

**ANNETTE CAMPO**

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**NO. 2004-CA-0849**

**VERSUS**

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**COURT OF APPEAL**

**THE UNIVERSITY OF NEW  
ORLEANS AND THE  
LOUISIANA STATE  
UNIVERSITY BOARD OF  
SUPERVISORS**

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**FOURTH CIRCUIT**

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**STATE OF LOUISIANA**

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APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2002-12585, DIVISION "M-7"  
HONORABLE SHERYL HOWARD, JUDGE PRO TEMPORE

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**JAMES F. MCKAY III  
JUDGE**

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(Court composed of Judge James F. McKay III, Judge Dennis R. Bagneris Sr., Judge Edwin A. Lombard)

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## **AFFIRMED**

### **STATEMENT OF THE CASE AND FACTS**

The appellant, Annette Campo, appeals the trial court's judgment granting summary judgment in favor of the defendant, the University of New Orleans ("UNO"), because genuine issues of material fact remain unresolved. On September 14, 2001, Campo was a student at UNO when she stepped down on the sidewalk in front of the Administrative Building on her way to the admission's office and twisted her ankle on a sidewalk with an uneven surface.

On August 12, 2002, Campo filed a petition for damages, alleging that her fall was caused by irregularities in the sidewalk that created a dangerous defect and an unreasonable risk of injury to persons exercising ordinary care and prudence while traversing the sidewalk. Campo also alleged that the defect was well known to UNO, which took no corrective action despite notice of the defect. Campo alleged in her petition that she sustained injuries consisting of "scrapes, cuts, abrasions, bruises, contusions, and a non-displaced avulsion fracture of the left fifth metatarsal base (left foot/ankle)".

On October 1, 2002, UNO filed an answer denying Campo's

allegations and asserting the comparative fault of Campo and indemnity and contribution from Campo and/or unnamed third parties.

On November 14, 2003, UNO filed a motion for summary judgment on the grounds that there were no genuine issues of material fact. In its memorandum in support of its motion for summary judgment, UNO relied on the affidavit of Don Palmintier, which was attached to the memorandum in support of the motion for summary judgment. Palmintier stated in his affidavit that he was a claims representative for Crawford and Company and that he investigated the accident site on February 4, 2002, approximately four months after Campo's accident. Palmintier stated that he found cracks in the sidewalk, that he measured the cracks, and that he photographed the cracks. According to Palmintier, the largest crack in the sidewalk measured one half inch at its apex, and the remaining cracks measured less than one half inch in height. The photographs showed a small crack in the sidewalk and were submitted to show that the area was free of tree roots and other obstructions.

Based on Palmintier's investigation, UNO argued that under the standard set in Boyle v. Board of Sup'rs, Louisiana State University, 961158, (La. 1/14/97), 685 So.2d 1080, the cracks in the sidewalk were minor and did not create an unreasonably dangerous defect. That is, the

crack was one half inch or less in height, there were no other reported falls in the accident location, and there were no other complaints regarding the condition of the sidewalk. UNO further argued that it would be unreasonable to expect it to maintain its vast system of sidewalks in perfect condition when the social utility of sidewalks (including the cost of repair) is compared to the minimal risk of a relatively small depression in a sidewalk. In addition, UNO argued that it did not have actual or constructive notice of the particular vice or defect that allegedly caused Campo's injuries prior to her accident, as there had been no prior accidents at the site reported to UNO. *See* La. R.S. 9:2800.

On February 10, 2004, Campo mailed her opposition to the motion for summary judgment. In her opposition, Campo argued that the self-serving affidavit of Palmintier was insufficient support for a motion for summary judgment, as the photographs did not show the measurements on a ruler. Campo further argued that the nature of her injury supported her claim that she stepped over a significant crack in the sidewalk. Campo attached to her opposition the medical report of Dr. James K. Baker, a physician who examined her approximately one month after the accident. Dr. Baker stated in his report that Campo sustained a twisting injury while walking on UNO's campus and that she reported to Chalmette Medical Center's emergency

room after the accident for treatment. Dr. Baker stated that he examined Campo and diagnosed her with a “non-displaced avulsion fracture of the left fifth metatarsal base”. Dr. Baker recommended that she discontinue use of a splint and crutches, as prescribed by physicians at the Chalmette Medical Center, and use a “postop shoe with crutches” for three weeks while gradually increasing the weight on her injured ankle and foot. Dr. Baker stated that he told Campo that the fracture should heal in six to eight weeks with very little problem healing.

At no time did Campo provide evidence of UNO having actual or constructive notice of the allegedly defective sidewalk prior to her accident.

On February 20, 2004, the trial court heard the motion for summary judgment. On March 26, 2004, the trial court signed a judgment granting summary judgment in favor of UNO and dismissing Campo’s claim. On April 12, 2004, Campo filed a motion for appeal, which the trial court granted. This devolutive appeal follows.

## **STANDARD OF REVIEW**

In Independent Fire Ins. Co. v. Sunbeam Corp., 99-2181, 99-2257 (La. 2/29/00), 755 So.2d 226, the Louisiana Supreme Court discussed the standard of review of a summary judgment, stating:

Our review of a grant or denial of a motion for summary judgment is de novo. Schroeder v. Board of Sup'rs of Louisiana State University, 591 So.2d 342 (La.1991). A motion for

summary judgment will be granted "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 material fact, and that the mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B). This article was amended in 1996 to provide that "summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action.... The procedure is favored and shall be construed to accomplish these ends." La. C.C.P. art. 966(A)(2). In 1997, the article was further amended to specifically alter the burden of proof in summary judgment proceedings as follows: The burden of proof remains with the movant. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. La. C.C.P. art. 966(C)(2).

Id. at 230-31.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute.

Smith v. Our Lady of the Lake Hosp., Inc., 93-2512, p. 27 (La. 7/5/94), 639

So.2d 730, 751. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. Id. at 751.

Generally, a pedestrian has a duty to see that which should be seen.

Lofton v. Hayward, 2000-2019, p. 7 (La. App. 4 Cir. 1/9/02), 806 So.2d 877,

882. A pedestrian is not required to look for hidden dangers but is bound to observe the course to see if the pathway is clear and is held to have seen

those obstructions in the pathway that would be discovered by a reasonably prudent person exercising ordinary care under the circumstances. Lofton, 2000-2019, p. 7, 806 So.2d 877, 882.

In Reed v. Wal-Mart Stores, Inc., 1997-1174 (La. 3/4/98), 708 So.2d 362, the Louisiana Supreme Court discussed the specific standard of review in cases involving an allegation of cracks in sidewalks creating an unreasonable risk of harm and stated:

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 those defects which present an unreasonable risk of harm.

In determining whether a defect presents an unreasonable risk of harm, the trier of fact must balance the gravity and risk of harm against the individual and societal rights and obligations, the social utility, and the cost and feasibility of repair. Boyle, 685 So.2d at 1083; Entrevia v. Hood, 427 So.2d 1146, 1149 (La.1983); Langlois v. Allied Chemical Corp., 258 La. 1067, 249 So.2d 133 (1971). Simply put: The trier of fact must decide whether the social value and utility of the hazard outweigh, and thus justify, its potential harm to others? W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 31 (5th ed. 1984). The reviewing court must then evaluate the fact finder's determination under the manifest error standard of review.

Id. at 363, 365.

In the instant case, Campo claimed the sidewalk had irregularities that

created an unreasonably risk of injury. UNO countered the claim by measuring the height of the cracks, which it found to be no more than one half inch high, and applying the reasoning in Boyle to argue that the cracks were not unreasonably dangerous. That is, in light of the risk-utility balancing test that weighs factors such as gravity and risk of harm, individual and societal rights and obligations, and the social utility involved, a crack of no more than one half inch in an area otherwise free of tree roots and other obstructions is not unreasonably dangerous.

The burden of proof was initially on UNO as the mover in the motion for summary judgment, and UNO relied on Palmintier's affidavit, which properly set forth specific facts in the form of measurements of the cracks. *See* La. C.C.P. 967. Campo challenged the sufficiency of Palmintier's affidavit but failed to make more than mere allegations regarding the height of the cracks in the sidewalk as unreasonably dangerous. If a plaintiff fails to oppose a motion for summary judgment by filing affidavits, then the "facts alleged in the movers' affidavits must be considered as true." Gagliano v. Gosling, 1999-0168, p. 1-2 (La.App. 4 Cir. 12/1/99), 768 So.2d 47, 52, *citing* LeBlanc v. Adams, 510 So.2d 678, 682 ( La. App. 4 Cir. 1987). Campo could have provided the trial court with an affidavit and photographs of a ruler measuring the cracks to challenge Palmintier's measurements.



Campo, however, provided a medical report, which did not set forth specific facts showing that there was a genuine issue of material fact regarding the height of the cracks.

It is undisputed that the crack in the sidewalk was at most one half inch high. The social utility of a sidewalk is clear, as is the cost of maintaining a large system of sidewalks such as on the UNO campus. Therefore, the trial court did not manifestly err in granting summary judgment in favor of UNO and dismissing Campo's claims.

**AFFIRMED**