The Supreme Court of the State of Louisiana

HELENA SHEAR

No. 2021-CC-00873

VS.

TRAIL BLAZERS, INC., ET AL.

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IN RE: SMG/Facility Management of Louisiana - Applicant Defendant; The State of Louisiana, through the Louisiana Stadium and Exposition District (LSED) - Applicant Defendant; Applying For Supervisory Writ, Parish of Orleans Civil, Orleans Civil District Court Number(s) 2014-1435, Court of Appeal, Fourth Circuit, Number(s) 2021-C-0087;

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December 21, 2021

Writ application granted. See per curiam.

JLW

JDH

SJC

JTG

WJC

JBM

PDG

Supreme Court of Louisiana
December 21, 2021

Katie Marjanovic

Chief Deputy Clerk of Court
For the Court

SUPREME COURT OF LOUISIANA

No. 2021-CC-0873

HELENA SHEAR

VS.

TRAIL BLAZERS, INC., ET AL

On Supervisory Writ to the Orleans Civil District Court, Parish of Orleans

PER CURIAM

We are presented with the question of whether defendants are entitled to summary judgment because there are no genuine issues of material fact as to whether the seating configuration during a basketball game was unreasonably dangerous. For the reasons that follow, we conclude summary judgment is appropriate.

UNDERLYING FACTS AND PROCEDURAL HISTORY

This case arises from an accident which occurred during a February 13, 2013 professional basketball game between the New Orleans Hornets[1] and the Portland Trail Blazers at the New Orleans Arena. Helena Shear, a season ticket holder since the 2007 season, attended the game and was seated on the third row of the courtside seating. The New Orleans Hornets game tickets included a printed warning on the back which stated in pertinent part that "the holder of this ticket voluntarily assumes all risk and danger of personal injury (including death)."

During the game, one of the players chased a loose ball into the courtside seating area. As he did so, he collided with Ms. Shear.

In 2014, Ms. Shear filed the instant suit against several defendants, including the State of Louisiana through Louisiana Stadium Exposition District and SMG/Facility Management of Louisiana (collectively referred to as the "State"), in

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[1] The Hornets' name was subsequently changed to the "Pelicans."

its capacity as owner and manager of the New Orleans Arena.[2] With regard to the State, plaintiff alleged her seating was "in a dangerous and unsafe area." She contended the State was negligent in failing to erect "safety measures" to prevent her injuries.

After discovery, the State moved for summary judgment. The State asserted Ms. Shear, as a season ticket holder, was aware of the risk presented by her courtside seating and its proximity to the game. The State also relied on an affidavit from Bart Whitaker, an expert in the area of facilities management. Mr. Whitaker opined that the courtside seating was reasonable and commensurate with general industry standards.

Ms. Shear did not produce any expert testimony in response to the State's motion. Instead, she relied on her own testimony for the proposition that she was unaware of the particular risk encountered.

After a hearing, the district court denied the State's motion for summary judgment. In written reasons for judgment, the district court found it was reasonable to infer that Ms. Shear, as a season ticket holder, "was aware of the potential for players to come off the court in pursuit of a loose ball." The court also observed "it is fair to deduce that any potential hazard of player collisions while sitting courtside is open and obvious." Nonetheless, the court denied the

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[2] Ms. Shear also named James Edward Hickson, Jr., the player who ran into her, as a defendant. In 2016, Mr. Hickson filed a motion for summary judgment. The district court granted Mr. Hickson's motion for summary judgment, stating:

> Here, the Respondent was sitting two or three rows behind courtside seating very close to the action of the game. Further the rules of the game permit the players to chase a loose basketball and injuries to a spectator may result but this does not create an unreasonable risk of harm. The record establishes that Ms. Shear was familiar with the rule of the game, as she was a season ticket holder for the then New Orleans Hornets since the 2007-2008 season. As such it is reasonable to find that she was aware of the risk of a ball being chase into the spectator area thereby causing the exact injury she suffered.

State's motion for summary judgment based on a finding that there were questions of fact concerning "whether the seating arrangement was safe to begin with."

The State applied for supervisory review of this judgment. The court of appeal denied the writ, with one judge dissenting.

The State then applied to this court. Pursuant to La. Code Civ. P. art. 966(H), we ordered briefing from the parties.[3]

DISCUSSION

A summary judgment is reviewed on appeal de novo, with the appellate court using the same criteria that govern the trial court's determination of whether summary judgment is appropriate; i.e., whether there is any genuine issue of material fact, and whether the movant is entitled to judgment as a matter of law. *Guidry v. Brookshire Grocery Co.*, 2019-1999 (La. 2/26/20), 289 So.3d 1026, 1027; *Murphy v. Savannah*, 2018-0991 (La. 5/8/19), 282 So.3d 1034, 1038; *Wright v. Louisiana Power & Light*, 2006-1181 (La. 3/9/07), 951 So.2d 1058, 1070.

On a motion for summary judgment, the burden of proof remains with the mover. However, if the moving party will not bear the burden of proof on the issue at trial and points out an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. La. Code Civ. P. art. 966(D)(1); *Stephenson v. Bryce W. Hotard Sunbelt Rentals, Inc.*, 2019-0478 (La. 5/20/19), 271 So.3d 190, 193; *Bufkin v. Felipe's*

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[3] As required by the article, we permitted the parties an opportunity to request oral argument and entertained the State's request for argument. After careful consideration, we found oral argument was unnecessary under the facts of this case and therefore elected to exercise our discretion to consider the matter on written briefs only.

Louisiana, LLC, 2014-0288 (La. 10/15/14), 171 So.3d 851, 854; *Schultz v. Guoth*, 2010-0343 (La. 1/19/11), 57 So.3d 1002, 1006.

In order to prove a public entity is liable for damages caused by a thing, the plaintiff must establish: (1) custody or ownership of the defective thing by the public entity; (2) the defect created an unreasonable risk of harm; (3) the public entity had actual or constructive notice of the defect; (4) the public entity failed to take corrective action within a reasonable time; and (5) causation. La. R.S. 9:2800; *Chambers v. Village of Moreauville*, 2011-898 (La. 1/24/12), 85 So.3d 593, 597; *Lasyone v. Kansas City Southern R.R.*, 00–2628 (La. 4/3/01), 786 So.2d 682, 690; *Dupree v. City of New Orleans*, 1999–3651 (La.8/31/00), 765 So.2d 1002, 1008.

The focus of the arguments in this case is over the second element – namely, whether the seating configuration at the time of Ms. Shear's injury created an unreasonable risk of harm. In support of its motion for summary judgment, the State introduced an affidavit from Mr. Whitaker, an expert in the area of facilities management. Mr. Whitaker opined that the manner in which the floor seating of the New Orleans Arena was configured on the date of the accident was reasonable and commensurate with general industry standards. Mr. Whitaker further explained that no basketball courts of any type, at any level, employ physical barriers. He concluded that the lack of physical barriers between the court and spectators is normal and customary.

We find this evidence is sufficient to satisfy the State's burden under La. Code Civ. P. art. 966(B) to establish an absence of factual support for an essential element of Ms. Shear's claim. At this point, the burden shifted to Ms. Shear "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.* Other than her own affidavit, Ms. Shear presented no evidence which would

support her theory that the seating configuration was unreasonably dangerous.[4] Therefore, summary judgment in favor of the State is mandated.

Accordingly, we must reverse the judgment of the district court and grant summary judgment in favor of the State.

DECREE

For the reasons assigned, the writ is granted and made peremptory. The judgment of the district court is reversed. The motion for summary judgment filed by State of Louisiana through Louisiana Stadium Exposition District and SMG/Facility Management of Louisiana is granted, and the claims of Helena Shear against these defendants are dismissed with prejudice.

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[4] In her opposition to the State's motion for summary judgment, Ms. Shear attached certain photographs which purportedly showed physical barriers in the seating area of college basketball games. The State's brief indicates these photographs were never authenticated and are inadmissible. In her pleadings to this court, Ms. Shear states these photographs "were not exhibits per say [sic] but submitted to the trial court along with the website link to assist the Court in determining if the statements presented by [t]he State and its expert that no basketball game at any level had barriers was true or false." We find these photographs were not properly submit as summary judgment evidence under La. Code Civ. P. art. 966(A)(4) and decline to consider them. *See Campbell v. Dolgencorp, LLC*, 2019-0036 (La. App. 1 Cir. 1/9/20), 294 So.3d 522, 527 ("[b]ecause the photographs were not properly submitted as summary judgment evidence pursuant to La. Code Civ. P. art. 966, we cannot consider the photographs on appeal.").