STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

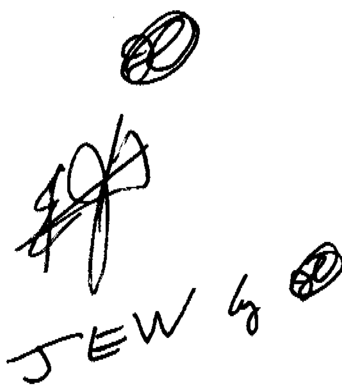
2010 CA 1929

GERALDINE GUILLORY AND LINUS GUILLORY

VERSUS

OUTBACK STEAKHOUSE OF FLORIDA, INC., AND JOEY GANNARD, d/b/a OUTBACK STEAKHOUSE

Judgment Rendered: NOV 2 2 2011



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Appealed from the 19th Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 551,235, Section 23

Honorable William A. Morvant, Judge Presiding

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BEFORE: PARRO, GUIDRY, GAIDRY, HUGHES, AND WELCH, JJ.

Guidry, J. dissents and assigns reasons
Parro, J., concurs.

HUGHES, J.

This is an appeal of a directed verdict in favor of Outback Steakhouse of Florida, Inc. and its proprietor, Joey Gannard, d/b/a Outback Steakhouse (Outback), and against plaintiffs, Linus and Geraldine Guillory. For the following reasons, we reverse and remand.

FACTS

On January 28, 2006 the Guillorys and their friends, Roland and Judith Joubert, visited an Outback Steakhouse in East Baton Rouge Parish. The party took a booth in the bar area before it had been cleaned. Ms. Guillory excused herself to go to the restroom. While Ms. Guillory was in the restroom, a busboy came to their table and used a rag to wipe the food remnants on the table onto the floor, with some falling onto the pantleg of Mr. Joubert. The busboy left the table without cleaning the floor. The busboy was then observed going to another table and again wiping food onto the floor.

On her way back to the table, Ms. Guillory slipped on a french fry in the bar area and fell to the floor. Lorelei Nicholson, a waitress who was standing at a nearby table, picked up the remnants of the french fry with a napkin while someone else helped Ms. Guillory to her feet.

Mr. and Ms. Guillory filed suit against Outback. After discovery, Outback sought summary judgment, arguing that the Guillorys could not prove that Outback had constructive notice of the french fry on the floor. The motion was granted and the plaintiffs appealed. On appeal, the summary judgment was reversed and the matter was remanded to the district court for a trial on the merits.[1] A jury trial was held and after the close of the Guillorys' case in chief, the district court rendered a directed verdict in

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[1]**Guillory v. Outback Steakhouse of Florida, Inc.**, 2008-2304 (La. App. 1 Cir. 5/8/09), unpublished opinion.

favor of Outback and against the Guillorys, once again finding that the Guillorys had failed to prove constructive notice on the part of Outback. The Guillorys appeal and make the following assignments of error:

> A. The trial court legally erred by not applying the appropriate legal standard for granting a directed verdict.
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> B. The trial court was clearly wrong in its determination that plaintiffs had not proved constructive notice or failure to exercise reasonable care pursuant to La. R.S. 9:2800.6(B)(2) and (C)(1).
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> C. The trial court legally erred in failing to recognize an expansion of the pleadings to include a claim for spoliation or negligent impairment of a civil claim.

LAW AND ANALYSIS

1. Directed Verdict

Pursuant to LSA-C.C.P. art. 1810,[2] a party may request that the court render a directed verdict, without submitting the case to the jury for decision. A trial court has much discretion in determining whether or not to grant a motion for directed verdict. **New Orleans Property Dev., Ltd. v. Aetna Casualty and Surety Co.**, 93-0692 (La. App. 1st Cir. 4/8/94), 642 So.2d 1312, 1315; **Belle Pass Terminal, Inc. v. Jolin, Inc.**, 92-1544 and 92-1545 (La. App. 1st Cir.3/11/94), 634 So.2d 466, 478, writ denied, 94-0906 (La. 6/17/94), 638 So.2d 1094. A motion for directed verdict is appropriately granted in a jury trial when, after considering all evidentiary inferences in the light most favorable to the party opposing the motion, it is clear that the facts and inferences are so overwhelmingly in favor of the

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[2] LSA-C.C.P. art. 1810 states:

> A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict that is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

moving party that reasonable men could not arrive at a contrary verdict. **Barnes v. Thames**, 578 So.2d 1155, 1162 (La. App. 1st Cir.), writs denied, 577 So.2d 1009 (La. 1991). However, if there is substantial evidence opposed to the motion, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might reach different conclusions, the motion should be denied, and the case submitted to the jury. **Newpark Resources, Inc. v. Marsh & McLennan of Louisiana, Inc.**, 96-0935, pp. 4-5 (La. App. 1st Cir. 2/14/97), 691 So.2d 208, 211, writ denied, 97-0691 (La. 4/25/97), 692 So.2d 1094.

On appeal, the standard of review for directed verdicts is whether, viewing the evidence submitted in the light most favorable to the movant's opponent, the appellate court concludes that reasonable people could not reach a contrary verdict. Furthermore, the propriety of a directed verdict must be evaluated in light of the substantive law underpinning the plaintiff's claims. **Newpark Resources, Inc.**, 691 So.2d at 211.

2. Substantive Law

Louisiana Revised Statute 9:2800.6, as revised in 1996 and in effect at the time of the plaintiff's accident, provides, in relevant part:

> 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, and in addition to all other elements of his cause of action, that:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable;
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> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and
>
> (3) The merchant failed to exercise reasonable care.
>
> C. Definitions:

> (1) "Constructive notice" means the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care.

We find, and the jurisprudence supports, that a french fry on the floor creates an unreasonable risk of harm and that harm is reasonably forseeable.[3] Therefore, we will address only the issues of whether the evidence supports the inference that Outback either created the condition[4] or had actual or constructive notice of the condition and failed to use reasonable care.

3. Constructive Notice

On granting the directed verdict, the trial court found that the plaintiffs failed to make "any showing" of constructive knowledge and failed in their burden "to prove the temporal element."

Our jurisprudence holds that in order to prove constructive notice, a claimant must show a temporal element. Specifically, the claimant must show that the condition existed for "such a period of time" that the defendant would have discovered it. **White v. Wal-Mart Stores, Inc.**, 97-0393, p. 7 (La. 9/9/97), 699 So.2d 1081, 1086. As explained by the supreme court in **White**, "[t]he statute does not allow for the inference of constructive notice absent **some showing** of this temporal element. The claimant must make a positive showing of the existence of the condition **prior to the fall.**" **White**, 699 So.2d at 1084. (Emphasis added.)

> Though there is no bright line time period, a claimant must show that "the condition existed for such a period of time..." Whether the period of time is sufficiently lengthy that a merchant should have discovered the condition is necessarily a fact question; however, there remains the prerequisite showing of some time period. A claimant who simply shows that the condition existed without an additional showing that the condition existed for some time before the fall has not carried

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[3]See **Beninate v. Wal-Mart Stores, Inc.**, 97-802 (La. App. 5th Cir. 12/10/97), 704 So.2d 851, writ denied, 98-0082 (La. 3/13/98), 713 So.2d 470.

[4]The issue of whether Outback created the unreasonable risk of harm is not before us on appeal.

> the burden of proving constructive notice as mandated by the statute. **Though the time period need not be specific in minutes or hours**, constructive notice requires that the claimant prove the condition existed for some time period prior to the fall. This is not an impossible burden.

White, 699 So.2d at 1084-85. (Emphasis added. Footnote omitted.)

Essentially, the question in this case turns upon whether Ms. Guillory, in light of the supreme court's pronouncement in **White**, carried her burden of positively establishing that the french fry was on the floor of the Outback for "such a period of time" that Outback should have discovered it in the exercise of reasonable care. In order for the directed verdict of the trial court to be upheld, this court must view all evidentiary inferences in favor of the Guillorys and conclude that no reasonable-minded person could have found that the evidence established constructive notice.

Mr. and Mrs. Joubert and Mr. Guillory testified that when they sat down, a busboy came to their table and pushed crumbs and chunks of food from their table onto the floor with a rag. They all also testified that some of the food the busboy wiped off of the table fell onto Mr. Joubert's pantleg. Mr. Joubert further stated that he observed the busboy wipe food from another table onto the floor with a rag at some point while they were seated and that he had "seen the crumbs fall on the floor."

Their testimony was further corroborated by Ms. Lorelei Nicholson, a waitress at Outback on the night of the accident. She stated that the busboys at the Baton Rouge location did not use bus tubs and that she had also seen busboys wipe food onto the floor with a rag.

Ms. Nicholson testified that she was standing at Table 44 at the time of the fall. She believed that the customers she was facing, seated at Table 44, saw Ms. Guillory fall behind her, but their testimony was not taken. Ms. Nicholson testified that as she turned around to go help Ms. Guillory, other

customers, seated at either Table 42 or 43, "said that they had seen a piece of french fry on the floor." After a customer pointed out the remaining potato material on the floor, she grabbed a napkin to pick up the fry, "but it was stuck to the floor ... It was pretty stuck to the floor because I had to kind of scrub it off." She then threw the potato material away.

Mr. Gannard, proprietor of the Baton Rouge Outback location at the time of the incident, testified at trial. He said that he was informed of the fall by Brandi Harris, the on-duty manager. Mr. Gannard testified that there was a "rim" on the floor where a french fry had been, however, he did not see the fall nor did he see the french fry prior to or after the fall.

According to a drawing of the area where Ms. Guillory fell, Table 44, where Ms. Nicholson was standing, was closer to the site of the fall than the customers at Table 42 or 43, who said they had seen a french fry on the floor.

We conclude from these facts that the plaintiffs have made "some showing" of the required temporal element and have offered proof that the condition existed for some time period prior to the fall. The time period need not be specific in minutes or hours, all as taught by **White**. The customers' statement that they "had seen" a french fry on the floor was given to Ms. Nicholson immediately after the fall,[5] as she was going to help Ms. Guillory. "Had seen" is the past perfect tense, which describes an action that took place in the past before another past action; or that something had happened before something else took place. The inference is

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[5] Plaintiffs filed an emergency writ application contesting the trial court's grant of defendant's Motion in Limine to Exclude and/or Strike Hearsay, wherein the defendants sought to have Ms. Nicholson's testimony regarding the statement of the customers that they had seen the fry on the floor prior to the fall deemed inadmissible. This court reversed the trial court's grant of the motion and found that the statement met the requirements of LSA-C.E. 803(1) as a present sense impression. **Guillory v. Outback**, 2010-0982 (La. App. 1st Cir. 6/2/10), writ denied, 2010-1267 (La. 6/4/10), 38 So.3d 309.

that the french fry was on the floor for some period of time before the fall. The time period need not be specific.

Plaintiffs also argue that the post-accident description of the french fry by the Outback employees, *i.e.*, that the waitress had to "scrub" the material up, that it was "pretty stuck" to the floor, and that it left a "rim" or ring after removal, indicates that the material had been there long enough to have dried and adhered to the floor, indicating the passage of some period of time, or perhaps even that the french fry had already been smashed when encountered by Ms. Guillory. Plaintiffs contend that a fresh french fry, still moist or greasy, would not have been so difficult to remove, even if smashed. Thus, the plainitiffs suggest that the evidence establishes the required temporal element.

The plaintiffs have offered proof that there was a french fry on the floor prior to the fall, and that it was difficult to clean up and left a "rim." We do not hold that plaintiffs have established constructive notice—that is a question for the jury. But when this evidence is viewed in the light most favorable to the plaintiffs, we must conclude that the trial court erred in granting a directed verdict on this issue. There was evidence to support that the temporal element has been established, and as noted in **White**, "it was unnecessary to show precisely how long the foreign substance was on the floor." **White**, 699 So.2d at 1085.

4. <u>Failure to Exercise Reasonable Care</u>

The judgment granting the directed verdict does not specify the grounds upon which it was granted. In oral reasons, the trial judge stated "[t]his is a pure constructive knowledge case," but also addressed the issue of whether Outback failed to exercise reasonable care to prevent the fry from remaining on the floor, stating "[t]hat has been answered today by the

testimony as to the steps and the exercise of reasonable care both from Mr. Gannard and from Ms. Harris as to what Outback did to determine whether or not items were on the floor." While the trial court seems to indicate, and counsel for Outback suggests, that Outback had a "proactive" plan or procedure for finding items on the floor, a close reading of the testimony of Mr. Gannard and Ms. Harris shows that the procedure was instead reactive. For instance, there were no timed inspection sweeps or personnel assigned to that task. Rather, all employees, from the owner-proprietor on down, were to be constantly on watch for items on the floor as they performed their other duties, and were to clean up items once discovered. When questioned about Outback's plan or procedures for items on the floor, Ms. Harris, the on-duty manager, answered "just to keep your eye out and sweep it up." And Mr. Gannard, the owner-proprietor, answered:

> Thoroughly walk-throughs from management to servers to bussers, constantly pacing up and down. There is normally not a shift that goes by where I don't have a dustpan or a broom in my hand **at some point** in time during that evening, nor the manager. We focus on that because of the cleanliness and the safety of our guests.
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> * * * *
>
> **As soon as we spot something** on the floor, we make an attempt to get to that part of the restaurant and clean it up immediately. [Emphasis added.]

It seems clear that Mr. Gannard (or his employees) did not walk around with a dustpan and broom in hand, but rather "at some point" "as soon as we spot something" they would react to items discovered on the floor. The actual policy seems to be that all employees, at all times, were to be alert to, and clean up quickly, items discovered on the floor. It might be argued that this is little more than common sense, and really no plan at all,

but given the nature of the establishment, it does not seem unreasonable. However, its execution and effectiveness are belied by the evidence.

The testimony of the Jouberts, confirmed by Mr. Guillory and Lorelie Nicholson, establishes that the busboys of the Baton Rouge Outback did not use bus tubs and regularly wiped food onto the floors, in violation of company policy. Specifically, the "General Duties of a Busser", introduced at trial as Plaintiff's Exhibit 26, states "Place dirty dishes and linens **in your bus tub**. Wipe all messes **into your bus tub** (not onto floor)." (Emphasis added.) Four witnesses saw food wiped onto the floor on the night of the accident.

Ms. Nicholson, Mr. Gannard, and Ms. Harris all agreed that company policy places the responsibility to keep the floors clean on all employees. Specifically, Mr. Gannard testified that Outback's "plan" to deal with objects or food on the floor was that it was the responsibility of all employees to clean up things seen on the floor "immediately". However, Mr. Joubert testified that after he saw the busboy wipe food onto the floor, the busboy left the area *without* cleaning.

The testimony of Ms. Nicholson that the busboys regularly wiped food onto the floor and did not use bus tubs, combined with the corroborating testimony from Mr. and Mrs. Joubert and Mr. Guillory that they actually saw the busboy wipe food onto the floor and that they were not using bus tubs on the night that Ms. Guillory fell, tends to show that regardless of policy, there was obvious non-compliance.

Further, the diagrams submitted into evidence establish that at the time of the accident, the waitress was closer to the french fry than the customers who saw it before the fall. This evidence may lead to an inference that if customers saw the fry before the fall, it should have been spotted and

cleaned by the waitress or other Outback employees during their constant checking. Again, this is a conclusion for the jury to draw. But, we must view the evidence in a light most favorable to the plaintiffs. We cannot say the facts and inferences are so overwhelmingly in favor of Outback that reasonable persons could not arrive at a contrary verdict. **Barnes**, 578 So.2d at 1162. Rather, we conclude that jurors in the exercise of impartial judgment might reach different conclusions, and therefore a directed verdict is not appropriate, and the case should be submitted to the jury.[6] **Newpark Resources, Inc.**, 691 So.2d at 211.

CONCLUSION

The judgment of the trial court granting a directed verdict in favor of defendants/appellees, Outback Steakhouse of Florida, Inc. and its proprietor, Joey Gannard, d/b/a Outback Steakhouse, is reversed and this case is remanded to the trial court for further proceedings. All costs of this appeal are assessed against appellees, Outback Steakhouse of Florida, Inc. and its proprietor, Joey Gannard, d/b/a Outback Steakhouse.

REVERSED AND REMANDED.

[6] We pretermit any discussion of plaintiffs' third assignment of error, that the trial court erred in its failure to allow the plaintiffs to amend the petition and add a spoliation claim and/or negligent impairment of a civil claim on the eve of trial, as it is an interlocutory judgment and this matter will be remanded for conclusion of the trial.

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VERSUS

OUTBACK STEAKHOUSE OF FLORIDA, INC., AND JOEY GANNARD, d/b/a OUTBACK STEAKHOUSE

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I respectfully disagree with the majority's reversal of the directed verdict in favor of defendants, Outback Steakhouse of Florida, Inc., and its proprietor, Joey Gannard, d/b/a Outback Steakhouse. I do not agree that the evidence presented by the plaintiffs was sufficient to establish that the french fry had been on the floor for a period of time before the fall. Absent such proof, plaintiffs failed to establish the temporal element of their claim, and the trial court was correct in granting a directed verdict in favor of the defendants.