

**Fifth Circuit Court of Appeal**  
**State of Louisiana**

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No. 25-CA-595

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EARL ROSIERE

versus

THE CITY OF KENNER, DEPARTMENT OF PUBLIC WORKS FOR THE CITY OF KENNER,  
MAYOR E. "BEN" ZAHN III AND XYZ INSURANCE COMPANY

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ON APPEAL THE TWENTY-FOURTH JUDICIAL DISTRICT COURT  
PARISH OF JEFFERSON, STATE OF LOUISIANA  
NO. 807-702, DIVISION "H"  
HONORABLE DONALD L. FORET, JUDGE PRESIDING

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May 27, 2026

**STEPHEN J. WINDHORST**  
**JUDGE**

Panel composed of Judges Susan M. Chehardy,  
Stephen J. Windhorst, and Timothy S. Marcel

**AFFIRMED**

**SJW**  
**SMC**  
**TSM**

TRUE COPY



MORGAN NAQUIN  
DEPUTY CLERK

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## **WINDHORST, J.**

Appellant/plaintiff, Earl Rosiere, seeks review of the trial court's August 25, 2025 judgment in favor of the appellee/defendant, the City of Kenner ("the City"), granting the City's motion for summary judgment and dismissing appellant's claims with prejudice. For the following reasons, we affirm.

### **PROCEDURAL HISTORY and FACTS**

On June 19, 2019, plaintiff, Earl Rosiere, was jogging in the 3300 block of Maine Avenue, in Kenner, at approximately 7:30 P.M., "near dusk." Plaintiff was familiar with the area and had "run there many, many times" for a number of years. As part of his regular routine, plaintiff asserted he was running in the street, "right off the middle" or "left of center" of the street, because the sidewalk in that location, which was in front of a school, had "trees and a mess" and it was "not safe to run." Plaintiff explained that a car approached him, which prompted him to step to the left side of the street while he continued "in a jog mode, not a running mode." He then glanced to the right to see if he could return to his regular running spot. In that "split second," he tripped or stepped into a "divot or pothole" and fell. Plaintiff explained that the "hole had blacktop" in it and appeared to have been fixed "at one time." He expounded that "when you're running, it doesn't take much for you to trip," and that this hole "was enough" to make him lose his balance and "fall hard." The deviation or pothole, at its deepest point, was approximately one and one-half inches.

On June 25, 2020, plaintiff, Earl Rosiere, filed suit against the City for damages. In his petition, plaintiff alleged that he was jogging in the street on Maine Avenue, in Kenner, at approximately 7:30 P.M. when "his foot hit a deep divot or pothole in the street." Plaintiff asserted that the accident was due to the negligence

of the City.<sup>1</sup> The City answered the petition generally denying the allegations and asserting defenses.

On May 27, 2025, the City filed a motion for summary judgment, seeking dismissal of plaintiff's claim. The City asserted that plaintiff could not meet his burden of proof as to two essential elements of his premises liability claim, namely (1) the deviation in the roadway did not present an unreasonable risk of harm and therefore, was not a defect; and (2) the City did not have actual or constructive notice of any alleged defect before plaintiff's fall on June 30, 2019.<sup>2</sup>

First, the City asserted to the trial court that plaintiff had not presented any evidence that the alleged defect in the street presented an unreasonable risk of harm. The City argued that Louisiana jurisprudence has consistently held that a one and one-half inch deviation does not generally present an unreasonable risk of harm. Pointing to the plaintiff's deposition testimony and the photograph measuring the alleged defect, the City contended that it is undisputed that the deviation in the street was under two inches.<sup>3</sup> The City concluded that plaintiff could not prove that the alleged defect in the street was an unreasonably dangerous condition because a height deviation of one and one-half inches in a public roadway not designed or intended for regular pedestrian traffic is not an unreasonably dangerous condition.

Secondly, the City argued that it had no actual or constructive knowledge of the deviation prior to plaintiff's fall. The City referred to the affidavit of Aimee Vallot, to establish that it did not have actual notice of the alleged defect because the City did not receive any complaints regarding the accident location for six years prior to plaintiff's fall. The City further argued that plaintiff could not prove that it had constructive notice of the alleged defect because the City did not have actual

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<sup>1</sup> On October 14, 2020, plaintiff voluntarily dismissed without prejudice defendants, the Department of Public Works for the City of Kenner and Mayor E. "Ben" Zahn, III.

<sup>2</sup> In support of its motion, the City attached the petition for damages, excerpts from plaintiff's deposition, and the affidavit of Aimee Vallot, the Deputy Chief Administrative Officer for the City.

<sup>3</sup> In his deposition, plaintiff asserted that the deviation was "at least an inch or so," and the photograph taken by plaintiff's neighbor showed that the deviation was no more than one and one-half inches.

notice and no similar incidents had been reported in the area. The City pointed out that courts have relied on the lack of similar prior incidents as evidence to prove a lack of constructive knowledge.

Plaintiff filed an opposition, contending that he produced factual support sufficient to sustain his burden to establish the existence of genuine issues of material fact showing that reasonable minds could conclude that the condition complained of would likely cause harm, and therefore, was unreasonably dangerous. Additionally, plaintiff argued that the evidence shows that the City had either actual and/or constructive knowledge of and/or created the defective condition that caused plaintiff's accident, and had an opportunity to repair the defective condition prior to the accident.<sup>4</sup>

On August 4, 2025, at the conclusion of the hearing, the trial court granted the City's motion for summary judgment. On August 25, 2025, the trial court issued a judgment granting the motion for summary judgment and dismissing plaintiff's claims with prejudice. This appeal followed.

## **LAW and ANALYSIS**

On appeal, plaintiff contends that the trial court erred in granting the City's motion for summary judgment, dismissing his claims with prejudice because genuine issues of material fact exist as to (1) whether the pothole created an unreasonable risk of harm; and (2) whether the City had actual or constructive knowledge of the pothole.

A motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966 A(3).

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<sup>4</sup> In support his opposition, plaintiff attached (1) plaintiff's affidavit with attached photographs; (2) excerpts from plaintiff's deposition; (3) the City's answers to interrogatories; (3) an affidavit by an employee of the City, Bryan J. Whitfield; (4) Ms. Vallot's affidavit; and (5) a writ application to the Louisiana Supreme Court in Seymour v. Murphy Oil USA, Inc., case number 23-00710, in the 14<sup>th</sup> Judicial District Court.

The burden of proof rests with the mover. La. C.C.P. art. 966 D(1). Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Id. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. Id. Appellate courts review summary judgments *de novo* using the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Reed v. Landry, 21-589 (La. App. 5 Cir. 6/3/22), 343 So.3d 874, 880.

A fact is "material" when its existence or nonexistence may be essential to the plaintiff's cause of action under the applicable theory of recovery. Alexander v. Parish of St. John the Baptist, 12-173 (La. App. 5 Cir. 10/16/12), 102 So.3d 904, 909, writ denied, 12-2448 (La. 1/11/13), 107 So.3d 617. Facts are material if they potentially insure or preclude recovery, affect a litigant's ultimate success, or determine the outcome of the legal dispute. Id.

The party moving for summary judgment must meet a strict standard of showing that the facts are clear and that any real doubt as to the existence of a genuine issue of material fact has been excluded. Robinson v. Otis Condominium Ass'n, Inc., 20-359 (La. App. 5 Cir. 2/3/21), 315 So.3d 356, 361, 361, writ denied, 21-343 (La. 4/27/21), 314 So.3d 837. If the mover meets this burden, the burden shifts to the non-mover to present evidence demonstrating that material issues of fact remain. Id. "Once the motion for summary judgment has been properly supported by the moving party, the failure of the nonmoving party [who has the burden of proof at trial] to produce evidence of a material factual dispute mandates the granting of

the motion.” Portillo v. Progressive Paloverde Ins. Co., 13-815 (La. App. 5 Cir. 3/26/14), 138 So.3d 696, 698.

In determining whether a genuine issue of material fact exists, we must consider the substantive law governing the litigation, which in this case includes La. C.C. arts. 2315, 2317, 2317.1, and La. R.S. 9:2800. La. C.C. art. 2315 provides that every act which “causes damage to another obliges him by whose fault it happened to repair it.” La. C.C. art. 2317 states that we are responsible for damage caused by the things in our custody and La. C.C. art. 2317.1 provides, in pertinent part:

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

La. R.S. 9:2800 limits the liability of a public body and provides, in pertinent part:

C. Except as provided for in Subsections A and B of this Section, no person shall have a cause of action based solely upon liability imposed under Civil Code Article 2317 against a public entity for damages caused by the condition of things within its care and custody unless the public entity had actual or constructive notice of the particular vice or defect which caused the damage prior to the occurrence, and the public entity has had a reasonable opportunity to remedy the defect and has failed to do so.

D. Constructive notice shall mean the existence of facts which infer actual knowledge.

Thus, to establish liability against a public entity, a plaintiff must prove that (1) the public entity had custody of the thing that caused the plaintiff's injuries or damages; (2) the thing was defective because it had a condition that created an unreasonable risk of harm; (3) the public entity had actual or constructive knowledge<sup>5</sup> of the defect and did not take corrective measures within a reasonable

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<sup>5</sup> Louisiana jurisprudence refers to this element interchangeably as “notice” and “knowledge.” This court also uses these terms interchangeably in this opinion. See Perdomo v. City of Kenner, 18-156 (La. App. 5 Cir. 10/17/18), 258 So.3d 983, 988 fn.2.

time; and (4) the defect in the thing was a cause-in-fact of the plaintiff's injuries. Perdomo v. City of Kenner, 18-156 (La. App. 5 Cir. 10/17/18), 258 So.3d 983, 991-992, writs denied, 18-1860 (La. 1/18/19), 262 So.3d 288 and 18-1861 (La. 1/18/19), 262 So.3d 895; Chambers v. Village of Moreauville, 11-898 (La. 1/24/12), 85 So.3d 593, 597. The failure to prove any one of the requirements enumerated in La. R.S. 9:2800 is fatal to a plaintiff's claim under La. R.S. 9:2800 against a public entity. Tanner v. Lafayette City-Par. Consol. Gov't, 18-900 (La. App. 3 Cir. 5/22/19), 273 So.3d 382, 384; Batiste v. United Fire & Cas. Co., 17-482 (La. App. 5 Cir. 3/14/18), 241 So.3d 491, 497-98.

In the instant case, plaintiff claims that there are genuine issues of material fact regarding the second and third requirements under La. R.S. 9:2800, *i.e.*, the existence of an unreasonable risk of harm and actual or constructive notice. Because we conclude, for the following reasons, that plaintiff failed to produce factual support sufficient to show he will be able to establish that the City had actual or constructive notice of the deviation or pothole in the street, we pretermitt plaintiff's first assignment of error regarding whether the deviation or pothole presented an unreasonable risk of harm.

### ***Actual or Constructive Notice***

As to the issue of notice, plaintiff argues that *the City failed to show* that there is no genuine issue of material fact that it had actual or constructive notice of the pothole. First, plaintiff asserts that a reasonable person could find that the City had actual notice of the pothole based on the fact that the City admitted that it (1) is responsible for maintenance of the street where plaintiff tripped and fell in the pothole; (2) was notified of an issue with the concrete paving of the street in the same area on May 16, 2013; and (3) completed the "concrete repair work" to that area on June 4, 2013. Plaintiff avers that the City's prior work on the street was confirmed by him after his fall when he saw "remains of an old asphalt patch in part

of the depression,” where the City “tried to fix it at one time.” Plaintiff asserts that based on these admissions, a reasonable person could find that the City had actual notice of the pothole that caused his injuries in 2019, based on its earlier attempted repair of the pothole in 2013, which creates a genuine issue of material fact regarding the City’s actual notice and precludes summary judgment.

Secondly, plaintiff argues that a reasonable person could also find that the pothole existed for such a long period of time that the City must have known of its existence and could have prevented the harm had it exercised ordinary care and diligence. Plaintiff contends the evidence in the record establishes that (1) the pothole existed long enough for at least an inch and a half of the “old asphalt patch” used to repair it in June of 2013, six years earlier, to “vanish and for grass to grow in it;” and (2) the Google Maps photographs of the pothole taken in June 2014 and December 2018, and a photograph of the pothole “as it appeared on June 30, 2019,” the date of the accident, show the deteriorating condition of the pothole during this period of time. Thus, plaintiff asserts that the question of whether such period of time is sufficiently lengthy that the City should have discovered the defective condition of the deteriorating repair work and the resulting pothole is a question of fact regarding constructive notice, which is not appropriate for summary judgment.

Plaintiff further argues that the City admitted that it (1) did not have a regular schedule of inspection or maintenance for city streets; (2) had not done anything since June of 2013 to discover, repair, or warn the public about the deteriorating and defective condition of the pothole that caused plaintiff’s accident; and (3) repairs defects strictly on a case-by-case basis and only when it receives complaints or notifications about them from the public or from city workers. Plaintiff avers that the lack of inspection and failure to have a regular schedule of inspection and maintenance for the city streets are factors to be weighed in determining whether the City had constructive notice of the pothole that caused plaintiff’s fall. Thus, plaintiff

asserts that the worn condition of the patched repair is a genuine issue of material fact regarding the City's constructive notice of the defect, which precludes summary judgment.

Courts have defined actual knowledge as “knowledge of dangerous defects or conditions by a corporate officer or employee of the public entity having a duty either to keep the property involved in good repair or to report defects and dangerous conditions to the proper authorities.” See, e.g., Fragala v. City of Rayville, 557 So.2d 1118, 1121 (La. App. 2 Cir.1990), writ denied 561 So.2d 103 (La. 1990); Boddie v. State, 27,313 (La. App. 2 Cir. 9/27/95), 661 So.2d 617, 622; Purolator Courier Corp. v. City of New Orleans, 93-1068 (La. App. 4 Cir.1994), 635 So.2d 1232, 1233, writs denied, 94-1509 (La. 9/23/94), 642 So.2d 1296 and 94-1542 (La. 9/23/94), 642 So.2d 1297. Pursuant to La. R.S. 9:2800, actual notice has also been found in cases where complaints about the injury-causing defect were received by the proper authorities. Perdomo, 258 So.3d at 992.

La. R.S. 9:2800 D provides that “constructive notice shall mean the existence of facts which infer actual knowledge.” Constructive notice can be found if the conditions which caused the injury existed for such a period of time that those responsible, by the exercise of ordinary care and diligence, must have known of their existence in general and could have guarded the public from injury. Perdomo, 258 So.3 at 992; Blount v. East Jefferson General Hosp., 04-407 (La. App. 5 Cir. 10/12/04), 887 So.2d 535, 538.

Nevertheless, the existence of a defective condition cannot be inferred solely from the fact that an accident occurred, and it takes more than the existence of a mere factual possibility to defeat summary judgment. Hebert v. Louisiana State University System Board of Supervisors Through Louisiana State University, 25-246 (La. App. 1 Cir. 11/7/25), 424 So.3d 809, 816, writ denied, 25-1542 (La. 2/10/26), 425 So.3d 1205, citing Todd v. State Through Dept. of Social Services,

Office of Community Services, 96-3090 (La. 9/9/97), 699 So.2d 35,43 (“Proof which establishes only possibility, speculation, or unsupported probability does not suffice to establish a claim.”); See also, Jefferson v. Nichols State University, 19-1137 (La. App. 1 Cir. 5/11/20), 311 So.3d 1083, 1086-1087, writ denied, 20-779 (La. 11/4/20), 303 So.3d 623; Encalade v. A.H.G. Solutions, LLC, 16-357 (La. App. 4 Cir. 11/16/16), 204 So.3d 661, 668.

Furthermore, the Louisiana Supreme Court has held that a public entity’s failure to conduct inspections of its streets does not rise to the level of actual or constructive knowledge of defects in its streets, and “[t]he absence of a plan of inspection in no way shows or implies that an employee of the appropriate public entity has actual knowledge of a dangerous defect or condition.” Jones v. Hawkins, 98-1259 (La. 3/19/99), 731 So.2d 216, 220; See also Johnson v. Consolidated Sewerage District #1 of Parish of Jefferson, 23-498 (La. App. 5 Cir. 5/1/24), 389 So.3d 211, 216; Jefferson, 311 So.3d at 1087. Moreover, this court has previously relied on a lack of similar incidents as evidence to show a lack of constructive notice. See Klumpp v. Ochsner Clinic Foundation, 24-175 (La. App. 5 Cir. 12/18/24), 410 So.3d 315, 324, Boutall v. Chirstakis, P.M., Co. LLC, 17-402 (La. App. 5 Cir. 12/27/17), 236 So.3d 1268, 1275; Johnson v. Federated Mut. Ins. Co., 21-242 (La. App. 5 Cir. 6/23/21), 325 So.3d 578, 582

In its motion for summary judgment, the City pointed out an absence of factual support for an essential element of plaintiff’s claim, namely, that it did not have actual or constructive notice of the alleged defective condition (*i.e.*, the deviation/pothole). Specifically, the City pointed out that it did not receive any complaints regarding the accident location for the six years prior to plaintiff’s fall and no similar incidents had been reported in the area.

In support of this assertion, the City submitted the affidavit of Aimee Vallot, the Deputy Chief Administrative Officer for the City, whose duties include

overseeing the Public Works Department. Ms. Vallot stated that the Public Works Department for the City is responsible for maintenance and improvements of the City's infrastructure as it pertains to its streets and she has access to all work orders and/or complaints involving Maine Avenue, in Kenner. She reviewed the records to identify any complaints related to the condition of the streets at or near the intersection of Maine Ave and 33rd Street prior to June 30, 2019. Ms. Vallot attested that the "Public Works Department did not receive at any time, in the 6 years prior to June 30, 2019, any complaints or requests for inspection related to a deviation in the street pavement in that area." She stated that the City was previously notified in May of 2013 of an issue in that area, and "concrete repair work was performed and completed in June of 2103, six years before June 30, 2019." Ms. Vallot further attested that the Public Works Department did not conduct any activities at or near the location that would have reasonably led to the discovery of any existing deviation or pothole in the street prior to the June 30, 2019 accident.

The burden then shifted to plaintiff to produce factual support to show a genuine issue of material fact existed as to whether the City had actual or constructive notice of the deviation/pothole. We find that plaintiff did not meet his burden.

In opposition, as to the issue of notice, plaintiff attached the City's answers to interrogatories, asserting that the City admitted that "there is no regular schedule of inspection and maintenance of the area" at issue, and the City did not identify "any city worker that was assigned to the maintenance of the area" at issue for the six month period prior to plaintiff's accident. Plaintiff also attached the affidavit of Bryan J. Whitfield, an employee of the Public Works Department, contending that the City "could not produce *any* inspection report" for this area at issue. We find the fact that the City does not have a regular schedule of inspection and maintenance

does not imply the City had actual or constructive notice of the alleged defective condition in 2019. See Jones, *supra*.

Plaintiff also attached his own affidavit, which stated that he inspected the “divot or pothole” after he fell, and he saw “dead grass in the hole and the remains of an old worn asphalt patch in part of the depression.” Plaintiff averred that the dead grass in the hole is a factual inference that the hole existed for an extended period of time prior to plaintiff’s accident. He further attested that the remains of an old worn asphalt patch in the depression are a factual inference of an attempted repair by the City prior to plaintiff’s fall and the hole existed for an extended period of time prior to plaintiff’s accident. Thus, he contended that the earlier attempted repair provided the City with actual notice of the defect and the worn condition of the patch shows constructive notice when coupled with the City’s failure to inspect. Plaintiff also attached Google photographs of the area taken in June 2014 and December 2018, stating that both photographs showed the hole plaintiff stepped in and that an inadequate repair was made to the hole in 2013. He claimed that the Google photographs showed the worn asphalt patch and attempted repair. He further averred that because the City admitted it was responsible for maintenance and improvements of the City’s infrastructure as it pertains to the streets, this admission provides circumstantial evidence the City “placed the asphalt patch partially covering the depression in the cement prior to plaintiff’s fall giving defendant actual notice of the defect in the roadway or showing it actually caused the defect by inadequate repair prior to the plaintiff’s accident.

A plaintiff may not satisfy his burden on summary judgment by relying on allegations and uncorroborated, self-serving testimony in response to a defendant’s properly supported motion for summary judgment. Caminita v. Roman Catholic Church of Archdiocese of New Orleans, 20-54 (La. App. 5 Cir. 7/8/20), 299 So.3d 1269, 1272; see also Sims-Gale v. Cox Commc'ns of New Orleans, 04-952 (La. App.

4 Cir. 4/20/05), 905 So.2d 311, 313-14 (finding that plaintiff's reliance on her own self-serving and factually unsupported affidavit was not the type of factual support required to demonstrate that she would be able to meet her evidentiary burden of proof at trial). Here, plaintiff's statements in his own affidavit are speculative, self-serving, and uncorroborated, and they do not create a disputed issue of material fact as to the City's actual or constructive notice. It takes more than the existence of a factual possibility to defeat summary judgment. Likewise, the photographs attached to plaintiff's affidavit only show a dark spot where the deviation/pothole was repaired. Despite plaintiff's arguments that the City "allegedly" fixed or "inadequately repaired" the deviation/pothole in 2013, plaintiff did not provide any evidence that the City did not repair the deviation or pothole in 2013, or that it was inadequately repaired. Moreover, the photographs do not provide evidence that the deviation or pothole existed for a prolonged period of time prior to plaintiff's fall.

Consequently, upon *de novo* review of the parties' pleadings and the evidence admitted, we find that the City established that there was an absence of evidence to show that it had actual or constructive notice of the alleged defect (*i.e.*, deviation/pothole) in the street. The burden then shifted to plaintiff to show a genuine issue of material fact existed on the issue of actual or constructive notice, and he failed to do so. Therefore, we find that the City was entitled to summary judgment as a matter of law.

## **DECREE**

Accordingly, for the reasons stated herein, we affirm the trial court's judgment granting summary judgment in favor of the City of Kenner and dismissing plaintiff's claims with prejudice.

**AFFIRMED**

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
STEPHEN J. WINDHORST  
JOHN J. MOLAISSON, JR.  
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TIMOTHY S. MARCEL

JUDGES



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**NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **MAY 27, 2026** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

**CURTIS B. PURSELL**  
CLERK OF COURT

**25-CA-595**

**E-NOTIFIED**

24TH JUDICIAL DISTRICT COURT (CLERK)  
HONORABLE DONALD L. FORET (DISTRICT JUDGE)  
DAVID L. HAIK (APPELLANT)  
SUSAN M. CARUSO (APPELLEE)

JOSHUA M. HUDSON (APPELLEE)  
DANIEL CARUSO (APPELLEE)

RUTH ANN REEVES (APPELLEE)  
KRISTI A. POST (APPELLANT)  
L. BLAKE JONES (APPELLANT)

**MAILED**

NO ATTORNEYS WERE MAILED