NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 2023

BARBARA KIRBY DENNIS, INDIVIDUALLY AND ON BEHALF OF HER MINOR NEPHEW, XAVIER HUNT AND ALEXANDER DENNIS

VERSUS

FAMILY DOLLAR STORE OF LOUISIANA, INC. AND XYZ INSURANCE COMPANY

Judgment Rendered: ***March 27, 2009***

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ON APPEAL FROM NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA,
DOCKET NUMBER 549804, DIVISION 23 (E)

THE HONORABLE WILLIAM A. MORVANT, JUDGE

* * * * * * *

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* * * * * *

BEFORE: PETTIGREW, McDONALD, HUGHES, JJ.

Hughes, J., dissents with reasons.

McDONALD, J.

This is an appeal from a judgment granting a motion for summary judgment. The plaintiff, Barbara Kirby Dennis, filed suit against Family Dollar Store of Louisiana, Inc. Mrs. Dennis asserted that on November 29, 2005, after she completed her 12-hour shift at Our Lady of the Lake Regional Medical Center as a nursing assistant, some family members picked her up at work, and they went to the Family Dollar Store in Westmoreland Village. Mrs. Dennis indicated that from there she went to her daughter's house, and then she went home. That night when she removed her shoes and socks, Mrs. Dennis found blood in her left shoe and sock and discovered that a security tag had been stuck into her toe through her thick, rubber-soled shoe. As a diabetic with neuropathy, Mrs. Dennis had not felt the puncture of the security tag into her shoe and toe. She sought medical attention, and eventually her toe was amputated.

Mrs. Dennis asserted in her petition that the security tag that injured her was from the Family Dollar Store. However, in her deposition, Mrs. Dennis admitted that she did not know when she stepped on the tag or how long the tag had been in her shoe. Family Dollar Store filed a motion for summary judgment, asserting that Mrs. Dennis could not say for certain that the security tag came from the Family Dollar Store and thus she could not prove her case at trial. The trial court granted the motion for summary judgment in favor of the Family Dollar Store and dismissed Mrs. Dennis's suit. Mrs. Dennis appealed that judgment.

Our review of a grant or denial of a motion for summary judgment is de novo. **Independent Fire Ins. Co. v. Sunbeam Corp.**, 99-2181, 99-2257, p. 7 (La. 2/29/00), 755 So.2d 226, 230. 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 mover is entitled to judgment as a matter of law." La. C.C.P. art. 966(B).

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 not genuine issue of material fact. La. C.C.P. art. 966(C)(2).

Family Dollar Store asserts that the admission by Mrs. Dennis that she did not know for certain where the security tag came from is fatal to her case. At her deposition, Mrs. Dennis testified in part as follows:

Q. When you got home and you took your shoes and socks off, you noticed you had blood in the left shoe and sock; is that correct?
A. Yes.
Q. And did you wonder where that was coming from?
A. Yes.
Q. Did you inspect the bottom of your shoes?
A. Yes, my husband did.
Q. He was in the bathroom or wherever you were undressing?
A. He was in the bedroom.
Q. And you hollered for him?
A. Yes.
Q. And he came in and inspected your shoes?
A. Yes. He was trying to figure out where the blood was coming from.
Q. Do you know how long the security tag tack had been [in] your shoe?
A. No.
Q. Do you know where it came from?
A. The Family Dollar is the only store that I went to.
Q. So you assume that it came from Family Dollar?
A. Yes.
Q. You mentioned in your lawsuit that you suffer from peripheral neuropathy. We discussed that a moment ago. I guess that makes it difficult for you to feel anything in your feet; is that correct?
A. That is correct.

Q. So do you think that is why it is that it took you a while before you noticed that? Well, actually, you didn't even notice it until you saw the blood, right?

A. Right.

Q. Prior to this incident or this occasion, have you ever stepped on anything that caused your feet to bleed?

A. No.

Q. Have you ever suffered any other injury to your feet before the November 29, 2005 date?

A. No.

Q. So if I understand you correctly, you're pretty much speculating that because the only place you had been that evening was Family Dollar in terms of retail so that's where the security tag came from?

A. Yes.

A review of Mrs. Dennis's deposition shows that she did not know when she stepped on the security tag, she could not say how long it was imbedded in her shoe, she shopped at other stores that used these security tags, she did not see any security tags on the floor of the Family Dollar store that day, and she admitted that she was speculating that the security tag that stuck her foot was from the Family Dollar Store that day.

To prevail in her case, Mrs. Dennis must prove by a preponderance of the evidence that she was injured by a security tag from the Family Dollar Store. Since Mrs. Dennis has admitted that she cannot say for certain that the security tag at issue came from the Family Dollar Store, she cannot prevail, as there is a failure of proof on one of the essential elements of the cause of action.

Thus, for the foregoing reasons, the trial court judgment granting the motion for summary judgment in favor of the Family Dollar Store and dismissing the suit is affirmed. Costs are assessed against Mrs. Dennis.

AFFIRMED.

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HUGHES, J., dissenting.

I respectfully dissent from the majority opinion affirming the trial court's grant of summary judgment and dismissal of plaintiffs' case.

Initially it must be noted that application of LSA-R.S. 9:2800.6(B) to this case is inappropriate.[1] While Paragraph (A) of LSA-R.S. 9:2800.6 supplies the duty that a merchant owes to persons who use his premises, Paragraph (B) of the statute applies only to actions involving a person

[1] LSA-R.S. 9:2800.6 provides, in pertinent part:

> A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained ***because of a fall*** due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, in addition to all other elements of his cause of action, all of the following:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence.
>
> (3) The merchant failed to exercise reasonable care. In determining reasonable care, the absence of a written or verbal uniform cleanup or safety procedure is insufficient, alone, to prove failure to exercise reasonable care.
>
> (Emphasis added.)

damaged "because of a fall" on a merchant's premises under the plain language of the statute. See **Jefferson v. Costanza**, 628 So.2d 1158, 1161 (La. App. 2 Cir. 1993). See also **Retif v. Doe**, 93-1104 (La. App. 4 Cir. 2/11/94), 632 So.2d 405, 407. In the instant case, the plaintiff did not fall on the merchant's premises, but rather stepped on a tack-like security sensor tag, which became lodged in her shoe and caused injury to her foot. Therefore, this case must be evaluated under the standards provided for LSA-C.C. art. 2317.1 premises liability.

The general rule is that the owner or person having custody of immovable property has a duty to keep such property in a reasonably safe condition. He must discover any unreasonably dangerous condition on his premises and either correct the condition or warn potential victims of its existence. This duty is the same under theories of negligence or strict liability. Under either theory, the plaintiff has the burden of proving that: (1) the property which caused the damage was in the "custody" of the defendant; (2) the property had a condition that created an unreasonable risk of harm to persons on the premises; (3) the unreasonably dangerous condition was a cause-in-fact of the resulting injury; and (4) defendant had actual or constructive knowledge of the risk. **Smith v. The Runnels Schools, Inc.**, 2004-1329, p. 4 (La. App. 1 Cir. 3/24/05), 907 So.2d 109, 112.

In **Jefferson v. Costanza** the Second Circuit considered whether pins on the floor of a store dressing room were unreasonably dangerous. On ruling in the affirmative, the court reasoned that it was foreseeable that a customer's small child would enter a dressing room, play on the floor, and be injured by the pins. The court further found that the store employees were aware of the presence of pins on the store floors and that the store's twice a

day vacuuming of the dressing room was inadequate given the presence of straight pins on the dressing room floor despite the vacuuming.

In the instant case, Family Dollar Store employees were aware that security sensor pins were at times present on the store floors; testimony of store employees revealed that security tags were regularly broken by shoplifters who left the security tags on store floors. At least one employee and one other customer had stepped on the pin portion of a security tag before. Employees would pick up the tags when they saw one on the floor. However, store employees were only required to inspect store floors two to three times per day. In light of this evidence, a factfinder could conclude that the Family Dollar Store had notice of this hazard.[2] Moreover, considering **Jefferson v. Costanza** and the facts of this case, it could reasonably be concluded that the known and regular presence of security tag pins on the floor of the Family Dollar Store created an unreasonable risk of harm to persons on the premises.

There further remains a question of fact as to whether the security tag that caused plaintiffs' damage was encountered within the defendant's store. Although Ms. Dennis had shopped at other stores in the week preceding her injury, she testified by deposition that she had shopped only in the Family Dollar Store on Government Street on the day her foot was injured. Testimony of Family Dollar Store employees confirmed that the security tag that injured plaintiff was the type used in the Family Dollar Store at the time of the injury. Based on this evidence, it is plausible that a factfinder could conclude that plaintiff stepped on the security tag in defendant's store.

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[2] The trial court improperly applied the LSA-R.S. 9:2800.6(B) burden to this non slip and fall case. Proof of a temporal element is required by the jurisprudence only with respect to an inference of constructive notice in LSA-R.S. 9:2800.6(B) slip and fall cases. See **Wheelock v. Winn-Dixie Louisiana, Inc.**, 2001-1584 (La. App. 1 Cir. 6/21/02), 822 So.2d 94, 96-97 (citing **White v. Wal-Mart Stores, Inc.**, 97-0393, p. 4 (La. 9/9/97), 699 So.2d 1081, 1084).

Factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing a motion for summary judgment, and all doubt must be resolved in the opponent's favor. **Bradford v. Coody**, 2008-1059, p. 4 (La. App. 1 Cir. 12/23/08), ___ So.2d ___, ___ (citing **Willis v. Medders**, 2000-2507 (La. 12/8/00), 775 So.2d 1049, 1050).

CONCLUSION

This is not a "slip and fall" case. Plaintiffs presented sufficient evidence in proper form to defeat the motion for summary judgment. Issues of credibility should be addressed by the factfinder.