

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 2295

PATRICIA DEMOUY

VERSUS

**SAM'S WHOLESALE, INC., WAL-MART STORES, INC., AND CLAIMS
MANAGEMENT, INC. D/B/A CLAIMS MANAGEMENT, INC. OF
ARKANSAS, ARKANSAS CLAIMS MANAGEMENT, INC.**

Judgment Rendered: JUN 10 2011

On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 2006-13407

Honorable William J. Crain, Judge Presiding

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and Claims Management, Inc. d/b/a
Claims Management, Inc. of Arkansas,
Arkansas Claims Management, Inc.

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

In this action for negligence against a merchant, the plaintiff appeals the grant of summary judgment in favor of the merchant upon the finding that the plaintiff could not prove the mandatory temporal element of her cause of action under LSA-R.S. 9:2800.6. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

On August 4, 2005, plaintiff, Patricia Demouy, went grocery shopping at a Wal-Mart store in Covington, Louisiana. Plaintiff alleges that while standing in the store's checkout line, she slipped on grapes and/or a liquid substance on the floor that had been "negligently placed and/or left there by store employees," resulting in injuries to her face, shoulder, and back.

On August 8, 2006, plaintiff filed the instant suit, naming Sam's Wholesale, Inc., Wal-Mart Stores, Inc. ("Wal-Mart") and their insurer as defendants. Plaintiff alleged that her injuries "were caused solely and entirely by the negligence of Sam's Wholesale, Inc. or [Wal-Mart], or their employees, by allowing a dangerous situation to develop and exist wherein defendant(s) knew or should have known that the grapes and/or liquid substance would lead to injuries to pedestrians, if unabated."

On April 6, 2009, Wal-Mart filed a Motion for Summary Judgment, asserting that plaintiff could not meet the requirements set forth in LSA-R.S. 9:2800.6 to show that Wal-Mart "either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence...and failed to exercise reasonable care." Plaintiff opposed the motion, contending that a two-minute eighteen second security video provided through discovery shows that the dangerous substance/objects were in place for at least two minutes and eighteen seconds prior to her fall. Following a hearing, the trial court granted Wal-Mart's motion for summary judgment and dismissed plaintiffs' claims, with prejudice.

Plaintiff has appealed, asserting that the district court erred in its interpretation of LSA-R.S. 9:2800.6 and erred in granting a summary judgment in favor of Wal-Mart despite the presence of genuine issues of material fact.

DISCUSSION

It is well settled that appellate courts must use the *de novo* standard in reviewing a trial court's grant or denial of a motion for summary judgment under the same criteria that govern the trial court's consideration of whether a summary judgment is appropriate in any given case. **Indep. Fire Ins. Co. v. Sunbeam Corp.**, 99-2181, 99-2257, p.7 (La.2/29/00), 755 So.2d 226, 230. Louisiana Code of Civil Procedure Article 966(B) states that a summary judgment shall 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." If the party moving for summary judgment will not bear the burden of proof at trial, it need merely point out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. LSA-C.C.P. art. 966(C)(2). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Rambo v. Walker**, 97-2371, p. 4 (La.App. 1 Cir.11/6/98), 722 So.2d 86, 88, writ denied, 98-3030 (La.1/29/99), 736 So.2d 840.

Louisiana Revised Statutes 9:2800.6(B)(2) provides that in a negligence claim, the plaintiff must prove the merchant either created or had actual or constructive notice of the condition that caused the damage, prior to the occurrence. "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. LSA-R.S. 9:2800.6(C)(1).

To carry her burden of proving the temporal element of LSA-R.S. 9:2800.6(B)(2) a claimant must make a positive showing of the existence of the condition prior to the fall. **White v. Wal-Mart Stores, Inc.**, 97-0393, p. 4

(La.9/9/97), 699 So.2d 1081, 1084. A defendant merchant does not have to make a positive showing of the absence of the existence of the condition prior to the fall. **White**, 97-0393 at p. 4, 699 So.2d at 1084-85. 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. **Id.** 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. 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.**

Plaintiff notes that Wal-Mart's own accident report points out that there was water on the floor where the accident occurred and that the statement prepared by Wal-Mart's cashier indicates that plaintiff slipped on a grape. Plaintiff also avers that the surveillance video provided by Wal-Mart through discovery does not specifically show any substance or object hitting the floor in the two minutes and eighteen seconds prior to her fall.¹ Accordingly, plaintiff submits that although the video footage is grainy, the trier of fact could determine that grapes and/or water did not hit the floor during that two-minute-eighteen second time period and find that the hazard at issue was present for a sufficient period of time to give Wal-Mart constructive notice. Plaintiff notes that the determination of how long a period of time is sufficient for a hazard to be discovered in the exercise of reasonable care is inherently a question of fact.

Plaintiff does not allege that Wal-Mart had actual notice of the condition of the floor prior to her fall. Rather, she asserts that the video is sufficient to raise genuine issues of material fact as to whether Wal-Mart received constructive

¹ Plaintiff does not allege that Wal-Mart intentionally concealed or destroyed video that would support her claim. See **Robertson v. Frank's Super Value Foods, Inc.**, 08-592 (La.App. 5 Cir. 1/13/09), 7 So.3d 669.

notice of the condition prior to her fall. However, as noted by the trial court, the video is inconclusive as to whether the spill occurred in the two minutes and eighteen seconds prior to plaintiff's fall and it does not reveal whether water and/or grapes are present on the floor during this period of time. Mere speculation or suggestion is not enough to meet the stringent burden imposed upon a plaintiff by LSA-R.S. 9:2800.6. **Allen v. Wal-Mart Stores, Inc.**, 37,352, p. 5 (La.6/25/03), 850 So.2d 895, 898. Accordingly, plaintiff is unable to meet her evidentiary burden of proof at trial to make a positive showing that the dangerous condition existed for some period of time prior to her fall as required by LSA-R.S. 9:2800.6.² Thus, the trial court did not err by granting summary judgment in favor of Wal-Mart.

CONCLUSION

For the foregoing reasons, the trial court's June 23, 2010, judgment granting summary judgment in favor of Wal-Mart is affirmed. Costs of this appeal are assessed against the plaintiff, Patricia Demouy.

AFFIRMED.

² Based on the review of the video, we do not reach the issue of whether a substance on the floor for two minutes and eighteen seconds would have been sufficient to establish constructive knowledge under LSA-R.S. 9:2800.6.