidence of breach. Thus, courts have less reason to confuse their role in garden variety negligence cases because their role is the same in a violation of statute negligence case.

VI. Conclusion

Judges are powerful people. They interpret and develop the law; their decisions define the detailed outlines of our rights as citizens. They preside over trials where lives are at stake. They interpret contracts and other important legal documents. With all that power, they must resist the temptation to exercise powers that do not belong to them. Judicial restraint is why courts deferentially review legislation dealing with commercial matters.[250] They generally defer to the legislature on such matters. Judicial restraint in such cases arises out of the need to respect another branch of government.

But judges should exercise restraint out of respect for other actors in the litigation process—the jury as

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[250] *See, e.g.*, Jamal Greene, How Rights Went Wrong 62 (2021).

factfinder and the judge herself as factfinder. When a judge conflates duty and breach, the judge usurps the factfinder's right to decide breach.[251] As noted throughout, breach is a mixed question of fact and law. Its resolution depends upon the facts of the particular case and the factfinder's measure of due care under the peculiar circumstances in front of it. The breach decision in a particular case has no predictive value for future cases. Characteristically lawyers will cite, analogize, and distinguish breach and no-breach cases but those decisions are not controlling. They are not even persuasive authority for how a future case should be decided. The judge normally has no more expertise with a community's sense of reasonability, despite what Justice Holmes believed, than the fact finder has. Merging breach and duty turns what is essentially a factual question into a legal question but law applies beyond the facts of a particular case and a decision that a defendant did or did not breach the standard of reasonable care under the circumstances does not. As Justice Lemmon, calling on the work of the late Professor David Robertson, said in his *Pitre* concurrence:

> The statement that "the defendant had no duty," as noted in Professor David W. Robertson et al, *Cases and Materials on Torts* 161 (1989), should be reserved for those "situations controlled by a rule of law of enough breadth and clarity to permit the trial judge in most cases raising the problem to dismiss the complaint or award summary

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[251] *See*, Galligan, Let the Jury Decide!, *supra* note 1. This usurpation is as pernicious as the usurpation that occurs when judges decide scope of the risk or proximate cause as a legal decision, rather than a mixed question of fact and law.

> judgment for defendant on the basis of the rule." Thus, a "no duty" defense generally applies when there is a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances. In the usual case where the duty owed depends upon the circumstances of the particular case, analysis of the defendant's conduct should be done in terms of "no liability" or "no breach of duty."[252]

Exactly. When a court ignores the general duty to exercise reasonable care and finds there is a duty or no duty based on the particular facts and determines duty or no duty based on the facts of the specific case the court errs and creates confusion. The more jurisprudence we have conflating duty or no duty and breach, the more duty begins to look pointillistic and fact dependent. That weakens the general duty to exercise reasonable care. Moreover, it suggests that people may escape liability by exercising less than reasonable care for the safety and property of others.

Justice Holmes' stop, look, and perhaps do more than listen rule took away the factfinder's ability to determine plaintiff negligence where the facts indicated that stopping, looking, and doing more than listening was, in fact, not reasonably safe. His rule of law was thankfully short-lived.

Louisiana jurisprudence is sprinkled with Holmesesque decisions conflating duty and breach. I have discussed several herein: *Noble, Robinette, Posecai, Pitre, Bufkin*, etc. Each of those cases involved questions of breach, not duty. In each of them the court could have found that there was no breach. Justice

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[252] *Pitre*, 673 So. 2d at 596 (Lemmon, J., concurring).

Lemmon's concurrences in *Posecai* and *Pitre* make that point. In Boykin that is exactly what Justice Lemmon did in his majority opinion. And, Justice Knoll in *Broussard*, echoing without citing *Boykin*, clearly noted the separation of duty and breach and the proper allocation of decision-making authority: the factfinder determines breach because it is case specific. It has no impact beyond the particular case.

But, to reiterate, just because the factfinder determines breach at trial does not mean that judges are powerless to grant summary judgment or judgments as a matter of law on the breach issue. Summary judgment or a judgment as a matter of law would be appropriate on breach if no reasonable juror could find that the defendant breached the duty to exercise reasonable care.[253] Of course a judge could also grant a summary judgment or judgment as a matter of law that the defendant did breach the appropriate standard of care if no reasonable juror could fail to find breach. But that standard shows appropriate respect for the factfinder's role—the factfinder decides breach unless the issue is so clear that no reasonable juror could fail to find that there was no breach.[254]

So, what should happen when a defendant moves for summary judgment contending that there is no duty owed based on the particular facts before the court, including the claim that the risk involved was open and obvious?[255] The court should remind the defendant

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[253] Of course, a judge could also grant a summary judgment or judgment as a matter of law that the defendant did breach the appropriate standard of care if no reasonable juror could fail to find breach.

[254] Or could fail to find that there was a breach. *See*, note 184.

[255] A defendant could legitimately file an exception of no cause of action, contending that there is no duty owed if, in fact, as

that there is a general duty to exercise reasonable care, except in specific categorical classes of cases, and deny the motion, suggesting that the proper motion would be a motion for summary judgment or judgment as matter of law on the question of breach. The Louisiana Supreme Court could help by stating that is the way to read *Noble, Posecai, Pitre, Bufkin*, and *Allen*; citing *Bufkin* and *Broussard* with approval. In doing so, the Court would respect the proper allocation of decision-making in negligence case, avoid unnecessary confusion for lawyers, law professors, law students, and litigants, and forever separate duty from breach in Louisiana negligence cases.

Justice Lemmon noted in his *Pitre* concurrence there is a "a categorical rule excluding liability as to whole categories of claimants or of claims under any circumstances." *Pitre*, 673 So. 2d at 596 (Lemmon, J., concurring).