NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2016 CA 1628

CHARLES FRAZIER

VERSUS

DOLLAR GENERAL CORPORATION

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 2013-13915

HONORABLE DONALD R. FENDLASON, JUDGE AD HOC

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DG Louisiana, L.L.C.

BEFORE: PETTIGREW, McDONALD, and PENZATO, JJ.

Pettigrew, J. Concurs

McDONALD, J.

This is a falling merchandise case. Defendants appeal a judgment rendered in favor of plaintiff after the trial court found that defendants were responsible for plaintiff's injury from falling merchandise. Finding that the trial court applied the wrong legal standard to this case, we conduct a *de novo* review of the case. After a *de novo* review, we find that plaintiff did not meet his burden of proof, therefore, we reverse the trial court judgment and dismiss the suit.

FACTS AND PROCEDURAL HISTORY

On August 21, 2013, the plaintiff, Charles Frazier, filed suit against Dollar General Corporation (Dollar General). Mr. Frazier maintained that on August 24, 2012, he was a customer at the Dollar General store on Pontchartrain Drive in Slidell, Louisiana, when suddenly and without warning, merchandise (plastic tote lids) fell off a shelf and struck him, causing injury to his back and neck. Mr. Frazier asserted that he suffered past, present, and future physical pain and suffering; past, present, and future mental anguish; past, present, and future medical expenses; and, lost wages due to the negligent acts and omissions of Dollar General Corporation through its agents, servants, and employees. Mr. Frazier asked for judgment in his favor, and against the defendants, in excess of $50,000.00 for his injuries.[1]

On September 9, 2013, Dollar General answered the petition, denying liability, and raising numerous defenses. On April 21, 2015, Dollar General filed a motion for summary judgment, maintaining that Mr. Frazier could not prove that Dollar General caused the plastic tote lids to fall, could not prove that another customer did not cause the tote lids to fall, and could not prove that Dollar General placed the tote lids in an unsafe position on the shelf or otherwise caused the tote

[1] Mr. Frazier and Dollar General later entered into a stipulation, filed into the record on September 6, 2013, that Mr. Frazier's claims did not exceed $75,000.00, exclusive of interest and costs.

lids to be in such a precarious position that they would eventually fall. Dollar General asserted that Mr. Frazier could not prove all of the essential elements of his claims under La. R.S. 9:2800.6, thus, it was entitled to a judgment as a matter of law dismissing the claims with prejudice. On September 10, 2015, the motion for summary judgment filed by Dollar General was denied.

Mr. Frazier added Dolgencorp, L.L.C. and DG Louisiana, L.L.C. as additional defendants by supplemental and amending petitions. Dollar General, Dolgencorp, L.L.C., and DG Louisiana, L.L.C. answered the amended petitions, generally denying liability for the incident and raising numerous defenses, including that Dollar General was not required to exercise control or supervision over the circumstances under which the incident occurred, that the injuries were due to Mr. Frazier's own negligence, and that, alternatively, Mr. Frazier was contributorily and/or comparatively negligent. Dollar General, Dolgencorp, L.L.C., and DG Louisiana, L.L.C. asked that the claims be dismissed.

The matter proceeded to a bench trial on June 13, 2016, and afterward the trial court took the matter under advisement. Thereafter, the trial court ruled in favor of Mr. Frazier, and against Dollar General, Dolgencorp, L.L.C., and DG Louisiana, L.L.C., awarding Mr. Frazier $50,000.00 in damages, together with interest from the date of judicial demand until paid, and costs. The judgment was signed on August 25, 2016.

The defendants have appealed that judgment, and make the following assignments of error.

1. The trial court mistakenly applied subsection (B) of La. R.S. 9:2800.6, which is the legal standard for "slip-and-falls" on a merchant's premises, to this falling merchandise case.

2. The trial court failed to apply subsection (A) of La. R.S. [9:2800.6], which is the legal standard for "falling merchandise" cases, to the present case.

3. The trial court erred in relying on case law that was superseded by La.

R.S. 9:2800.6 and subsequently revised by the Louisiana Supreme Court.

4. The trial court failed to impose the correct burden of proof on Plaintiff.

5. The trial court prematurely and erroneously shifted the burden to Dollar General to exculpate itself from liability.

6. The trial court's conclusion that Plaintiff proved his case by a preponderance of the evidence is inconsistent with the applicable law and facts.

7. The trial court's conclusion that Dollar General was at fault for the subject accident is contrary to the law and evidence, and should therefore be reversed.

DISCUSSION

Louisiana Revised Statutes 9:2800.6 provides:

> 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, 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, in addition to all other elements of his cause of action, all of the following:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable.
>
> (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.

(2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. For purposes of this Section, a merchant includes an innkeeper with respect to those areas or aspects of the premises which are similar to those of a merchant, including but not limited to shops, restaurants, and lobby areas of or within the hotel, motel, or inn.

D. Nothing herein shall affect any liability which a merchant may have under Civil Code Arts. 660, 667, 669, 2317, 2322, or 2695.

The heightened burden under La. R.S. 9:2800.6(B) is applicable only in situations where a customer "falls" on a merchant's premises. In a "falling merchandise" case under La. R.S. 9:2800.6(A) the standard is that the merchant must use reasonable care to keep its aisles, passageways and floors in a reasonably safe condition and free of hazards which may cause injury. **Davis v. Wal-Mart Stores, Inc.**, 2000-0445 (La. 11/28/00), 774 So.2d 84, 90.

Thus, the trial court committed legal error by applying La. R.S. 9:2800(B) to this falling merchandise case. Where one or more trial court errors interdict the fact-finding process, the manifest error standard is no longer applicable, and, if the record is otherwise complete, the reviewing court should make its own independent *de novo* review and assessment of the record. **Campo v. Correa**, 2001-2707 (La. 6/21/02), 828 So.2d 502, 510.

A plaintiff who is injured by falling merchandise must prove, even by circumstantial evidence, that a premise hazard existed. Once a plaintiff proves a prima facie premise hazard, the defendant has the burden to exculpate itself from fault by showing that it used reasonable care to avoid such hazards by means such as periodic clean up and inspection procedures. **Davis**, 774 So.2d at 90.

To prevail in a falling merchandise case, the customer must demonstrate that (1) he or she did not cause the merchandise to fall, (2) that another customer in the aisle at that moment did not cause the merchandise to fall, *and* (3) that the

merchant's negligence was the cause of the accident: the customer must show that either a store employee or another customer placed the merchandise in an unsafe position on the shelf or otherwise caused the merchandise to be in such a precarious position that eventually, it does fall. **Davis**, 774 So.2d at 90.

Only when the customer has negated the first two possibilities *and* demonstrated the last will he or she have proved the existence of an "unreasonably dangerous" condition on the merchant's premises. **Davis**, 774 So.2d at 90.

Mr. Frazier testified that he walked down the aisle, then stopped and reached over to pick up a quart of oil when the tote lids fell and hit him on the neck and he went down on one knee. He stated that when he got up and started walking to the front of the store to report the incident, he noticed an individual was in next aisle. Mr. Frazier described the individual as "down on their knee or something." He could not provide physical characteristics of the individual, and did not know if the person was male or female. Mr. Frazier did not know whether the person was white, black or Hispanic. He thought the person was wearing black, but was not certain. Mr. Frazier surmised that the person "could have" been a Dollar General employee stocking merchandise, but he was not certain.

The incident at issue occurred on a Friday. Walter Ghoulson, the Dollar General store manager at the time of the incident, testified that the store received stock on Friday mornings around 4:00 a.m. He explained that on stock days, there were four to six employees on duty starting at 4:00 a.m. and ending between 10:00 a.m. and 11:00 a.m.

Mr. Ghoulson testified he had been down the aisle where the incident occurred ten or fifteen minutes prior to the incident, and that there were no unsafe conditions in that aisle at the time. He testified that safety was a priority for him, and that in addition to the twice-daily safety checks, he constantly monitored the store throughout his shift. Mr. Ghoulson stated that if a potentially unsafe

condition was found in the store, it was handled immediately. He testified that he had a reputation as a "drill sergeant" on safety issues. Mr. Ghoulson testified that the tote lids were stacked in a safe manner on the top shelf immediately prior to the incident.

Mr. Ghoulson stated that the only two employees on duty and in the store at the time of the incident were himself and a cashier. He testified both he and the cashier were at the front of the store ringing up customers at the registers when Mr. Frazier approached them and reported the incident. The evidence shows that the brooms were attached to a holder on the other side of the shelf that the tote lids were on. Mr. Ghoulson testified that he believed that a customer on the next aisle must have pulled a broom off the shelf and accidentally knocked over the tote lids with the head of the broom.

Mr. Frazier testified that he noticed the tote lids before they fell, and that they looked neatly stacked. He testified that he did not notice anything wrong with the shelf that the tote lids were on. Mr. Frazier presented no evidence that the tote lids were stacked in an unsafe manner or in a precarious position before they fell.

Mr. Frazier proved, in accordance with La. R.S. 9:2800.6, he did not cause the merchandise to fall, however, he did **not** also show that another customer did not cause the merchandise to fall. The unknown individual one aisle over could have been a customer and could have caused the merchandise to fall. Mr. Frazier also **did not** show that the merchant's negligence was the cause of the accident: the customer must show that either a store employee or another customer placed the merchandise in an unsafe position on the shelf or otherwise caused the merchandise to be in such a precarious position that eventually, it does fall. *See* **Davis**, 774 So.2d at 90.

Therefore, after a *de novo* review, we find that Mr. Frazier did not meet the stringent burden of proof required in a falling merchandise case under La. R.S.

9:2800.6(A); thus, we reverse the trial court judgment and dismiss the case.

CONCLUSION

The trial court judgment rendered August 25, 2016, in favor of Charles Frazier and against Dollar General Corporation, Dolgencorp, L.L.C., and DG Louisiana, L.L.C., is reversed, and the suit is dismissed. Costs of this appeal are assessed against Charles Frazier.

REVERSED.