NOT DESIGNATED FOR PUBLICATION

GERALDINE M. CASCIO	*	**NO. 2002-CA-0552**
VERSUS	*	**COURT OF APPEAL**
COPELAND'S OF NEW ORLEANS, INC., DOM C. GRIESHABER, AGATHA G. SCHOEN AND JOSEPHINE WRIGHT	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2000-4879, DIVISION "G-11"
HONORABLE ROBIN M. GIARRUSSO, JUDGE
* * * * * *
JUDGE MAX N. TOBIAS, JR.
* * * * * *

(COURT COMPOSED OF JUDGE CHARLES R. JONES, JUDGE MICHAEL E. KIRBY, AND JUDGE MAX N. TOBIAS, JR.)

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AFFIRMED

Plaintiff, Geraldine Cascio, appeals the trial court's grant of summary judgment in favor of defendant, Copeland's of New Orleans, Inc. ("Copeland's), and the resulting dismissal, with prejudice, of all her claims.

FACTS AND PROCEDURAL HISTORY

Plaintiff was injured on 27 March 1999 when she fell on the sidewalk in front of Copeland's, a restaurant located on the corner of Napoleon and St. Charles Avenues. One year later, she filed suit against Copeland's, lessee of the property in question. Plaintiff alleged that she had fallen on a defective area of the sidewalk when her attention was diverted away from the sidewalk by various obstructions that Copeland's had placed in front of its restaurant. She further alleged that the obstructions had forced her to divert her passage to the area of the sidewalk where the defect was present. She claimed that Copeland's was liable for her injuries under theories of negligence and strict liability because it exercised control over the area of

the sidewalk where she had fallen, and because it's activities around the area were the cause of her fall.

Copeland's filed a motion for summary judgment on 15 October 2001 on the basis that the undisputed evidence established that it neither owned nor controlled the property where plaintiff was injured. Attached to its motion were excerpts from plaintiff's deposition, several photographs of the accident scene upon which plaintiff had circled the approximate location of her fall, an affidavit of Copeland's corporate counsel in which she stated that Copeland's neither owned nor controlled the sidewalk area where plaintiff's accident occurred, and a copy of Copeland's lease.

At plaintiff's request, Copeland's twice agreed to continue the hearing on its own motion. Several days before the last rescheduled hearing, plaintiff filed an opposition wherein she argued that summary judgment should be denied because many questions of material fact remained. She attached a complete copy of her deposition to her opposition.

Following a hearing on 11 January 2002, the trial court granted Copeland's motion for summary judgment and dismissed all of plaintiff's claims, with prejudice. No reasons for judgment were issued. Plaintiff now appeals.

DISCUSSION

Appellate courts review summary judgment *de novo*, using the same criteria applied by trial courts to determine whether summary judgment is appropriate. *Independent Fire Ins. Co. v. Sunbeam Corp.,* 99-2181, 99-2257 (La.2/29/00), 755 So.2d 226, 230.

In her sole assignment of error, plaintiff asserts that the trial court erred in granting Copeland's motion for summary judgment because substantial issues of material fact exists regarding: (1) Copeland's control over, and strict liability for, the area in which she fell and was injured; and (2) Copeland's negligence in its placement of objects relating to its business in an area that it knew pedestrians would travel.

Under either of plaintiff's theories of liability, i.e., strict liability or negligence, she must prove that the condition of the sidewalk presented an unreasonable risk of harm, or was defective, and that this condition was the cause-in-fact of her injuries. She must also prove that Copeland's owned the area of the sidewalk where she fell, or that it was in Copeland's care, custody, and control (i.e., garde). *See Baker v. Murphy Oil USA, Inc.,* 2001-1299 (La. App. 4 Cir. 4/10/02), 816 So.2d 329.

Abutting property owners are under no duty to repair or maintain a public sidewalk unless they have done something to cause or create a defect

in the sidewalk. *Carpenter v. State Farm Fire and Cas. Co*., 411 So.2d 1206 (La. App. 4 Cir.1982).

In *Hartman v. Applewhite*, 93-2452 (La. App. 4 Cir. 5/17/94), 637 So.2d 1164, a pedestrian sued the owner of a parking lot for injuries she sustained on a portion of the street right-of-way that abutted the parking lot. We affirmed the trial court's grant of summary judgment dismissing plaintiff's strict liability claims against the parking lot owner and his insurer. In doing so, we found that the parking lot owner could not be held strictly liable for plaintiff's injuries, which were caused by a defective grate located 9.98 feet from the property line and in the city-owned street right-of-way, absent an allegation that the parking lot owner had helped to create the defect. The trial court subsequently granted summary judgment in favor of the parking lot owner and his insurer, dismissing the plaintiff's negligence claims against them as well. We again affirmed the trial court, finding that the pedestrian had failed to offer any evidence that the parking lot owner had assumed responsibility for maintaining the area where she had fallen, or that he had done anything to create or contribute to the condition that had caused her to fall. *Hartman v. Applewhite*, 94-2630 (La. App. 4 Cir. 11/16/95), 665 So.2d 103. It is interesting to note that both of our rulings in *Hartman* occurred prior to the 1996 amendment to La. C.C.P. art. 966, which

mandated that the summary judgment procedure be favored.

STRICT LIABILITY

Plaintiff contends that Copeland's exercised control over the area where she fell and, thus, can be held strictly liable for her injuries, even if her fall occurred on city owned property. In support of her contention, plaintiff relies on *George v. Western Auto Supply Co., Inc.,* 527 So.2d 428 (La. App. 4 Cir. 1988), *Youngblood v. Newspaper Production Co.,* 135 So.2d 620 (La. App. 2 Cir. 1961), and *Carpenter v. State Farm Fire and Cas. Co.*, 411 So.2d 1206 (La. App. 4 Cir.1982).

We agree that the above-cited case law stands for the proposition stated by the plaintiff. As shown by Copeland's, however, the evidence has not borne out plaintiff's allegations that it owned, maintained, or exercised custody or control of the defective area of the sidewalk where she fell.

In her deposition, which was taken on 2 May 2001, plaintiff admitted that she had walked past Copeland's many times. She stated that after crossing St. Charles Avenue, she had stepped up on the curb and had taken five or six steps before her fall occurred. Although plaintiff initially stated that she was walking through the area via "the only way to get through there" due to "tables on both sides, plus a bus thing, plus some poles from

Mardi Gras", she later admitted that she would have "came through here anyway" and that she "would have gone the same way, I guess" even if those things had not been there. When asked what she thought Copeland's had done wrong to cause her accident, plaintiff answered that she thought it had too much clutter out. She admitted, however, that she did not encounter any of the tables, chairs, or valet stands between the curb and where she fell. In fact, she stated that the valet stands were approximately six feet away from where she first tripped.

According to a sketch attached to Copeland's lease, the property lines extend twelve feet from the building's exterior on the Napoleon Avenue side and ten feet from the building's exterior on the St. Charles Avenue side of the restaurant.

During her deposition, plaintiff marked the location of her fall on several photographs that had been taken some time after her accident. She acknowledged that the area where she had fallen had since been repaired as was evidenced in the photographs where the new cement appeared to be a different color.

According to the affidavit of Copeland's corporate counsel, Judith A. Exnicios, sworn to on 12 October 2001, "the location of plaintiff's accident as identified by her in her deposition appears to place the site of the accident

outside from Copeland's of New Orleans' property lines."

We have examined copies of the two photographs attached to Copeland's motion for summary judgment on which the plaintiff had circled the approximate location of the depression in the sidewalk that had caused her to fall. Without question, that location appears well beyond the property lines covered by Copeland's lease. Plaintiff admitted in her deposition that she had **not** encountered any of the so-called "obstructions" placed by Copeland's outside of its restaurant before she started to fall. She specifically recalled that the valet stands were approximately six feet away from where she first tripped. Although she claims that she was walking "the only way to get through there" because of the "bus thing" and the Mardi Gras poles, plaintiff offered absolutely no evidence to establish that the bus stop shelter/seating area depicted in the photographs of the accident location, or that the Mardi Gras poles she claims were present at the time of her fall, were placed there by, or at the request of, Copeland's.

Copeland's met its initial burden on summary judgment of proving that there was an absence of factual support for plaintiff's claim that Copeland's was strictly liable for her injuries because it owned or exercised control over the location where plaintiff identified her fall had occurred. Specifically, Copeland's showed, through plaintiff's own testimony, that her

fall occurred due to a depression on a part of the sidewalk that Copeland's did not own. Because plaintiff further testified that she had not encountered any of the "obstructions" placed by Copeland's outside of its restaurant before she fell and that the nearest of those "obstructions" was approximately six feet away from her when she began to fall, plaintiff's contention that Copeland's exercised control over the area where she fell is not supported by the evidence. The plaintiff could not rely on the allegations of her pleadings; it was incumbent upon her to establish that she would be able to satisfy her evidentiary burden of proof at trial. *See, e.g., Moody v. City of New Orleans*, 99-0708 (La. App. 4 Cir. 9/13/00), 769 So.2d 670. She failed to do so. Accordingly, we find no error in the trial court's grant of summary judgment as to plaintiff's strict liability claim.

NEGLIGENCE

In her petition, plaintiff additionally alleged that her attention was diverted away from the sidewalk due to Copeland's placement of objects related to its business near the sidewalk. She further alleged that the "obstructions placed in her path by the defendants forced her to divert her passage into the area of the sidewalk where the defect was present." In other words, plaintiff alleged that Copeland's placement of tables, chairs, valet

stands, and other equipment and personnel contributed to her fall and thus constituted negligence. She cites no caselaw in support of this contention.

Copeland's, on the other hand, points out that a pedestrian has a duty to see what should be seen and is bound to observe his or her course of travel to determine whether the path is clear. *See Gray v. State ex rel. Dept. of Transp. and Development*, 00-7, p.9 (La. App. 5 Cir. 5/17/00), 761 So.2d 760, 765 citing *Williams v. Orleans Parish School Board*, 541 So.2d 228 (La. App. 4 Cir. 1989). Copeland's further points out the *Gray* court's statement that "[t]he degree to which a danger may be observed by a potential victim is one factor in the determination of whether the condition is unreasonably dangerous." *Gray*, 00-7 at 5, 761 So.2d at 763-4.

Copeland's argues that, even accepting all of plaintiff's allegations as true, i.e., that the area outside its restaurant included such objects as tables, chairs, valet stands, and staff, and that the area beyond Copeland's leased premises included newspaper boxes, Mardi Gras barricades, and a bus stop, those objects did not create an unreasonable risk of harm to pedestrians such as the plaintiff. We agree.

Copeland's likewise met its initial burden on summary judgment of proving an absence of factual support for plaintiff's claim that her fall had been caused by any negligence or fault on its part. As stated previously,

plaintiff admitted in her deposition that she had not encountered any of the "obstructions", i.e., tables, chairs, or valet stands, placed by Copeland's outside its restaurant before she started to fall. Because plaintiff admitted that she had begun to fall approximately six feet away from any of the objects related to Copeland's business, plaintiff did not meet her burden of proving that Copeland's placement of those objects outside its restaurant constituted negligence or had in any way caused her accident. Plaintiff's claim that she was somehow distracted by Copeland's restaurant operations does not dictate a finding that those operations created an unreasonable risk of harm. Plaintiff could have avoided the accident by paying closer attention to her path of travel. Consequently, we find no error in the trial court's grant of summary judgment as to plaintiff's negligence claim against Copeland's.

CONCLUSION

For the foregoing reasons, the judgment of the trial court granting summary judgment in favor of Copeland's of New Orleans, Inc. is affirmed.

AFFIRMED