STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2021 CA 0693

ELTON BRADLEY

VERSUS

WAL-MART LOUISIANA, LLC AND CINTAS CORPORATION NO. 2

Judgment Rendered: DEC 2 2 2021

Appealed from the
Seventeenth Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Docket Number 135192

The Honorable John E. LeBlanc, Judge Presiding

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BEFORE: WHIPPLE, C.J., PENZATO, AND HESTER, JJ.

WHIPPLE, C.J.

This matter is before us on appeal by plaintiff, Elton Bradley, from a judgment of the trial court, granting motions for summary judgment in favor of defendants Wal-Mart Louisiana, LLC and Cintas Corporation No. 2 and dismissing his claims against them with prejudice. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

This appeal arises from a suit filed by Bradley against Wal-Mart Louisiana, LLC ("Wal-Mart") and Cintas Corporation No. 2 ("Cintas") seeking damages for injuries allegedly sustained as the result of a trip and fall. According to the allegations in his petition, on the morning of February 28, 2018, plaintiff entered the Raceland Wal-Mart Supercenter through the Tire Lube Express ("TLE") register area, where he purportedly tripped over a "tucked up or elevated or otherwise unsafely insecure rug" causing him to trip and fall. Plaintiff averred that the floor covering, required by Wal-Mart and provided by Cintas, was not reasonably safe.

Wal-Mart filed a motion for summary judgment contending that plaintiff could not satisfy his burden of proving the existence of a condition that allegedly presented an unreasonable risk of harm and further, has not, and could not, put forth any evidence that Wal-Mart created or had actual or constructive notice of the condition that allegedly caused plaintiff to trip and fall on its premises. Thus, Wal-Mart sought dismissal of plaintiff's claims against it on the basis that plaintiff could not satisfy his burden of proof at trial for claims against merchants under LSA-R.S. 9:2800.6.

Cintas also filed a motion for summary judgment seeking dismissal of plaintiff's claims against it. Cintas contended that plaintiff could not meet his burden of proof for damages caused by a defect in things under LSA-C.C. art. 2317.1, in the absence of any evidence demonstrating that the allegedly defective condition of the mat was created by Cintas or that Cintas knew or should have known of its existence.

Following a hearing on October 24, 2019, the trial court signed a judgment on January 7, 2021, granting the defendants' motions for summary judgment and dismissing plaintiff's claims against Wal-Mart and Cintas with prejudice.[1] Plaintiff now appeals, contending: (1) that the trial court erred in disregarding expert evidence offered in opposition to the summary judgment; and (2) that summary judgment was not appropriate as to either defendant where material issues of fact remain.

DISCUSSION

Summary Judgment

Appellate courts review evidence *de novo* under the same criteria that govern the trial court's determination of whether summary judgment is appropriate. Leet v. Hospital Service District No. 1 of East Baton Rouge Parish, 2018-1148 (La. App. 1st Cir. 2/28/19), 274 So. 3d 583, 587. 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 burden of proof is on the mover. Nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover'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 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).

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[1]On January 15, 2021, the trial court issued written reasons for judgment.

Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of substantive law applicable to the case. Brown v. Amar Oil Company, 2011-1631 (La. App. 1st Cir. 11/8/12), 110 So. 3d 1089, 1091, writ denied, 2012-2678 (La. 2/8/13), 108 So. 3d 87.

Plaintiff's Claims Against Wal-Mart

As to plaintiff's claims against the merchant,[2] Wal-Mart, the applicable substantive law is found in LSA-R.S. 9:2800.6, which provides, in pertinent part:

> 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.

Under the applicable law, plaintiff has the burden of proving at trial that: (1) the floor mat where he tripped presented an unreasonable risk of harm that was reasonably foreseeable; (2) Wal-Mart had either actual or constructive notice of the condition that caused the damage; and (3) Wal-Mart failed to exercise reasonable

[2]A "merchant" is one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business. 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. LSA-R.S. 9:2800.6(C)(2).

care to eliminate the condition. See LSA-R.S. 9:2800.6(B). Failure to prove any one of these requirements is fatal to a plaintiff's case. Daigrepont v. Shardan, Inc., 2019-1083 (La. App. 1st Cir. 10/14/20) (unpublished) 2020 WL 6058576, at *2.

A merchant owes a duty to persons using his premises to exercise reasonable care to keep such premises in a reasonably safe condition. LSA-R.S. 9:2800.6(A). A hazardous condition is one that creates an unreasonable risk of harm to customers under the circumstances. Pena v. Delchamps, Inc., 2006-0364 (La. App. 1st Cir. 3/28/07), 960 So. 2d 988, 991, writ denied, 2007-0875 (La. 6/22/07), 959 So. 2d 498. However, merchants are not insurers of their patrons' safety, and a customer is under a duty to use ordinary care to avoid injury. Primeaux v. Best Western Plus Houma Inn, 2018-0841 (La. App. 1st Cir. 2/28/19), 274 So. 3d 20, 28. Accordingly, a merchant is not absolutely liable every time an accident happens. Williams v. Liberty Mutual Fire Insurance Company, 2016-0996 (La. App. 1st Cir. 3/13/17), 217 So. 3d 421, 424, writ denied, 2017-0624 (La. 6/5/17), 219 So. 3d 338, citing Leonard v. Wal-Mart Stores, Inc., 97-2154 (La. App. 1st Cir. 11/6/98), 721 So. 2d 1059, 1061. 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. Guillory v. The Chimes, 2017-0479 (La. App. 1st Cir. 12/21/17), 240 So. 3d 193, 196. The absence of an unreasonably dangerous condition implies the absence of a duty on the part of the merchant. Primeaux v. Best Western Plus Houma Inn, 274 So. 3d at 28.

Courts have adopted a four-part risk-utility balancing test to determine whether a condition is unreasonably dangerous. This test requires consideration of: (1) the utility of the complained-of condition; (2) the likelihood and magnitude of harm, which includes the obviousness and apparentness of the condition; (3) the cost of preventing the harm; and (4) the nature of the plaintiff's activities in terms of its

social utility or whether it is dangerous by nature. Primeaux v. Best Western Plus Houma Inn, 274 So. 3d at 28.

"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. Moreover, 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. LSA-R.S. 9:2800.6(C)(1).

Wal-Mart contends that plaintiff cannot establish that an unreasonably safe condition existed, that Wal-Mart caused the alleged condition or that the alleged condition was present for a period of time to create constructive knowledge on behalf of Wal-Mart, or that Wal-Mart failed to exercise reasonable care. In support of its motion for summary judgment, Wal-Mart attached and relied on plaintiff's deposition, wherein he testified that he did not notice the rug before he fell, but further stated that **after** his fall, he noticed that the rug had a "kink" around the edges or "frayed edges" where it was not flat. Wal-Mart also attached and relied on the affidavit of its employees, Nita Comeaux and Demetria Hampton, who attested that they personally witnessed plaintiff fall as he entered the area, that he was wearing "sandal slide shoes and socks," and that he was shuffling his feet as he was walking, causing his sandal to get caught in the rug. They attested that the rug was lying flat before plaintiff lifted it with his foot, that the rug had no bumps or frayed edges prior to plaintiff's fall, and that the rug was not raised over the threshold of the doorway prior to plaintiff's fall. Wal-Mart also attached the affidavit of its employee, Chester Coleman, Jr., who attested that he observed plaintiff after he fell, that plaintiff was wearing "sandal slide shoes and socks," that his slide sandal came off of his foot, and that he shuffled his feet as he walked. Mr. Coleman testified that he did not see any bumps, ridges, or frayed or flipped edges on the rug prior to plaintiff's fall.

Wal-Mart further introduced video surveillance footage, which showed plaintiff wearing slider sandals with socks and several customers and employees safely traversing the mat with no problem before plaintiff's fall. Wal-Mart introduced the affidavit of Brett M. Lundy, an asset protection associate and later asset protection manager, who attested that for five years prior to plaintiff's fall, Wal-Mart has consistently placed a weather mat at the entrance in the same manner as on the day of this incident. Mr. Lundy further attested that in his five years as asset protection manager, this is the sole incident to have occurred allegedly involving a weather mat at the entrance, and that at the time of this incident, Cintas provided a weekly service by which it would collect all mats and replace them with fresh, clean mats. Wal-Mart further showed that the Cintas mats are certified high traction by the National Floor Safety Institute, whose mission is to prevent slips, trips, and falls through education, research, and standards development.

In an attempt to rebut Wal-Mart's showing that the mat did not present an unreasonable risk of harm that was reasonably foreseeable and that Wal-Mart had no constructive notice of any such condition, plaintiff offered and relied on a report from his expert, AIA Architect, Edward H. Angelloz, Jr., who opined that the door entranceway presented an unreasonable hazard to the public because it contained a tripping hazard presented by a number of features that were created by or allowed to exist by Wal-Mart. Mr. Angelloz essentially opined that regardless of the location of the mat or whether it was lying flat on the floor or whether a portion of it was over the threshold, the premises were defective and posed an unreasonable risk of injury simply through the presence of the unsecured mat in the doorway. According to Mr. Angelloz, a "properly designed floor would even have had to account for risks to persons who did drag or shuffle their feet, according to Americans With Disabilities Act, and would have had a warning." Mr. Angelloz attested that "**[t]he existing applicable principles violated by this entranceway and walking surface**

are well known and established and should be well known to persons such as Wal-Mart and those in charge of design and construction of its premises and those in charge of safety or premises." (Emphasis added.) Mr. Angelloz concluded that "[t]he unsecured mat and its positioning and lack of adequate inspection, detection and removal of the defective and hazardous condition were all factors in creating an unsafe condition and operation of Wal-Mart's store that presented unreasonable and foreseeable risk to a pedestrian customer."

Plaintiff also offered his own affidavit, wherein he attested that at the time of the incident, he walked in a normal fashion and did not "shuffle" his feet as he walked, that Wal-Mart's "unsecure" rug and placement at its entrance way "tripped" him, and that there was no warning of the unsecure rug. Plaintiff attached two photographs taken after the rug had been removed and once it was replaced on the ground after the incident herein, which he contends show a "fish mouth" condition at the edge of the rug.

On *de novo* review, we note that the photographs do not establish the placement or condition of the rug prior to, or at the time of, plaintiff's fall. Plaintiff testified in his deposition that he did not see or notice the mat prior to his fall. Thus, any conclusions made by plaintiff concerning the condition of the mat prior to his fall, based on photographs of the mat taken after his fall, are speculative and unsupported. Accordingly, plaintiff's affidavit and photographs are not sufficient to show or create a material issue of fact as to the condition of the rug prior to his fall or to show that the mats condition created an unreasonable risk of harm.

The jurisprudence is clear that the mere existence of a standard unsecured floor mat at an entranceway in and of itself does not constitute an unreasonable risk of harm. See Borruano v. City of Plaquemine, 97-1926 (La. App. 1st Cir. 9/25/98), 720 So. 2d 62, 65 ("The determination that the mere existence of a standard floor mat at the entranceway inside the public building constituted an unreasonable risk

of harm to this plaintiff defies not only the judicially created legal precepts associated with unreasonable risk of harm, but is inconsistent with the axioms of common sense. ... There was no evidence to support a finding that a one-eighth inch deviation in the height of the surface between a floor mat and the floor surface constituted a defective condition. [Plaintiff's expert] did not ascribe any flaw in the elevation of the mat on the floor. Moreover, one does not expect the surface of a mat to be totally flush with the floor on which it is located.") See also Washauer v. J.C. Penney Co., 2003-0642 (La. App. 1st Cir. 4/21/04), 879 So. 2d 195, 198-199 ("[Plaintiff's expert] claimed no safety expertise and said he did not know of any building or safety codes that might impact the placement or securing of floor mats in a retail store. ... A floor mat does not present a tripping hazard until or unless it is moved from its flat position on the floor. Therefore, in and of itself, the flat floor mat, even though unsecured, was not a dangerous condition. [Plaintiff's] evidence in opposition to the motion for summary judgment did not show that she would be able to satisfy her evidentiary burden of proof at trial that the unfastened floor mat was, in and of itself, a condition presenting an unreasonable risk of harm to her.").

Mr. Angelloz essentially opined that the unsecure mat and its position with a gap between the threshold and edge of the mat created a hazardous condition and thus violated "applicable principles." However, Mr. Angelloz failed to identify these "applicable principles" or cite to a single regulation or code governing the placement of such mats or otherwise establish how Wal-Mart violated these purported "applicable principles," or that Wal-Mart was required to comply with these purported "applicable principles." See Primeaux v. Best Western Plus Houma Inn, 274 So. 3d at 30. Mr. Angelloz's report likewise could not establish any issues of fact as he could not show the condition or placement of the mat prior to plaintiff's fall. Thus, his opinions are conclusory and are unsupported by any showing of the underlying facts. In sum, Mr. Angelloz's report essentially is based on speculation

("risk is present even *if* the mat is completely flat," "is an even worse risk *if* the mat contains a 'fish mouth'," and "the mat, *if* on the threshold, was in an unsafe position" (emphasis added)).

Affidavits that are conclusory with no supporting underlying facts are legally insufficient to defeat a motion for summary judgment. Mere conclusory allegations, improbable inferences, and unsupported speculation will not support a finding of a genuine issue of material fact. Guillory v. The Chimes, 240 So. 3d at 195 ("Although factual inferences reasonably drawn from the evidence must be construed in favor of the party opposing the motion, mere conclusory allegations, improbable inferences, and unsupported speculation will not support a finding of a genuine issue of material fact."); Charles v. Travelers Indemnity Co., 2015-0956 (La. App. 1st Cir. 5/10/16), 2016 WL 2669821, at *5 (unpublished). Mr. Angelloz's report does not establish the principles and methods he relied upon to form his conclusions therein and is based upon speculation. See LSA-C.E. art. 702; Primeaux v. Best Western Plus Houma Inn, 274 So. 3d at 30. As such, Mr. Angelloz's report does not meet the requirements of LSA-C.C.P. art. 967(A).[3] See Mariakis v. North Oaks Health System, 2018-0165 (La. App. 1st Cir. 9/21/18), 258 So. 3d 88, 95-96. Accordingly, we find Mr. Angelloz's report fails to create a genuine issue of material fact or that plaintiff will be able to prevail at trial.

We further reject plaintiff's contention on appeal that the trial court erred in disregarding expert evidence offered in opposition to the summary judgment. As

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[3]Louisiana Code of Civil Procedure article 967(A) provides that:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The supporting and opposing affidavits of experts may set forth such experts' opinions on the facts as would be admissible in evidence under Louisiana Code of Evidence Article 702, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or by further affidavits.

noted in its written reasons for judgment, the trial court clearly considered Mr. Angelloz's affidavit and report, but nonetheless found they were insufficient to create a material issue of fact. In doing so, the trial court noted:

> Plaintiff introduced the Affidavit of E.A[.] Angelloz, who rendered the opinion that Walmart should have secured the mats at the entrance of the buildings. There is nothing in his report [that] directs the court to specific violations of building codes or safe entry standards by failing to secure the mat to the floor. He opined that Walmart could have and should have done things differently. However, **he does not indicate how the use of moveable [sic] entry mats by commercial establishments in South Louisiana creates an unreasonable condition. Nor is there anything in his analysis that shows that the entry mat functioned any differently than it was intended to function.** [Emphasis added.]

In sum, in opposition to Walmart's motion for summary judgment, plaintiff was required to come forth with evidence to establish: (1) that the condition of the mat, or its placement, created an unreasonably dangerous condition, prior to and at the time of the incident herein; (2) how long any such condition existed; and (3) whether that condition was created by a Wal-Mart employee or a customer. See LSA-R.S. 9:28:00.6; Guillory v. The Chimes, 240 So. 3d at 195-196; see also Kennedy v. Wal-Mart Stores, Inc., 98-1939 (La. 4/13/99), 733 So. 2d 1188, 1191 (where plaintiff presented absolutely no evidence as to the length of time the puddle was on the floor before his accident, plaintiff did not carry his burden of proving Wal-Mart's constructive knowledge of the condition). Plaintiff failed to establish any of the essential elements under LSA-R.S. 9:2800.6 as the record is devoid of any such evidence.

Accordingly, where plaintiff failed to rebut Wal-Mart's motion for summary judgment with any evidence to establish that a material issue of fact exists as to whether there was an unreasonable risk of harm at the time of his fall that was reasonably foreseeable or that Wal-Mart had constructive knowledge of any such condition, we find no error in the trial court's granting of summary judgment and dismissal of plaintiff's claims against Wal-Mart.

Plaintiff's Claims Against Cintas

As to plaintiff's claims against Cintas, the applicable substantive law is found in LSA-C.C. art. 2317.1, which provides in pertinent part, as follows:

> The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care.

Thus, pursuant to LSA-C.C. art. 2317.1, in order to prevail against Cintas at trial, plaintiff had to establish that: (1) the mat had a ruin, vice, or defect; (2) that Cintas knew, or in the exercise of reasonable care should have known of the ruin, vice, or defect, which caused the damage; (3) that the damage could have been prevented by the exercise of reasonable care; and (4) that Cintas failed to exercise reasonable care.

Cintas contends that plaintiff cannot meet his burden of proof under LSA-C.C. art. 2317.1 because he has produced no evidence that the purportedly defective condition of the mat on the ground at Wal-Mart, which allegedly cause plaintiff to trip and fall, was created by Cintas or that Cintas knew or should have known of its existence. In support of its motion for summary judgment, Cintas offered Wal-Mart's motion for summary judgment and all of its attachments *in globo*. In particular, Cintas offered the affidavit of Rusty Fernandez, the General Manager of Cintas for the region that delivered and maintained the mats rented by Wal-Mart herein. Mr. Fernandez attested that Cintas delivered the 3 x 10 mat at issue to Wal-Mart on February 23, 2018, five days prior to the incident herein, and that the next time it provided services to Wal-Mart was on March 2, 2018. Mr. Fernandez attested that at no time between the two dates did Cintas receive a complaint, service request, or notification from Wal-Mart regarding the mat at issue or any defects related thereto. Cintas also pointed to plaintiff's testimony that he did not see the rug prior

to his trip and fall, the witnesses' affidavit testimony that the mat contained no visible defects, and the video surveillance coverage that showed no visible defects in the mat. As discussed above, the mere presence of an unsecured rug, does not alone create a defect. See Borruano v. City of Plaquemine, 720 So. 2d at 65; Washauer v. J.C. Penney Co., 879 So. 2d at 198-199.

The burden then shifted to plaintiff to rebut the showing by Cintas with evidence to establish the mat contained a ruin, vice, or defect and that Cintas had actual or constructive notice of same. In opposition, plaintiff offered Mr. Angelloz's affidavit and report and plaintiff's affidavit and deposition. For the reasons set forth above, the report of Mr. Angelloz and the affidavit and deposition testimony of plaintiff are insufficient to create a material issue of fact and cannot serve to establish that plaintiff will be able to carry his burden of establishing that the mat had a vice or defect. See Guillory v. The Chimes, 240 So. 3d at 195. Moreover, plaintiff failed to set forth any evidence to show that Cintas had actual or constructive knowledge of any purported defect in the mat. In the absence of same, we find there is no genuine issue of fact and the trial court likewise correctly granted summary judgment in favor of Cintas. See Christakis v. Clipper Construction, L.L.C., 2012-1638 (La. App. 1st Cir. 4/26/13), 117 So. 3d 168, 171, writ denied, 2013-1913 (La. 11/8/13), 125 So. 3d 454.

CONCLUSION

For the above and foregoing reasons, the January 7, 2021 judgment of the trial court, granting motions for summary judgment in favor of Wal-Mart Louisiana, LLC and Cintas Corporation No. 2 and dismissing plaintiff's claims against them with prejudice, is hereby affirmed. Costs of this appeal are assessed to the plaintiff/appellant, Elton Bradley.

AFFIRMED.