NOT DESIGNATED FOR PUBLICATION

ROSALIND CHAMBERS LEW WIFE OF/AND RAPHEAL LEW	*	**NO. 2003-CA-1846**
	*	**COURT OF APPEAL**
VERSUS	*	**FOURTH CIRCUIT**
D & M ENTERPRISES, INC. AND ABC INSURANCE COMPANY	*	**STATE OF LOUISIANA**
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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2002-148, DIVISION "M-7"
Honorable C. Hunter King, Judge
* * * * * *
Judge Patricia Rivet Murray
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(Court composed of Judge Charles R. Jones, Judge Patricia Rivet Murray, Judge Michael E. Kirby)

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AFFIRMED

This is a trip and fall case. The trial court rendered summary judgment in favor of the defendant, D & M Enterprises, Inc. ("D&M"). From that judgment, the plaintiffs, Rosalind and Rapheal Lew, appeal. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 6, 2001, Mrs. Lew was a customer at D&M's Texaco gas station. As she was walking from the gas pumps to pay the attendant for the gas, she fell and broke her hip. According to Ms. Lew, there was a Coca-Cola display blocking the level, direct pathway between the two elevated gas pump islands, which required her to walk across the elevated island. In so doing, she tripped on the lip of the elevated, cement island. This suit followed.

D&M filed a motion for summary judgment. In support of its motion, D&M offered an affidavit from Michael J. Frenzel, a certified safety professional, who conducted an inspection of its gas station. Mr. Frenzel attested to the following:

1 The preformed curb nosing (lip) is rounded and does not have an abrupt underside. Consequently, if any part of the shoe were to strike the curb below the lip, the shoe would not be caught.

2 The island, with its rounded nosing, serves a socially useful

purpose by preventing vehicles from mounting the curb and contacting, possibly damaging, the gas pumps.

3 The island at issue, as constructed and painted, violates no applicable safety and/or building codes, and is in conformance with industry standards.

The Lews present no contradictory evidence. Nor did they argue that the cement island was defective or presented a hazard. Instead, their argument in opposing the summary judgment was that the obstructed passageway, caused by the Coca Cola display, was what created a tripping hazard.

Finding no issues of material fact, the trial court reasoned:

> Here, the accident occurred at a gas station with an open cement area around the cement island and the store where people traversed the area on a regular basis. The plaintiff, Rosalind Lew, chose one route out of several routes to the entrance of the store. She chose a route where she had to step up. However, there were other routes which were not blocked and which she could have stayed on level ground to enter the store. Moreover, the cement island was clearly marked and has no visual defects when she proceeded to cross the cement island to enter the store.

The trial court thus granted D&M's motion for summary judgment. This appeal by the Lews followed.

ANALYSIS

On appeal, the standard of review of a trial court's decision granting summary judgment is *de novo*. *Independent Fire Ins. Co. v. Sunbeam Corp.*,

99-2181, 99-2257 (La. 2/29/00), 755 So. 2d 226, 230*; Potter v. First Federal Savings & Loan Ass'n of Scotlandville*, 615 So.2d 318, 325 (La. 1993). "An appellate court thus asks the same questions as does the trial court in determining whether summary judgment is appropriate: whether there is any genuine issue of material fact, and whether the mover-appell[ee] is entitled to judgment as a matter of law." *Smith v. Our Lady of the Lake Hospital, Inc.*, 93-2512, p. 26 (La. 7/5/94), 639 So. 2d 730, 750. We are also guided by the Legislature's admonition that "[t]he summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action" and that "[t]he procedure is favored and shall be construed to accomplish these ends." La. C. Civ. Pro. Art. 966 A(2).

Another pertinent provision is La. C. Civ. Pro. Art. 966 C(2), which provides:

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant'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 that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. 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.

On appeal, the Lews contend that the trial court erred in granting

summary judgment because there are at least three genuine issues of material fact; to wit: (1) whether the obstructed passageway presented a foreseeable tripping hazard, (2) whether D&M had actual or constructive knowledge of the hazard, and (3) whether Mrs. Lew failed to exercise reasonable care under the circumstances. The Lews further contend that the trial court erred in accepting D&M's argument that it did not erect, own, or maintain the Coca-Cola display that was obstructing the passageway and thus could not be liable.

D&M counters that there is no duty on the part of a merchant to provide the most direct means of ingress to his establishment, nor to maintain such a direct passageway forever once one exists, especially when suitable alternatives routes are available. D&M further counters that even if the gas pump island or the Coca Cola display posed a tripping hazard, that hazard was an open and obvious one to the reasonably prudent pedestrian.

The Lews' claims against D&M apparently were based on negligence, strict liability, and D&M's status as a merchant. An essential element of recovery under all these theories is cause-in-fact. Simply stated, "[t]here must be a causal relationship between the defendant's wrongful act and the plaintiff's injury." Frank L. Maraist & Thomas C. Galligan, Jr., *Louisiana Tort Law*, §4-1 (1996). The absence of any factual support for this essential

causation element is fatal to the Lews' claims and fully supports the trial court's grant of summary judgment.

Although the Lews contend that the obstructed passageway created a tripping hazard, they failed to offer any factual support that the obstructed passageway was the cause-in-fact of Mrs. Lew's injuries. In her own deposition, Mrs. Lew stated that she saw that the walkway between the two islands was blocked by the Coca-Cola display and that she therefore stepped up on, or tried to step up on, the elevated island. She further stated that she knew that there was a step up and that she did not know what caused her to fall. When asked if she had any idea what caused her to fall, she answered that it might have been the lip of the concrete island. Although her husband and child were in the car, neither of them witnessed her fall. Nor were there any other eyewitnesses. Ms. Lew thus offered no factual support as to how the obstructed passageway caused her to fall. Instead, she offered only speculation that perhaps it was the lip of the concrete island.

"Proof which establishes only possibility, speculation, or unsupported probability does not suffice to establish a claim." *Todd v. State Through Social Services*, 96-3090, p. 16 (La. 9/9/97), 699 So. 2d 35, 43. Illustrating this principle, the court in *Reed v. Home Depot USA, Inc*., 37,000 (La. App. 2 Cir. 4/9/03), 843 So. 2d 588, *writ denied*, 2003-1638 (La. 10/10/03), 855

So. 2d 345, affirmed a finding of no genuine issue of material fact as to causation under similar facts to those presented in this case.

In *Home Depot, supra*, the plaintiff denied that she stepped on anything; instead, she testified that she fell immediately after placing her foot on the ground. Rejecting the plaintiffs' hypothesis that her foot got caught in the pallets, the court reasoned that "[t]heir speculation as to what caused the accident cannot supply the *factual support* necessary to show that the plaintiff would be able to meet her evidentiary burden at trial." *Home Depot*, 37,000 at p. 5, 843 So. 2d at 591 (citing *Babin v. Winn-Dixie La., Inc*., 2000-0078 (La. 6/30/00), 764 So. 2d 37). As noted, we find the same is true in this case. The Lews speculation as to what caused Mrs. Lew to fall is insufficient to establish causation.

We also find merit to D&M's argument that the Coca Cola display and the lip of the concrete island were not defective and did not present an unreasonable risk of harm because they were open and obvious. In so holding, we find our reasoning in *Haynes v. New Orleans Archdiocesan Cemeteries*, 98-0439 (La. App. 4 Cir. 8/5/98), 716 So. 2d 499, instructive.

In *Haynes, supra,* we found merit to the defendant's argument that a tomb atop a raised concrete slab (apron) was not defective and did not present an unreasonable risk of harm because any danger presented was

open and obvious. Pictures in evidence depicted the tomb and apron and reflected the absence of a crack or hole in the cement. Although the apron and the abutting walkway were both the same stone-colored cement, there was an obvious change in elevation of the apron. The plaintiff testified that she was looking straight ahead when she tripped on the apron and fell. Vacating a default judgment, we held that there was insufficient evidence to establish a prima facie case that the tomb and apron presented an unreasonable risk of harm.

Likewise, we find the Coca Cola display and the lip of the concrete island were not defective and did not present an unreasonable risk of harm because they were open and obvious. Pictures in evidence depict the display and the obviously elevated, painted concrete island. Indeed, Mrs. Lew acknowledged that she was aware there was a step up.

In sum, we find that there is no factual dispute as to the location of the Coca-Cola display, Mrs. Lew's awareness of the display, her awareness of the fact that the island was elevated, and the existence of alternative routes. We thus find, as did the trial court, that there is no genuine issues of material fact.

DECREE

For the foregoing reasons, the judgment of the trial court is affirmed.

AFFIRMED