NOT DESIGNATED FOR PUBLICATION

MYRA MOLAISON

VERSUS

AUDUBON INSURANCE COMPANY

NO. 01-CA-1014

FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE 24TH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 515-039, DIVISION "L"
THE HONORABLE CHARLES V. CUSIMANO, II, JUDGE PRESIDING

JANUARY 15, 2002

# SOL GOTHARD
# JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.,
Sol Gothard, and Clarence E. McManus

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## AFFIRMED

Plaintiff, Myra Molaison, appeals from the grant of summary judgment in favor of defendant, Audubon Insurance Company, dismissing plaintiff's suit with prejudice. We affirm the decision of the trial court.

Plaintiff instituted this suit for damages alleging that, on October 5, 1996, she was a customer at a Solo Serve store[1]. While in the checkout line, another customer behind her fainted and fell into her, causing her to sustain injury. The plaintiff alleges that the customer fainted because of the "inordinately and unreasonably high temperatures" in the store.

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[1]After the accident at issue, Solo Serve Corporation filed for bankruptcy, leaving its insurer, Audubon Insurance Company, as defendant in this suit.

Defendant filed a motion for summary judgment, alleging that plaintiff could not establish an essential element of its case. Defendant cited plaintiff's deposition testimony, in which she said that the woman who fell into her, who was pregnant at that time, was unknown to her. Plaintiff also stated that she did not know why the woman fainted. Because the plaintiff could not state that it was a defective condition of the store that caused the pregnant woman to faint, she could not carry an essential element of her cause of action. Plaintiff did not file an opposition to defendant's motion.

A motion for summary judgment will 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." La. C.C.P. art. 966.

> The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact.

La. C.C.P. art. 966(C)(2).

In this appeal, plaintiff argues that the trial court erred in applying La. R.S. 9:2800.6 to the instant case, because this matter does not involve a slip and fall, and therefore this matter falls under the duty-risk analysis of

**tort. Plaintiff further argues that there is a material issue of fact as to what caused the customer to faint, sufficient to defeat summary judgment. Defendants respond that, under either theory of recovery, plaintiff cannot prove her case.**

**Generally, the owner or operator of a facility has the duty of exercising reasonable care for the safety of persons on his premises and the duty of not exposing such persons to unreasonable risks of injury or harm. *Manning v. Dillard Dept. Stores, Inc.*, 99-1179 (La. 12/10/99), 753 So.2d 163; *St. Hill v. Tabor*, 542 So. 2d 499 (La. 1989). However, a business establishment is not the insurer of its patrons' safety. *Phillips v. Equitable Life Assurance Co.*, 413 So. 2d 696 (La. App. 4th Cir. 1982), *writ denied*, 420 So. 2d 164 (La. 1982). Mere allegation of premises defect cannot defeat a motion for summary judgment. *Edwards v. Burgess*, 96-2064 (La. App. 4 Cir. 10/1/97), 700 So.2d 1129.**

**In this case, plaintiff has alleged that the Solo Serve store was unreasonably warm, that there were inordinately long lines at the check-out counter and, therefore, this created a premise hazard which caused the pregnant woman to faint. In her deposition, plaintiff could not state the approximate temperature of the store, nor could she state the length of the checkout line. She furthermore stated that she did not know why the pregnant woman fainted, and only knew that the woman complained of the heat, and that the woman's husband said that the woman needed to sit down. This factual support is insufficient to show that plaintiff will be able to carry her evidentiary burden at trial, namely that it was the condition of**

**the store, and not some other reason, that caused the unknown pregnant woman to faint.**

**For the above discussed reasons, the decision of the trial court granting the defendant's motion for summary judgment is affirmed. All costs are assessed against plaintiff.**

**AFFIRMED**