NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2281

NATALIE AGUILAR

VERSUS

WAL-MART STORES, INC.

DATE OF JUDGMENT: JUN 10 2011

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
NUMBER 2007-12351, DIVISION E, PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. BURRIS, JUDGE

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BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

Disposition: AFFIRMED.

Kuhn, J.

Plaintiff, Natalie Aguilar, a store patron who slipped and fell on a clear, liquid substance, allegedly sustaining injuries, appeals a judgment that granted the motion for summary judgment of defendant, Wal-Mart Louisiana, L.L.C. ("Wal-Mart"), and dismissed her suit with prejudice. We affirm.

I. PROCEDURAL AND FACTUAL BACKGROUND

On May 22, 2006, Aguilar went to a Wal-Mart store in Slidell, Louisiana, with two of her friends. While one of her friends was still shopping, Aguilar and her other friend, Brittny Cavalero, headed towards the checkout area. According to Aguilar's deposition testimony, when they were "a couple" feet away from the self checkout area, she slipped and fell, landing on the floor. Before she fell, she did not see the substance nor did she know how long it had been on the floor.

After the fall, Aguilar did not examine the floor to determine whether there were footprints or buggy tracks in the area. Aguilar further testified that she did not know who put the substance on the floor. She also did not know whether any Wal-Mart employee knew the substance was on the floor or was responsible for the substance being in that area. According to Aguilar, a Wal-Mart employee, Carol Davis, rushed to her aid, offering assistance and handing her paper towels so that she could dry off her leg. Aguilar described that Davis used a large quantity of paper towels to wipe up the liquid on the floor in the area where she fell.

Aguilar's friend, Brittny Cavalero, testified in her deposition testimony that she did not see the liquid on the floor until after Aguilar had fallen. She did not notice a trail of liquid or see any other liquid in the area other than where Aguilar had fallen. Cavalero described that some of the liquid got on Aguilar's leg so the

liquid that remained was not "a full puddle ...." Cavalero stated that she did not know what the liquid was, where it came from, or how long it had been on the floor. Additionally, she did not know whether any Wal-Mart employees knew the liquid was on the floor before Aguilar fell. Cavalero further stated that when their other friend who was shopping with them reached the front of the store, Aguilar had already fallen, and a Wal-Mart employee had already cleaned up the liquid.

Michelle Lee Andrews, who was the assistant manager on duty at the time of Aguilar's fall, testified that when she learned of the accident, she got her paperwork and a camera and proceeded toward the checkout area. She photographed the accident scene, and she remembered that the substance on the floor looked like water because it was clear. She described what remained on the floor as only a "[v]ery few drops." She testified that another customer service manager, Davis, had arrived at the accident site about five minutes before her. Andrews stated that Davis cleaned the area, while she took pictures and took Aguilar's statement. Prior to learning of Aguilar's fall, Andrews was not aware of any liquid on the floor. She also testified that she had no information that indicated how long the drops of water were on the floor before the accident or where they came from. Further, she had no information indicating that other Wal-Mart employees knew the liquid was on the floor before Aguilar's accident occurred.

On October 29, 2008, Wal-Mart filed a motion for summary judgment, and on June 17, 2010, the trial court signed a judgment in Wal-Mart's favor,

dismissing Aguilar's suit.[1] Aguilar has appealed, asserting that the trial court erred in granting Wal-Mart's motion for summary judgment.[2]

II. ANALYSIS

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 of material fact and the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B). Summary judgment is favored and shall be construed to secure the just, speedy, and inexpensive determination of every action. La. C.C.P. art. 966(A)(2).

The initial burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial, he need not negate all essential elements of the adverse party's claim, but he must point out that there is an absence of factual support for one or more elements essential to the claim. La. C.C.P. art. 966(C)(2). Once the movant has met his initial burden of proof, the burden shifts to the non-moving party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden at trial. See ***Id.***; ***Samaha v. Rau,*** 07-1726, p. 5 (La. 2/26/08), 977 So.2d 880, 883. The nonmoving

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[1] Although the motion for summary judgment was initially set for a January 2009 hearing, it was continued to allow plaintiff to conduct further discovery. The hearing was reset for July 23, 2009, at which time the trial court took the matter under advisement. During an October 2009 hearing, the court granted plaintiff's request to have the matter continued so that she could complete her discovery.

[2] In brief, Aguilar states that she requested that Carol Davis be made available for a deposition, and because Davis did not appear for a scheduled deposition in January 2007, an adverse inference has been created that Davis' testimony would not favor Wal-Mart. We note, however, that the transcript of the July 23, 2009 hearing reveals that Aguilar did ultimately have the opportunity to depose Davis prior to the hearing on the motion for summary judgment. It appears that Aguilar failed to update her "STATEMENT OF FACTS" as of the date of this appeal to reflect that Davis' deposition had been taken. Rather, she utilized the same "STATEMENT OF FACTS" in her appellate brief as she had employed in her January 14, 2009 opposition to defendant's motion for summary judgment.

party may not rest on mere allegations or denials but must set forth specific facts that show that a genuine issue of material fact remains. If the nonmoving party fails to meet this burden, there is no genuine issue of material fact, and the movant is entitled to summary judgment as a matter of law. ***Davis v. Peoples Benefit Life Ins. Co.***, 10-0194, p. 5 (La.App. 1st Cir. 9/10/10), 47 So.3d 1033, 1035, ***writ denied***, 10-0194 (La. 12/17/10), 51 So.3d 11; see La. C.C.P. art. 966(C)(2). A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. ***Samaha***, 07-1726 at p. 6, 977 So.2d at 884 (quoting ***Hines v. Garrett***, 04-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765). An appellate court reviews a district court's decision to grant a motion for summary judgment *de novo,* using the same criteria that govern the district court's consideration of whether summary judgment is appropriate. ***Davis***, 10-0194 at p. 6, 47 So.3d at 1036.

At the hearing on the motion for summary judgment, Wal-Mart argued that Aguilar had not presented any evidence to show that she could satisfy her burden of proof under La. R.S. 9:2800.6(B)(2); *i.e.*, that she failed to establish that Wal-Mart had actual or constructive notice of the presence of the liquid on the floor prior to her fall.[3] Because constructive notice is defined to include a mandatory,

[3] Louisiana Revised Statutes 9:2800.6 provides, in pertinent part, as follows:

> 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 ... 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:

temporal element, where a claimant relies upon constructive notice under this statute, the claimant must come forward with positive evidence showing that the damage-causing condition existed for some period of time, and that such time was sufficient to place the merchant defendant on notice of its existence. ***White v. Wal-Mart Stores, Inc.***, 97-0393, p. 1 (La. 9/9/97), 699 So.2d 1081, 1082. The claimant must make a positive showing of the existence of the condition prior to the fall. A defendant merchant does not have to make a positive showing of the absence of the existence of the condition prior to the fall. ***Id.***, 97-0393 at p. 4, 699 So.2d at 1084. 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 the burden of proving constructive notice as mandated by the statute. ***Id.*** 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. ***Id.***, 97-0393 at p. 4, 699 So.2d at 1084-85.

(Continued . . .)

> (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.
>
> (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.
>
> C. Definitions:
>
> (1) "Constructive notice" means the claimant has proven that the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. The presence of an employee of the merchant in the vicinity in which the condition exists does not, alone, constitute constructive notice, unless it is shown that the employee knew, or in the exercise of reasonable care should have known, of the condition.

Here, Aguilar argues that she can satisfy her burden of proving that Wal-Mart had constructive notice of the existence of the substance on the floor before her fall because she has demonstrated that "Wal-Mart failed to exercise any degree of reasonable care in its store maintenance procedures, as is required by La. R.S. 9:2800.6(A)." Aguilar also argues that she can prove "the temporal element" addressed in ***White***, i.e., that the condition existed for some time period prior to the fall because she can establish that the substance on the floor that caused her to fall "fell at some point as early as the period of time during which she was standing at the customer service counter stretching as far back in time as any time at all during the whole working day ...." In essence, Aguilar contends there is a genuine issue as to whether the condition existed for a sufficient length of time before her fall, during which Wal-Mart should have discovered the condition.

Although the initial burden of proof was on Wal-Mart, it will not bear the burden of proof at trial on the issue of constructive notice. As such, Wal-Mart did not need to negate this element of Aguilar's claim. In order to shift the burden to Aguilar, Wal-Mart only had to point out that there was an absence of factual support for this element. La. C.C.P. art. 966(C)(2); ***Samaha***, 07-1726 at p. 5, 977 So.2d at 883. The burden then shifted to Aguilar, as the non-moving party, to produce factual support sufficient to establish that she would be able to establish constructive notice at trial. La. C.C.P. art. 966(C)(2); ***Samaha***, 07-1726 at p. 5, 977 So.2d at 883.

The deposition testimony of Aguilar and Cavalero establishes that they did not see the liquid on the floor before the fall, and they do not know how long the liquid was present before the fall. Further, Andrews' testimony establishes that

she was not aware of any liquid on the floor before she learned of Aguilar's fall. Because it is Aguilar's burden to prove the existence of the liquid for some period of time before her fall, such that Wal-Mart would have discovered its existence through the exercise of ordinary care, the absence of any evidence as to this issue establishes that there is no genuine issue of material fact relating to the issue of constructive notice.[4] Accordingly, Wal-Mart was entitled to judgment as a matter of law, and we find no merit in Aguilar's appeal. La. C.C.P. art. 966(B).

III. CONCLUSION

For these reasons, we find that the trial court properly granted Wal-Mart's motion for summary judgment and dismissed Aguilar's suit with prejudice. Appeal costs are assessed against Aguilar.

AFFIRMED.

[4] Plaintiff argues that whether there was in fact any video surveillance at the time of her accident is a genuine issue of material fact. Wal-Mart's answers to interrogatories established there was no video surveillance of the area where plaintiff fell. Wal-Mart further explained that it has a "30 day video retention policy, after which the video tapes are reused."