DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MARVEL MARTIN and JEFFREY MARTIN,

Appellants,

v.

CITY OF TAMPA; COLUMBIA FOOD SERVICE COMPANY, INC., d/b/a COLUMBIA RESTAURANT; and COLUMBIA OPERATING COMPANY, INC.,

Appellees.

No. 2D21-372

October 19, 2022

Appeal from the Circuit Court for Hillsborough County; Paul L. Huey, Judge.

Brian J. Lee of Morgan & Morgan, Jacksonville, for Appellants.

Hinda Klein of Conroy Simberg, Hollywood, for Appellees Columbia Food Service Company, Inc., and Columbia Operating Company, Inc.

No appearance for remaining Appellee.

ATKINSON, Judge.

Marvel Martin along with her husband Jeffrey Martin (the Martins) appeal the final judgment entered after summary judgment was granted in favor of Columbia Food Service Company, Inc., which does business as Columbia Restaurant, as well as its subsidiary company, Columbia Operating Company, Inc., which owns the restaurant property and runs the Columbia Restaurant (collectively, Columbia). We have jurisdiction, *see* Fla. R. App. P. 9.030(b)(1)(A), 9.110(k), and affirm because Columbia did not have a legal duty to maintain the sidewalk abutting the restaurant entrance upon which Mrs. Martin tripped and injured herself.

On May 21, 2017, Mrs. Martin had lunch with her sister at the Columbia Restaurant. As she was leaving, Mrs. Martin tripped on an uneven hexagonal paver located directly beneath the awning that Columbia owns and maintains. The awning is attached to the Restaurant and is supported by pillars that are affixed atop the hexagonal pavers. The City of Tampa permitted Columbia to erect the awning above the pavers after the parties entered into an encroachment agreement which did not mention the sidewalk underneath the awning.

Before the Restaurant opened each day, Columbia directed specific employees called "porters" to check outside for debris and hazardous substances. The porters also pressure washed the parking lot and the sidewalk around the Restaurant once weekly. To maintain the view and the point of ingress and egress, Columbia instructed the porters to inform management if they saw anything outside that was "not okay." Columbia would then contact the City of Tampa.

Based upon this evidence, the trial court granted summary judgment in Columbia's favor.

The Martins alleged that Columbia had joint and shared responsibility with the City of Tampa for the pavers located around the Restaurant. They contend that Columbia had "actual possession and control" of the sidewalk and therefore assumed the duty to keep it free from dangerous conditions. They further contend that Columbia's duty extended beyond the Restaurant because it invited customers to use the sidewalk for ingress and egress.

A Columbia employee who witnessed Mrs. Martin's fall testified at her deposition that she had stumbled over one of the

pavers close to the Restaurant on more than fifty occasions while on her way to work. She said that it was slightly uneven—by one-quarter to one-half inch. When asked why she never reported it to Columbia or to the City of Tampa, she responded that there were "uneven pavers all over town" and that she "wouldn't know who to report it to."

A negligence cause of action requires proof of the following elements: (1) a legal duty of care or obligation recognized by the law that requires conformity with a certain standard of conduct, to protect others against unreasonable risks; (2) a party's failure to conform with that standard; (3) a causal connection between the party's conduct and the resulting injury; (4) actual damage or loss. *See Clay Elec. Coop., Inc. v. Johnson*, 873 So. 2d 1182, 1185 (Fla. 2003). We review de novo a trial court's finding as to the existence of a duty of care owed to a business invitee. *See McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992). Whether a defendant has a duty of care is a question of law; however, "to determine this legal question the court must make some inquiry into the factual allegations . . . to determine whether a foreseeable, general zone of risk was created by the defendant's conduct." *Id.* at 502 n.1. "The

duty element of negligence focuses on whether the defendant's conduct foreseeably created a broader 'zone of risk' that poses a general threat of harm to others." *Id.* at 502. This duty "may arise from four general sources: (1) legislative enactments or administration regulations; (2) judicial interpretations of such enactments or regulations; (3) other judicial precedent; and (4) a duty arising from the general facts of the case." *Clay Elec. Coop., Inc.*, 873 So. 2d at 1185 (citing *McCain*, 593 So. 2d at 503 n.2).

Here, there is no legislatively imposed duty of care. The City of Tampa enacted the following ordinance regarding defective sidewalks:

> Sec. 22-12. - Defective sidewalks; notice to owner to repair.
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> Whenever a sidewalk in the city shall become so defective as to be dangerous to persons passing over the same, the occupant, owner or agent of the premises along which such defective and dangerous sidewalk may be shall be notified in writing, by the director, department of public works, that the sidewalk is dangerous and to repair the same and to place the same in a safe condition within fifteen (15) days after having received such notice. If the owner, agent or occupant refuses or neglects to repair the sidewalk within the time mentioned in this section, after having received written notice, he shall be deemed guilty of maintaining a public nuisance and, upon conviction thereof, shall be punished as provided in this Code. In such cases, the city may repair the sidewalk and bill the owner for the cost of such repairs.

Tampa, Fla., Code § 22-12 (2017). The ordinance therefore would only have imposed a duty to repair on Columbia if the City had provided the requisite notice regarding the uneven paver. There is nothing in the record indicating that such a notice was provided to Columbia. As a result, the ordinance did not create a legal duty owed to Mrs. Martin with respect to the paver.

Beyond a legislatively imposed duty, nonowners may owe a duty of care to their invitees where they are "in actual possession or control" a piece of property. *See, e.g.*, *Thompson v. Gallo*, 680 So. 2d 441, 443 (Fla. 1st DCA 1996); *Regency Lake Apartments Assocs., Ltd. v. French*, 590 So. 2d 970, 974 (Fla. 1st DCA 1991); *City of Pensacola v. Stamm*, 448 So. 2d 39, 42 (Fla. 1st DCA 1984); *Arias v. State Farm Fire & Cas. Co.*, 426 So. 2d 1136, 1138 (Fla. 1st DCA 1983). A party that "has the ability to exercise control over the premises" owes a duty of care to keep the premises in repair. *Metsker v. Carefree/Scott Fetzer Co.*, 90 So. 3d 973, 977 (Fla. 2d DCA 2012).

The Martins argue that Columbia had control over the pavers just outside the front door of the Restaurant because Columbia implicitly invited their patrons to use the pavers adjacent to the

building for ingress and egress. However, the mere fact that Columbia's location requires patrons to traverse the pavers to enter the Restaurant does not mean that it exercises control over the pavers or has created a foreseeable zone of risk in the pavers adjacent to the Restaurant. *See Carter v. Capri Ventures, Inc.*, 845 So. 2d 942, 944 (Fla. 5th DCA 2003).

All invitees must traverse property adjacent to defendant-owned or defendant-controlled property before coming onto the property or entering the zone within which a defendant has a duty of care. A business owner, too, might venture outside that zone and conduct activities beneficial to the business or its patrons without extending that zone by so doing. In this case those activities included dispatching porters to tidy up the walkway for aesthetic purposes. This does not extend the geographic space within which the business owner owes a duty to patrons any more than a Good Samaritan passerby who, observing a displaced paver, stoops to straighten it in hopes of preventing a future pedestrian from tripping over it. It is true that the business owner has a relationship to the business invitee that a random Good Samaritan does not. But that relationship alone does not give rise to a duty in

a location merely *adjacent* to the business's property. The business owner must have some control over the area in which the injury incurred or be conducting some activity on its own property that has foreseeable effects on the adjacent property.

The mere fact that patrons must walk on a public walkway before getting to the threshold of the business does not transform this case into one in which a "landowner [is] liable for a dangerous condition that results in injury off the premises." *Johnson v. Howard Mark Prods., Inc.*, 608 So. 2d 937, 938 (Fla. 2d DCA 1992). Rather, the potential pitfalls along the public pathways are a fact of life; the decision to patronize a business establishment includes the possibility that somewhere along the way the prospective patron's route might include terrain that is dangerous through no fault of the business owner—sidewalks with uneven pavers, roadways with potholes, busy streets with careless drivers. The public thoroughfares that all prospective patrons must traverse to reach their destination are not the responsibility of the business owner unless the owner has taken some action to create a foreseeable zone of risk in an area related to his or her own property.

If a tiki hut owner were to scour the sand in front of her drink stand for broken glass and cigarette butts in order to make patronizing her business safer and more attractive to potential customers, it does not follow that she would thereafter be liable to any beachgoer who might cut his heel on a pop top along the journey from his towel to the tiki hut counter. Likewise, were one of Columbia's porters to have jostled an uneven paver back into place for the purpose of keeping the general vicinity around the restaurant aesthetically pleasing or out of concern for potential customers or other passersby, the porter would be rectifying a hazard that already existed—not obviating a foreseeable risk created by activities undertaken by Columbia on its property.

The Martins attempt to avoid the arbitrariness and unworkability of a zone of infinite regress by asserting that under the facts of this case Columbia is liable because the uneven paver was on the sidewalk directly in front of Columbia's door. But there is no pertinent distinction between the paver at that location and one a few feet down from the Columbia property or a block away—any of which invitees might pass by on their way to Columbia's door. In order to incur liability for hazards existing on a public

surface along an invitee's path, the business must have exercised a requisite degree of control not present in this case or undertake activities that *create* the foreseeable zone of risk in the area of the injury.

In *Carter*, the plaintiff and her minor son were guests at one of the three hotels owned by the defendant. 845 So. 2d at 943. Two of the defendant's hotels were located on the east side of a major highway, and the third hotel was located on the west side of that highway. *Id.* Guests registered at any one of the hotels were free to use the amenities at any of the three hotels. *Id.* The plaintiff's son was killed in a car accident while he was attempting to cross the highway to use the amenities at the hotel on the other side of the highway. *Id.* The plaintiff "argue[d] that the hotel created a foreseeable zone of risk by inviting its guests to enjoy the amenities at each of its three affiliated hotels which were located on both sides of" the highway. *Id.* at 944. The trial court granted summary judgment in favor of the defendant, reasoning that "[n]o landowner creates the common risk associated with the public roadways that lead to a landowner's property simply by owning land that is adjacent to a public roadway or by inviting people to come onto his

property where public roadways are used as public access." *Id.* at 943. The Fifth District affirmed the trial court's ruling "because a property owner is generally liable only for injuries which occur on its premises, and the limited exceptions to that general rule which have been recognized by our courts and cited by Carter are factually distinguishable from, and thus not legally controlling over the instant case." *Id.* at 944.

Like the plaintiff's son in *Carter*, Mrs. Martin was not injured on the defendant's property. Instead, she was injured while walking on the public sidewalk adjacent to Columbia's business. Like the hotel in *Carter*, the fact that Columbia invites people to enter its Restaurant using a public sidewalk does not mean that Columbia exercised sufficient control over the public sidewalk so as to create a zone of foreseeable risk with respect to the sidewalk.

The Martins contend that *City of Naples v. Chops City Grill, Inc.*, 331 So. 3d 291 (Fla. 2d DCA 2021), requires reversal here. However, unlike Chops' failure to provide evidence that it did not have control over the area in which the injury occurred, the record in this case established that the city, not Columbia, had control of the pavers. In *Chops* the restaurant was entitled to erect structures

upon, and was required to maintain the condition of, the sidewalk pursuant to its agreement with the city. *Id.* at 293. Columbia, on the other hand, had to seek permission to erect an awning and had no duty to maintain or right to control the area pursuant to any agreement or ordinance. The encroachment agreement permitted Columbia to erect a structure atop the pavers, but it did not permit Columbia to occupy the area below the awning. In *Chops*, by contrast, the local municipal code permitted the restaurant to utilize the sidewalks for outdoor dining. *Chops*, 331 So. 3d at 294. Furthermore, the lease permitted signage on the sidewalks and required the restaurant to keep the adjoining premises clean and free of obstructions. *Id.* In this case, however, Columbia was required to seek permission to place a structure on the sidewalk, and there is nothing in the record to indicate that Columbia's arrangement with Tampa, unlike Chops' arrangement with Naples, included a requirement that it maintain the sidewalks or keep them free from hazards. Here, nothing gave Columbia control over the sidewalk.

In this case, there were no factual allegations or summary judgment evidence supporting that a foreseeable zone of risk was

created by Columbia's conduct. The requisite control must rise to the level of holding out or using the adjacent property as a part of the business's premises. *See Holiday Inns, Inc. v. Shelburne*, 576 So. 2d 322, 329 (Fla. 4th DCA 1991) (concluding that "[t]he jury could well have found that the Holiday Inn and the bar were, in effect, utilizing the adjacent parking lots rent free for their own business purposes"), *dismissed*, 589 So. 2d 291 (Fla. 1991), *disapproved of on other grounds by Angrand v. Key*, 657 So. 2d 1146 (Fla. 1995); *see also Chops*, 331 So. 3d at 294 (noting that the business had a contractual obligation "to keep the areas immediately adjoining the premises clean and free of obstructions" and the privilege to use sidewalks for outdoor dining and business signage). A business owner might very well have a peculiar incentive to be especially vigilant and proactive, but mere access to a public area that allows a business owner to tidy it up or check it for hazards does not give rise to a duty that supports liability.

Accordingly, the trial court did not err by granting final summary judgment in Columbia's favor.

Affirmed.

BLACK and LUCAS, JJ., Concur.

Opinion subject to revision prior to official publication.