NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 1252

HOPE F. HELD

VERSUS

HOME DEPOT, U.S.A.; LAURA SPELL, MANAGER;
AND XYZ INSURANCE COMPANY

Judgment Rendered: JUN 02 2017

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APPEALED FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ST. TAMMANY
STATE OF LOUISIANA
DOCKET NUMBER 2014-11742, DIVISION D

HONORABLE PETER J. GARCIA, JUDGE

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BEFORE: PETTIGREW, McDONALD, and PENZATO, JJ.

Pettigrew, J. Dissents and assigns Reasons

McDONALD, J.

In this appeal, a customer appeals a summary judgment dismissing her personal injury suit against a merchant. The trial court determined the customer did not produce sufficient factual support to establish a genuine issue of material fact as to the merchant's liability under the Louisiana Merchant Liability Statute. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On April 14, 2013, Hope Held and her son, Cameron, were shopping for supplies for her husband at a Home Depot Store in Slidell, Louisiana. Upon entering the store, they got a shopping cart, went to Aisle 7 in the electrical department, took three 1,000-foot spools of electrical wire from the floor under a shelf, and put them in the bottom of the cart. After shopping for other items, Mrs. Held called her husband, and he asked her to put one of the spools of wire back. Mrs. Held and Cameron returned to Aisle 7, and she slid one spool of wire from the bottom of the cart back to the floor under the shelf. As Mrs. Held stood upright and turned around, she tripped on the fork of a wire hand truck, a device with two forks used to lift large rolls of wire onto a wire machine for cutting. Mrs. Held alleges the "dolly" was positioned sideways, running perpendicular to the aisle and shelving, with the two forks facing the back of the store. She fell to the floor, striking her right knee and bumping her head on a nearby shelf. Jeffrey Crossland, a Home Depot electrical department employee, discovered Mrs. Held sitting on the floor on Aisle 7. He notified the manager on duty, and they assisted Mrs. Held into a wheelchair, and to the front of the store, where both Mr. Crossland and Mrs. Held completed incident reports.

Mrs. Held later filed this petition for damages against Home Depot, U.S.A.; Laura Spell, a Home Depot manager; and XYZ Insurance Company. Home Depot and Ms. Spell (collectively, Home Depot) answered the petition, and after discovery, filed a motion for summary judgment, seeking dismissal of Mrs. Held's claims. Mrs. Held opposed Home Depot's motion. After a hearing, the trial court signed a judgment on June 3, 2016, granting Home Depot's motion for summary judgment and dismissing the suit with prejudice. Mrs. Held appealed.

MOTION TO SUPPLEMENT APPELLATE RECORD

After the appeal was lodged, Home Depot filed a motion to supplement the appellate record with color copies of two black and white photographs already in the record. Mrs. Held originally filed the black and white photographs as exhibits to her opposition to Home Depot's motion for summary judgment. Home Depot's motion to supplement was referred to this panel for decision along with the merits of the appeal. At oral argument, with no objection from Home Depot, Mrs. Held's counsel presented this panel with color copies of the subject photographs. We note that, under current summary judgment law, photographs are not listed among the "documents" that may be filed in support of or in opposition to a motion for summary judgment. LSA-C.C.P. art. 966(A)(4). Here, however, Home Depot did not timely object below to Mrs. Held's inclusion of photographs as exhibits to her opposition to the motion for summary judgment (LSA-C.C.P. art. 966(D)(2)); in fact, Home Depot is the party who sought to add the color photographs to the appellate record. Thus, under LSA-C.C.P. art. 966(D)(2), and given the parties' agreement, this court granted Home Depot's motion to supplement the appellate record with color copies of the photographs appearing at pages 93 and 94 of the appellate record. We now turn to the merits of the appeal.

SUMMARY JUDGMENT AND THE LOUSIANA MERCHANT LIABILITY STATUTE

After an opportunity for adequate discovery, a motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(A)(3). The summary judgment procedure is favored and shall be construed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969. LSA-C.C.P. art. 966(A)(2). The burden of proof rests with the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue before the court on the motion for summary judgment, the mover's burden does not require that he negate all essential elements of the adverse party's claim, action, or defense, but rather to point to the absence of factual support for one or more elements essential to the adverse

party's claim, action, or defense. The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. LSA-C.C.P. art. 966(D)(1).

Summary judgment is subject to de novo review on appeal, using the same standards applicable to the trial court's determination of the issues. *Mabile's Trucking, Inc. v. Stallion Oilfield Servs., Ltd.,* 15-0740 (La. App. 1 Cir. 1/8/16), 185 So.3d 98, 102, *writ denied*, 16-0251 (La. 4/4/16), 190 So.3d 1207. Despite the legislative mandate that summary judgments are now favored, factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, and all doubt must be resolved in the opponent's favor. *Willis v. Medders,* 00-2507 (La. 12/8/00), 775 So.2d 1049, 1050 (per curiam). Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be determined only in light of the substantive law applicable to the case. *Mabile's Trucking, Inc.*, 185 So.3d at 102.

The applicable substantive law here is the Louisiana Merchant Liability Statute, LSA-R.S. 9:2800.6, under which a merchant has 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 that reasonably might give rise to damage. LSA-R.S. 9:2800.6(A). A plaintiff asserting a negligence claim against a merchant because of a fall shall have the burden of proving, in addition to all other elements of his cause of action, that: (1) the condition existing in or on the merchant's premises presented an unreasonable risk of harm to the plaintiff and that risk of harm was reasonably foreseeable; (2) the merchant either created or had actual or constructive notice of the condition prior to the occurrence; and (3) the merchant failed to exercise reasonable care. LSA-R.S. 9:2800.6(B). The failure to prove any one of the required elements negates a plaintiff's cause of action. *Tate v. Outback Steakhouse of Fla.*, 16-0093 (La. App. 1 Cir. 9/16/16), 203 So.3d 1075, 1078.

In granting summary judgment to Home Depot, the trial court determined that Mrs. Held had not established that Home Depot created an unreasonable risk of harm,

as required by LSA-R.S. 9:2800.6(B)(2). At the end of the summary judgment hearing, the trial court stated:

> I don't think that the plaintiff has established that there are genuine issues of material fact. I'm comfortable with the fact that the plaintiff has not established that there was an unreasonable risk of harm created by Home Depot.
>
> I don't think that I can make the factual leap that just because the hand cart was in the aisle that it was probably moved by a Home Depot employee[,] which would remove the necessity of the notice requirement[,] given the fact of the testimony of the Home Depot employee in deposition that he had been on the aisle within 15 minutes and that there was nothing in the aisle.
>
> I am therefore granting the motion for summary judgment.

On appeal, in a single assignment of error, Mrs. Held argues that the trial court should have inferred from the summary judgment evidence that Home Depot created the unreasonable risk of harm. She argues the evidence shows, when viewed in her favor, that a Home Depot employee left the wire hand truck positioned such that the forks were protruding into the aisle, creating an unreasonable risk that caused her harm.

To prove a merchant created a condition that caused an accident, there must be proof that the merchant, and not a store patron, is directly responsible for the hazardous condition. *Ross v. Schwegmann Giant Super Markets, Inc.*, 98-1036 (La. App. 1 Cir. 5/14/99), 734 So.2d 910, 913, *writ denied*, 99-1741 (La. 10/1/99), 748 So.2d 444; *Cyprian v. State Farm Fire and Cas. Co.*, 16-0717 (La. App. 1 Cir. 2/17/17), 2017 WL 658246 *5 (unpublished). Alternatively, to establish a merchant's constructive notice of a hazardous condition, the plaintiff must present positive evidence showing that the hazardous condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care. The presence of the merchant's employee in the vicinity of the hazardous condition does not, alone, constitute constructive notice, unless it is shown that the employee knew, or reasonably should have known, of the condition. LSA-R.S. 9:2800.6(C)(1).

In support of its motion, Home Depot filed excerpts of depositions given by Mrs. Held, Cameron Held, and Jeffery Crossland. In opposition to Home Depot's motion, Mrs. Held filed excerpts from her deposition and Mr. Crossland's deposition, the two

incident reports completed after the incident, two photographs Cameron Held took on Aisle 7, and Home Depot's discovery responses.

Mr. Crossland, a Home Depot electrical sales associate for 18 years, stated in his deposition that he knew of no established Home Depot policy as to how wire hand trucks were to be stored when not in use, except to note that storage was to be done "in a safe manner." He explained that the wire hand trucks were stored on the electrical aisle because that is where they are used; that is, when a customer needs wire cut, a Home Depot employee uses the wire hand truck to pick up a roll of wire and take it to a nearby machine to be cut. Mr. Crossland stated that the wire hand trucks were usually stored with the two forks positioned under a pallet or shelf. He also stated that only Home Depot employees are supposed to use the wire hand trucks, but he was unaware of any signage indicating such. He noted that, about 15 minutes before Mrs. Held's fall, the wire hand truck at issue was properly positioned with the forks under a shelf on Aisle 7, and he did not see any employee or customer move it. He acknowledged that the photographs Cameron Held took show two wire hand trucks on Aisle 7, one stored as Mr. Crossland described and the other positioned upright in the aisle. But, according to Mr. Crossland, when he entered Aisle 7, he recalled seeing Mrs. Held sitting on the ground and an upended wire hand truck with its forks pointing upward. He also stated that in his 18 years at Home Depot, the last 7 of which were at the Slidell location, he had never seen a customer try to use a wire hand truck, nor did he know of anyone tripping and falling over one of them.

Mrs. Held argues that Mr. Crossland's testimony is suspect. She claims the wire hand truck over which she tripped could not have been stored under the shelf as Mr. Crossland described, because based on the photographs, it "appears obvious" that the wire hand truck would not have fit in that space. She also claims that spools of wire were on the floor where Mr. Crossland said the wire hand truck was stored, and that the spools of wire and the wire hand truck could not have occupied the same space. Lastly, she contends Mr. Crossland's deposition testimony regarding the wire hand truck's position conflicts with his incident report.

After conducting a de novo review of the evidence, and construing the evidence in Mrs. Held's favor, we conclude Home Depot showed that there was an absence of support for elements essential to Mrs. Held's claim. First, we agree with the trial court that Mrs. Held did not produce evidence to establish that Home Depot created a condition presenting an unreasonable risk of harm. Accepting Mrs. Held's allegation that the wire hand truck was mispositioned in Aisle 7, and not positioned with the forks under the shelf, we cannot reasonably infer that a Home Depot employee was directly responsible for a hazardous condition. *See Ross*, 734 So.2d at 913. There is no evidence as to how the wire hand truck came to be mispositioned. The fact that two wire hand trucks were on Aisle 7 at the time of the accident is not proof that a Home Depot employee improperly positioned one of them. The fact that only a Home Depot employee is supposed to use the wire hand trucks is not sufficient proof that a Home Depot employee was the only person who could have moved the wire hand truck before the accident. Mr. Crossland's failure to describe the wire hand truck as upended in his accident report does not make his deposition testimony suspect. Further, we reject Mrs. Held's argument that the wire hand truck could not have been stored under the shelf as described by Mr. Crossland. Contrary to her argument, the photographs do not "obviously" show that the wire hand truck would not have fit under the shelf with or without the presence of spools of wire. Mrs. Held's argument is based on speculation, rather than on fact, and is not sufficient to defeat summary judgment. *Babin v. Winn-Dixie Louisiana, Inc.*, 00-0078 (La. 6/30/00), 764 So.2d 37, 40 (per curiam); *Crawford v. Brookshire Grocery Co.,* 50,151 (La. App. 2 Cir. 9/30/15), 180 So.3d 478, 486; *Hughes v. Home Depot USA, Inc.*, 15-0970 (La. App. 1 Cir. 12/23/15), 2015 WL 9466870 *4 (unpublished).

Next, we also note that there is an absence of factual support that Home Depot had constructive notice of the alleged hazardous condition created by the mispositioned wire hand truck. Mrs. Held has not presented positive evidence showing that the mispositioned wire hand truck was on Aisle 7 for "such a period of time that it would have been discovered" if Home Depot had exercised reasonable care. *See* LSA-R.S. 9:2800.6(C)(1). Mr. Crossland testified the wire hand truck was stored under a shelf on

Aisle 7 about 15 minutes before Mrs. Held's accident and he saw no one move it. In her deposition, Mrs. Held testified that she did not notice the wire hand truck until after she fell. She also stated that neither she nor her son moved the wire hand truck, nor did she see any store employee or customer move it. Cameron, her son, likewise testified in his deposition that he did not know the wire hand truck was there until after his mother tripped on it; and, he could not remember seeing anyone else come on the aisle and move it. There is no evidence showing that the wire hand truck was moved, how long it had been mispositioned, or that Home Depot should have known that it had been moved. Thus, Mrs. Held has not produced factual support sufficient to establish that she would be able to prove constructive notice at trial. *See* LSA-C.C.P. art. 966(D)(1); *Tate,* 203 So.3d at 1079; *Clark v. J-H-J, Inc.*, 13-0432 (La. App. 1 Cir. 11/1/13), 136 So.3d 815, 818-19, *writ denied*, 13-2780 (La. 2/14/14), 132 So.3d 964; *Williams v. Shoney's, Inc.*, 99-0607 (La. App. 1 Cir. 3/31/00), 764 So.2d 1021, 1024-25.

CONCLUSION

We have determined that Mrs. Held failed to establish that she would be able to satisfy her evidentiary burden at trial that Home Depot either created or had actual or constructive notice of a condition presenting an unreasonable risk of harm. Thus, we affirm the trial court's June 3, 2016 summary judgment in favor of Home Depot and Laura Spell and dismissing this suit with prejudice. We assess costs of the appeal to Hope F. Held.

AFFIRMED.

HOPE F. HELD

VERSUS

HOME DEPOT, U.S.A.; LAURA SPELL, MANAGER; AND XYZ INSURANCE COMPANY

NUMBER 2016 CA 1252

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BEFORE: PETTIGREW, McDONALD, AND PENZATO, JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.

I am of the opinion there were sufficient material issues of fact in dispute that precluded summary judgment in this matter.