SHARON ALLEN AND KEITH ALLEN, INDIVIDUALLY AND	*	**NO. 2000-CA-1060**
ON BEHALF OF THEIR MINOR CHILD, KAMARIA	*	**COURT OF APPEAL**
ALLEN	*	**FOURTH CIRCUIT**
VERSUS	*	**STATE OF LOUISIANA**
KMART CORPORATION	*	
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APPEAL FROM
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 86-260, DIVISION "C"
Honorable J. Wayne Mumphrey, Judge

* * * * * *

Charles R. Jones
Judge

* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Charles R. Jones, and Judge Dennis R. Bagneris, Sr.)

ARMSTRONG, J., CONCURS

John W. Redmann
LAW OFFICES OF JOHN W. REDMANN
9701 Lake Forest Boulevard
Suite 103
New Orleans, LA 70127
AMICUS CURIAE

Jack E. Truitt
Ingrid Cruz
THE TRUITT LAW FIRM
251 Highway 21
Madisonville, LA 70447

COUNSEL FOR KMART CORPORATION

AFFIRMED

Plaintiffs/Appellees, Sharon and Keith Allen, brought suit against the Kmart Corporation for damages to Ms. Allen's left leg and knee as a result of an alleged fallen shelf on the premises of the Kmart store located at 8601 West Judge Perez Drive in Chalmette.

Both Mr. and Ms. Allen testified at trial that they did not see from where the fallen shelf came. They also acknowledged no visible hazards in the area. The Allens alleged that they made several attempts to notify someone of the incident before Mr. Allen brought the shelf to the front desk to report the occurrence. Ms. Deborah Rogers, the Kmart hardlines manager

who took the report, also testified that she did not see where the shelf might have fallen; from nor did she notice any hazards in the area. Ms. Rogers also explained that Kmart's safety policy required that she inspect the store's premises every fifteen minutes in addition to her other duties.

Ms. Allen, prior to the accident, had both knees replaced. This condition was allegedly aggravated by the accident. Ms. Allen reported pain associated with her injury to her physician a week after the event. An x-ray was taken, and she was given pain medication. She was referred to another doctor who also took an x-ray and told her to continue her pain medication. She was referred again to a third physician, Dr. Butler, who informed her that she required surgery for damage to the replacement materials in her knee.

Based on the testimony, the district court determined liability in favor of the Allens and against the Kmart Corporation. It is from this judgment to which Kmart appeals, arguing that the district court erred by finding them liable and having constructive notice of the hazard, and that the damage award was excessive.

LIABILITY AND CONSTRUCTIVE NOTICE

The first issue raised in this appeal is whether the district court erred

by finding that the Kmart Corporation was liable for Ms. Allen's injuries and had constructive notice of the accident. La. R.S. 9:2800.6 states that

> …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.

This statute further states that

> …in a negligence claim…the claimant shall have the burden of proving…: (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.

Further, according to the statute

> …"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.

Kmart Corporation argues that the Allens did not prove that a hazardous condition existed as a result of Kmart's negligence, causing the injury to Ms. Allen. It argues that neither Ms. Rogers nor the Allens could determine from where the shelf fell or the condition of the premises at the

time of the accident. However, the district court found that Kmart failed to exercise reasonable care because the court did not find Ms. Rogers' testimony regarding the safety policies and procedures; particularly an inspection by her every fifteen minutes was credible. Additionally, the district court relied on Mr. Allen's eyewitness testimony to the accident.

> To prove constructive notice, a plaintiff must come forward with positive evidence showing that the damage-causing condition existed for some period of time, and that such time was sufficient to place the merchant defendant on notice of its existence. *White v. Wal-Mart Stores, Inc*. 97-0393 (La. 9/9/97), 699 So.2d 1081. As the *White* court further explained: "A claimant who simply shows that the condition existed without an additional showing that the condition existed for some time before the fall has not carried the burden of proving constructive notice as mandated by the statute. Though the time period need not be specific in minutes or hours, constructive notice requires that the claimant prove the condition existed for some time period prior to the fall." Id. At p. 4, 699 So.2d at 1084-1085.

Norden v. Wal-Mart Stores, Inc., 97-2128 (La. App. 4 Cir. 8/12/98), 716 So.2d 930, 932, *citing*, *White v. Wal-Mart Stores*, Inc., 97-0393 (La. 9/9/97), 699 So.2d 1081. The burden does not fall on defendant to prove that the spill had not been there at an earlier time and that absent such proof the store had constructive notice. *White v. Wal-Mart Stores*, Inc., *supra*.

In this case, the district court was within its discretion to logically rely

on the safety procedure because it found that the Kmart Corporation was unable to inspect the store every fifteen minutes. Although none of the witnesses were able to testify as to how long the hazardous condition may have existed prior to the accident in a precise and quantifiable time period, the fact that it was not probable that the store was inspected within the fifteen minutes as testified to by Ms. Rogers demonstrated that the hazard existed too long. Therefore, the district court dealt with the issue of constructive notice, which is a prerequisite for a successful claimant in a negligence action against a merchant, when the court found that Ms. Rogers could not have possibly inspected the facility for defects as she testified. Because of her failure to detect that which she should have in a timely manner, constructive notice was imputed upon the Kmart Corporation, rendering Kmart liable for the injuries sustained by the Allens.

Additionally the district court has vast discretion in findings of fact and its judgment should not be disturbed absent manifest error. *Stobart v. State though DOTD*, 617 So.2d 880 (La. 1993).

EXCESSIVE DAMAGES

As for the issue of whether the damage award was excessive, Kmart argues that Ms. Allens' injuries were actually previous injuries and not the

result of the incident at the Kmart facility. Appellees argue that the damage amount was conservative and reasonable in light of the particular circumstances of their case, and within the vast discretion of the trier-of-fact.

Absent manifest error, the appellate court should not disturb an award of general damages unless the record clearly reveals that the trier-of-fact abused its discretion in making the award. *Gaston v. G & D Marine Services, Inc*., 93-0182 (La. App. 4 Cir. 1/19/94), 631 So.2d 547. According to the judgment, the district court awarded Ms. Allen $31,000 for pain and suffering and 2,550.15 for medical expenses. The court also awarded Mr. Allen $8,000 for loss of consortium. The awards are within the $50,000 damage ceiling that both parties agreed to by stipulation. Further, the district court found the testimony of the Allens credible with regard to their pain, suffering, and loss of consortium. Thus, we do not find that the damage award was excessive.

DECREE

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED