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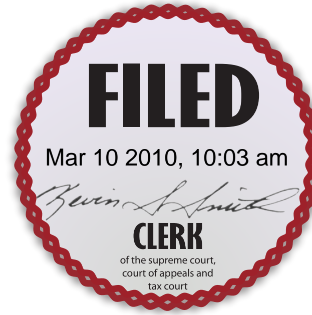

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IN THE COURT OF APPEALS OF INDIANA

BIG LOTS STORES, INC.,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 34A02-0909-CV-0867
STANLEY E. KERSTIENS,	)	
Appellee-Defendant.	)	

APPEAL FROM THE HOWARD SUPERIOR COURT
The Honorable Douglas A. Tate, Judge
Cause No. 34D03-0903-SC-927

March 10, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Big Lots Store, Inc. ("Big Lots") appeals the small claims court's judgment in favor of Stanley Kerstiens ("Kerstiens"). Big Lots argues that the trial court erred in finding that Big Lots breached a duty owed to Kerstiens and in finding that Kerstiens provided sufficient evidence to show that a Big Lots shopping cart caused the damage to Kerstiens's vehicle. We affirm.

Facts and Procedural History

On February 11, 2009, Kerstiens parked his truck in the parking lot shared by Rural King, Harbor Freight, and Big Lots. February 11, 2009 was a very windy day with wind speeds reaching sixty miles per hour, according to Kerstiens. Tr. p. 7. Between 5:00 p.m and 5:30 p.m., unidentified bystanders contacted Gene Johnson, a Harbor Freight employee, to report seeing substantial damage to the passenger door of Kerstien's truck and a Big Lots shopping cart lying next to the area of damage. Johnson notified a Rural King employee who then notified Kerstiens. Kerstiens went to his truck and saw a Big Lots shopping cart lying next to his truck with red paint on it. He also noted that the dent in his truck was the same shape as the cart. Kerstiens reported the damage to Big Lots assistant manager, Dave King. Kerstiens also noted that there were a number of Big Lots shopping carts in the Rural King parking lot and that no Big Lots employees were collecting carts.

Big Lots has approximately twenty carts made of metal and plastic. There are two cart corrals for these carts. Big Lots does not have a set schedule for retrieving carts but instead collects them "as needed." At least a half hour to an hour had passed since the carts had been collected when the damage to Kerstiens's truck and the adjacent Big Lots

cart were noticed and reported. According to Big Lots assistant manager Dave King, during the prior eight years, at least three or four claims had been made to Big Lots regarding damage to vehicles parked in the lot allegedly caused by uncollected Big Lots shopping carts.

On March 10, 2009, Kerstiens filed a small claims complaint against Big Lots seeking $2,052.20 and court costs. On June 24, 2009, the trial court entered judgment in favor of Kerstiens in the amount of $2,052.20. Big Lots filed a Motion to Correct Errors which the trial court denied on August 12, 2009. Big Lots now appeals.

Standard of Review

Judgments in small claims action are "subject to review as prescribed by relevant Indiana rules and statutes." Ind. Small Claims Rule 11(A). When reviewing claims tried by any court without a jury, the reviewing court shall not set aside the judgment "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Ind. Trial Rule 52(A). In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and reasonable inference to be drawn therefrom. Counceller v. Ecenbarger, Inc., 834 N.E.2d 1018, 1021 (Ind. Ct. App. 2005). A judgment in favor of a party having the burden of proof, i.e., Kerstiens, will be affirmed if a reasonable trier of fact could conclude that the elements of the party's claim were established by a preponderance of the evidence. Id. This deferential standard of review is particularly important in small claims actions,

where trials are "informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law." Ind. Small Claims Rule 8(A).

Discussion and Decision

In order to prevail on a claim of negligence, Kerstiens had to prove: "(1) a duty owed to Kerstiens by Big Lots; (2) a breach of that duty; and (3) injury to Kerstiens proximately caused by that breach." Kantz v. Elkhart County Hwy. Dept., 701 N.E.2d 608, 610 (Ind. Ct. App. 1998) (citing Wickey v. Sparks, 642 N.E.2d 262, 265 (Ind. Ct. App. 1994)), trans. denied. "Negligence will not be inferred; rather, all of the elements of a negligence action must be supported by specific facts designated to the trial court or reasonable inferences that might be drawn from those facts." Kincade v. MAC Corp., 773 N.E.2d 909, 911 (Ind. Ct. App. 2002) (citing Hayden v. Paragon Steakhouse, 731 N.E.2d 456, 458 (Ind. Ct. App. 2000)). "An inference is not reasonable when it rests on no more than speculation or conjecture." Id.

Big Lots recognizes that it owes a duty to retrieve shopping carts like the one at issue but disputes the extent of that duty to one using a common parking lot like Kerstiens. However, the evidence at trial shows that Big Lots has a store policy requiring the collection of shopping carts and has been made aware of prior instances of damage to vehicles caused by unrestrained shopping carts. The testimony presented at trial was such that a reasonable inference could be drawn that the shopping cart that damaged Kerstiens's vehicle belonged to Big Lots. Tr. p. 11.

At trial, Kerstiens, an employee of Rural King, testified that the wind reached speeds of fifty or sixty miles an hour on the day of the incident and that Big Lots carts

strayed into the Rural King part of the parking lot on a regular basis. Tr. p. 7. Although Big Lots presented evidence that the carts had been collected a half hour to an hour before the damage occurred, the evidence also shows that several Big Lots carts were in the parking lot near Rural King after the damage to Kerstiens' truck. Id.

The affidavit of Gene Johnson admitted at trial states that he saw a cart lying upside down next to Kerstiens's truck. Plaintiff's Exhibit 2. Kerstiens himself testified that there appeared to be red paint similar to that of his truck's paint on the Big Lots cart. Kerstiens also testified that the dent on his truck was similar in shape to that of the cart. Tr. p. 14. The trial court's judgment in favor of Kerstiens was not clearly erroneous.

Our standard of review bears repeating. In determining whether a judgment is clearly erroneous, we do not reweigh the evidence or determine the credibility of witnesses but consider only the evidence that supports the judgment and reasonable inference to be drawn therefrom. Counceller, 834 N.E.2d at 1021. Under this standard, we cannot say that the judgment of the small claims court was clearly erroneous.

Affirmed.

BARNES, J., and BROWN, J., concur.