NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2005 CA 2012

MARTA ALISON RICHARDS

VERSUS

ALBERTSON'S, INC.
AND McCUE CORPORATION

Judgment Rendered: September 20, 2006

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Appealed from the Nineteenth Judicial District Court
in and for the Parish of East Baton Rouge
State of Louisiana
Suit Number 514,639

Honorable William A. Morvant

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

This appeal challenges the action of the trial court in granting summary judgment in favor of a manufacturer. We reverse.

BACKGROUND

On January 4, 2003, Marta Richards was shopping at an Albertson's grocery store located on Government Street in Baton Rouge, Louisiana. While walking to her car in the store's parking lot, Ms. Richards traversed a shopping cart storage holder and tripped on an aluminum connecting-bar at one end of the holder. Albertson's store manager, John Griffin, Jr., investigated the accident and found Ms. Richards in the parking lot with a bloody mouth. He took photographs of the shopping cart holder over which Ms. Richards had fallen.

Thereafter, on December 4, 2003, Ms. Richards filed this lawsuit against Albertson's, Inc., and McCue Corporation, the manufacturer of the shopping cart holder. She alleged that the shopping cart holder was unreasonably dangerous in design and was unreasonably dangerous because of the lack of adequate warnings. She further averred that her damages arose from a reasonably anticipated use of the product.

McCue filed a motion for summary judgment on the issue of its liability. Therein, it noted that the only defect complained of by Ms. Richards was that the aluminum bumper bar at the end of the shopping cart holder was too low to the ground and presented a tripping hazard. McCue argued that there were no genuine issues of material fact because the product had been significantly and materially altered after it left McCue's control, thus preventing Ms. Richards from proving an essential element of her claim, namely, that the product was defective at the time of its manufacture. McCue sought to establish that the bar was lower to the ground than its

design due to Albertson's improper installation of the cart holder. McCue also claimed that it had no duty to warn of the presence of the bumper bar, insisting that the user should have known that if you attempt to walk through a shopping cart holder, you will encounter the bumper bar.

The trial court granted McCue's motion for summary judgment, observing that there was no dispute that the bumper bar had been incorrectly installed by Albertson's and was damaged. The court found that in light of the subsequent modification of the product, which was due to Albertson's failure to follow the manufacturer's specifications, McCue bore no responsibility for the trip and fall accident as a matter of law. This appeal, taken by Ms. Richards, followed.

DISCUSSION

Appellate courts review summary judgments *de novo* under the same criteria applied by trial courts to determine whether summary judgment is appropriate. **Independent Fire Insurance Company v. Sunbeam Corp.**, 99-2181, p. 7 (La. 2/29/00), 755 So.2d 226, 230; **Taylor v. Rowell**, 98-2865, p. 3 (La. 5/18/99), 736 So.2d 812, 814. Summary judgment is properly granted only 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 that the movant is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

The legal basis for recovery against a manufacturer for defects in its product is limited to those theories set forth in the Louisiana Products Liability Act, La. R.S. 9:2800.51 et seq. The theory of liability asserted by plaintiff is that the shopping cart holder was unreasonably dangerous in design under La. R.S. 9:2800.56 because the bar at the end of the cart holder was too low to the ground and presented a tripping hazard. She also claims

that the cart holder was unreasonably dangerous because of inadequate warnings of the presence of the bumper bar under La. R.S. 9:2800.57. Under either theory of liability, the characteristic of the product that renders the product unreasonably dangerous must exist at the time the product left the control of its manufacturer or result from a reasonably anticipated alteration or modification of the product. La. R.S. 9:2800.54(C). The claimant has the burden of proving this element. La. R.S. 9:2800.54(D).

McCue contends that plaintiff cannot establish her burden of proving that the alleged defect existed at the time the product left its control, insisting that the improper installation and subsequent damage to the bumper bar significantly altered the characteristics of the product. Any defect in the product, it contends, resulted from the improper installation and damage to the product, not from the design of its product. It further submits that because Ms. Richards cannot prove the cart holder was unreasonably dangerous in design or manufacture, it had no duty to warn as a matter of law.

The record reflects that in support of its motion for summary judgment, McCue offered the affidavit of its account manager, David Litavec. Mr. Litavec attested that McCue ships shopping cart holders to Albertson's in bulk with installation instructions. He stated that he inspected the cart holder Ms. Richards tripped over and identified it as a "Single Cart Park Open Return," which had been manufactured by McCue in 1996. The open-ended cart storage corral is designed with brightly colored yellow plastic sides and an aluminum stop bar or bumper bar at one end of the corral, with an overhead sign stating "Return Carts Here For Your Safety and Convenience." McCue's installation instructions demonstrate that the straight portion of the stop bar is to be installed in a horizontal position, and

that there should be a height of two feet, two inches from the horizontal portion of the stop bar to the surface of the parking lot. However, Mr. Litavec attested, Albertson's did not assemble the cart holder according to the instructions. He observed that the open ends of the bumper bar were not inserted over the protruding nubs provided on the bottom inside of the plastic sides as directed in the instructions, and that the metal bolt that held the bumper bar in the upright position was not installed to maintain it in an upright position. As a result, he stated, the bumper bar was bent downward, further reducing the height from the horizontal portion of the bar to the surface of the parking lot.

Mr. Litavec attested that he measured the height of the bumper bar from the base of the cart storage holder as it rested on the parking lot, and the distance was one foot instead of the two feet, two inches shown in the installation instructions. He also observed that the aluminum bar in question was damaged as evidenced by a split or break in the aluminum. He stated that the improper installation of the bumper bar and the damage to the bumper bar altered the cart holder so that it was not in the same condition and did not meet McCue's design specifications at the time it was manufactured and shipped by McCue.

Also in support of its motion, McCue offered an excerpt of Ms. Richards' deposition in which she acknowledged that she regularly shops at Albertson's. She denied having observed the cart corrals in the parking lot, and denied having seen the cart holder over which she tripped because it was obscured by vehicles. McCue submitted photographs depicting the cart holder in question, as well as another McCue Cart Park on the same Albertson's parking lot, which Mr. Litavec attested had been properly installed. Additionally, McCue offered its installation instructions, depicting

a height of two feet, two inches from the stop bar to the bottom of the cart holder. The instructions state, with respect to installation of the cart stop bar: "**Be aware that the bottom of the post should fit over the plastic nub at the bottom of the barrier** this adds strength to the bar even before bolting." (Emphasis in original).

In opposition to the motion for summary judgment, Ms. Richards offered an affidavit in which she attested that she was walking with groceries in her hands while returning to her parked vehicle, when she walked through an area she thought was a parking area of the grocery store. She also offered the affidavit of Fereydoun Aghazadeh, an associate professor of industrial engineering at Louisiana State University, who teaches ergonomics, safety engineering, workplace design, and biomechanics. Professor Aghazadeh visited the site in question and another Albertson's store in Baton Rouge. With respect to the accident site, Professor Aghazadeh observed that there are four McCue Cart Parks in the parking lot with openings that are seven feet wide. He noted that in three of them, the bumper bar was twelve inches above the ground. In one of the cart holders, he stated, the bar was twenty-six inches above the ground. Professor Aghazadeh attested that the cart holders that are twelve inches above the ground hold more carts.

Professor Aghazadeh offered his opinion that the height of the bumper guard, the width of the cart holder, the contrasting colors of the yellow sides and the gray bar, the gray color of the bumper bar, and the inadequate sign all rendered the cart holder unreasonably dangerous. He expounded that a person walking into the cart holder could not see the sign identifying its purpose because it was mounted on the side of the cart holder, parallel to the line of sight. The brightly colored sides attract the attention of a person,

while the gray-colored bumper bar does not attract attention and blends with the color of the ground and automobile bumpers. Accordingly, he stated, a person is prone to walk through the cart holder without thinking there may be a tripping hazard. He stated that a person holding a shopping bag in front of him/her would not be able to see the bar. Additionally, Professor Aghazadeh stated that the bars, varying from twelve to twenty-six inches in height, would not keep a person from tripping over the bars.

In contrast, the professor stated, the cart holders at another Albertson's store in Baton Rouge were only twenty-seven inches wide, capable of fitting only one cart between the walls of each cart holder. The parts of the cart holder were gray in color, with no part attracting more attention than the other. The sign identifying its purpose is located on top of the bumper bar and is completely visible to a person walking towards the opening of the cart holder. With this type of design, the professor attested, it would be impossible for a patron to walk through it not realizing the area is designated for shopping carts.

The only issue presented in McCue's motion for summary judgment on either theory of liability is whether there is a genuine issue of material fact on an essential element of Ms. Richards' case; that is, whether the defect existed at the time of the manufacture or resulted from a reasonably anticipated alteration or modification of the product. While it is undisputed that Albertson's did not install the product according to the manufacturer's specifications, there is a factual question as to the height a properly installed bumper bar should be. Although the trial court believed the photographs of properly installed bumper bars looked substantially higher than the twenty-six inches called for in the McCue installation instructions, and McCue suggests in brief that twenty-six inches is an erroneous notation on its

installation instructions, there was no evidence presented to establish the actual height of a properly installed bumper bar. Further, Ms. Richards' expert attested that even if Albertson's installed it according to McCue's instructions, the bumper bar would have presented a tripping hazard in light of a number of design flaws making the cart holder visually deceptive. Based on our review of the evidence, we conclude genuine issues of material fact exist as to whether the shopping cart holder presented an unreasonable risk of danger to Ms. Richards. Therefore, summary judgment on the issue of the manufacturer's liability was improper.

CONCLUSION

For the foregoing reasons, we reverse the summary judgment and remand this case to the trial court for proceedings consistent with this opinion. All costs of this appeal are assessed to appellee, McCue Corporation.

REVERSED AND REMANDED.